

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1279

Heard at Montreal, Friday, October 12, 1984

Concerning

VIA RAIL CANADA INC.

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Discharge of Steward-Waiter E. M. Sonier, VIA Atlantic, for misappropriation of Corporation revenues on Train 15, December 1st, 1983, Train 15 December 12th and Train 14 December 13th.

JOINT STATEMENT OF ISSUE:

CN Police Officers (Special Branch) submitted written reports of observations made while travelling on the aforementioned trains. The reports disclosed irregularities in the service of alcoholic beverages and in the volume of refreshment (beer) sales as reported by the grievor.

On receiving the police reports, the Corporation requested that the grievor attend a hearing on February 3, following which Mr. Sonier was discharged.

The Brotherhood contends that Articles 24.7 and 24.21 were violated and requests that the grievor be reinstated to his former position without loss of earnings or other benefits.

The Corporation has rejected the request.

FOR THE BROTHERHOOD:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) A. GAGNÉ
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

A. Leger	– Manager, Labour Relations, Montreal
D. J. Matthews	– Manager, Human Resources, Moncton
A. L. Soward	– Supervisor, Sales & Services, Halifax
C. O. White	– Labour Relations Assistant, Montreal
J. O'Connor	– Inspector, CN Police
M. Wickens	– Specialist, Language Testing - Montreal

And on behalf of the Brotherhood:

G. T. Murray	– Representative, Moncton
K. Sing	– Local Chairman, Halifax
G. Côté	– Representative, Montreal
E. M. Sonier	– Grievor

AWARD OF THE ARBITRATOR

The grievor, E. M. Sonier, Steward-Waiter, was discharged for the misappropriation of Corporation revenues on February 10, 1984.

Although the grievor was also alleged to have violated several provisions of System Circular No. 37 dealing with the regulation of serving alcoholic beverages to train passengers, the charge of theft was the principal reason precipitating his termination. The grievor is a long service employee (approximately 20 years) and appears to have an untainted disciplinary record.

The allegation of misappropriation of Corporation revenues arises out of the observations of a number of CN police officers assigned to carry out spot checks of the grievor's activities on three passenger runs on the Atlantic route between Moncton and Montreal. More particularly, two police officers were assigned to the Moncton-Montreal run on Train 15, December 1, 1983. And, two police officers were assigned the same run on December 12, 1983 and one officer the return run from Montreal on Train 14 December 13, 1983. Except for the one officer who left the employ of the Corporation at the time of the hearing to work for the RCMP the three other police officers involved in the investigation gave direct evidence under oath of their findings and were cross-examined by the Trade Union representative. The one police officer who did not give evidence was paired with Officer Richard Lord on the Moncton-to-Montreal run on December 12, 1983.

The Corporation's decision to "spot check" the grievor's activity was precipitated by an anonymous telephone call alleging that the grievor was selling his own inventory of beer to customers on the runs in question. Accordingly, the police officers were instructed to restrict their observations to the grievor's sales of beer to passengers.

This case turns on the contradictory statements of the police officers with respect to their observations and of the grievor's with respect to the beer sales documented by him in his "Report of Sales" submitted to the Corporation at the end of each trip. There is no issue here that the onus rests on the Corporation to establish by cogent and persuasive proof the allegations of theft brought against the grievor. The grievor's case stands or falls on the proposition that what is shown in the sales report is what was actually sold. In this regard the document provides:

I certify this to be a true report of sales on trip indicated and that all monies have been remitted as shown.

In accordance with the instructions given them the police officers (when paired) sat in the bar car serviced by Mr. Sonier. One officer marked the number of sales as the other counted. These counts were made either on the basis of the number of beers shown on the tray carried by Mr. Sonier or at the time a sales transaction was made. On each run the one partner relieved the other when they absented themselves from the bar car to go for a meal break. On the one run between Montreal to Moncton on December 13, 1983, Lieutenant Latendresse was alone and remained in the bar car for the entire trip.

At the end of each run the police officers transposed their findings into a report, checked their information with his or her colleague (where appropriate), and submitted their findings to the Corporation. Because instances of alleged impropriety were observed (with respect to Circular No. 37) the police officers submitted their reports immediately to the Corporation.

The credentials and qualifications of the police officers were not subjected to challenge. Each was either trained in course work at a Community College, Police College or the Company's own training centre. Moreover, each was shown to have had several years of experience in investigatory missions of this nature.

The data disclosed in the police officers' reports indicate serious discrepancies with the sales figures certified as true by the grievor in his report of sales form. The discrepancies in sales may be summarized as follows:

		Police	Grievor
December 1, 1983			
Train 15	Moncton-Montreal	178	122
December 12, 1983			
Train 15	Moncton-Montreal	59	38
December 13, 1983			
<u>Train 14</u>	<u>Montreal-Moncton</u>	<u>47</u>	<u>22</u>
Total		284	182

The Trade Union attempted to undermine the police evidence on two grounds. Firstly, it was argued that, qualitatively, their information was suspect. For example, the Trade Union could not appreciate how the two police officers on the December 1, 1983 run could have counted all the beer sales in having regard to how busy the bar was on that evening. Or, on the December 12, 1983 run there existed a serious gap in the police evidence (at the hearing) because the one officer (who had left the Company's employ) did not testify. Accordingly, there existed an eight minute period that is unaccounted for during the grievor's shift when the other officer (Officer Lord) left the bar car to purchase a sandwich. Lastly, as was the case in the other runs, the police officer who was involved in the December 13th run did not have his observations corroborated by another officer.

The second ground for attacking the police officer's findings pertained to the grievor's own alleged shortcomings in failing to count the inventory of beer at the outset of the December 1, 1983 run. The grievor usually marked a check (?) mark on the sales form showing the beer inventory. When he didn't mark a check he simply assumed that the figures shown by the steward on the previous run were accurate. On the December 1, 1983 run, no check mark is shown on the Report of Sales form. There is no dispute however that the grievor counted and was in total control of the beer inventory on the merged December 12 and 13, 1983 runs. Nonetheless, the inference is made that the grievor may very well have been the victim of a mistaken count.

In dealing with the Trade Union's principal argument I have had no reason presented to suspect the evidence adduced before me by the three police officers who testified. They were each properly trained and experienced investigative officers who had engaged in this type of mission on several previous occasions. Moreover, it is important to note that the investigation was not restricted to one passenger train run but encompassed three. Also different police officers (except for Officer Lord) were assigned the task of surveilling the grievor's activities. Moreover no evidence was adduced to demonstrate any sinister or untoward motive on the Corporation's part in subjecting the grievor to investigation. I have no reason to suspect that the grievor was "set up" or entrapped into committing a wrongdoing that he would not otherwise have committed.

Only the one passenger run of December 1 was busy. The evidence shows that the two assigned officers "together" observed the grievor's activities during his complete tour. Because two officers were assigned the task I am satisfied that any difficulties arising from the busy nature of the bar car would be overcome by the presence of two trained and experienced police officers.

With respect to the alleged shortcoming in the evidence resulting from the failure of one of the police officers to give direct testimony of the December 12, 1983 run I cannot appreciate how that difficulty inures to the grievor's benefit. Officer Lord's evidence indicated that he had personally observed the grievor sell 59 cans of beer during the course of the run. His absence for eight minutes was covered by his partner. When their notes were compared at the end of the run each had recorded 59 sales. At worst, the first hand evidence shows that the grievor was observed to have sold 59 cans of beer. Even had there existed some discrepancy between the two officers it could only have resulted in the observation of the sale of more than 59 cans of beer. As the evidence shows, when the first hand evidence of Mr. Lord is compared with the grievor's statement a serious discrepancy still would remain unexplained. And, indeed, for like reasons, I have no cause to impugn the observations of Lieutenant Latendresse. Although he alone observed the grievor for the entire train run of December 13, 1983, his statements, like the others, were not shaken during the course of cross-examination.

Finally, the Trade Union advanced the suggestion that the count on the December 1, 1983 run may have been mistaken owing to the grievor's failure to check the beer inventory figures. My only reaction to this submission is that while it may represent an interesting theory no evidence was led to prove it. The only evidence adduced was that the grievor treated those figures as accurate and, indeed, *prima facie*, that must remain the correct conclusion. And, in any event, that particular theory is clearly undermined with respect to the second and third rail passenger runs (merged together) when the grievor did do a proper count and still was observed to have made more sales than were recorded on the sales report.

In the last analysis because theft undermines the fundamental bond of trust between the employer and his employee I am satisfied that the only appropriate response to the grievor's infraction is discharge.

The grievance is accordingly denied.

(signed) DAVID H. KATES
ARBITRATOR