

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1524

Heard at Montreal, Tuesday, June 10, 1986

Concerning

**VIA RAIL CANADA INC.**

and

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

### **DISPUTE:**

Assessment of 15 demerit marks to Sleeping Car Porter P. Gess for allegedly being rude and argumentative to a lady passenger, showing lack of concern when information was requested. Refusing to follow instructions from Assistant Employee Services Supervisor to return to his assigned Sleeping Car at Winnipeg on May 27, 1985.

### **JOINT STATEMENT OF ISSUE:**

The Corporation received a written complaint from a lady passenger.

Prior to Train No. 1 departure on May 27, 1985, the grievor was told by the Assistant Employee Services Supervisor on duty to return to his car on the platform.

Following evaluation of the complaints, and an interview with the grievor, discipline was assessed in accordance with article 24.1 of collective agreement No. 2.

The Brotherhood requests removal of all discipline, and contends that discipline was assessed for a major offence under article 24.7, and was, therefore, subject to hearing.

The Corporation denies the Brotherhood's request.

**FOR THE BROTHERHOOD:**

**(SGD.) TOM MCGRATH**  
NATIONAL VICE-PRESIDENT

**FOR THE CORPORATION:**

**(SGD.) A. GAGNE**  
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. O. White – Officer Labour Relations, Montreal  
M. St-Jules – Manager Labour Relations, Montreal  
J. Kish – Personnel and Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

A. Cerilli – Regional Vice-President, Winnipeg  
P. Gess – Grievor

### **AWARD OF THE ARBITRATOR**

It is common ground that article 24.5 and article 24.7 require the Employer to hold a fair and impartial hearing with respect to "employees having been charged with a major offence".

The grievor was assessed fifteen (15) demerit marks for the infractions of verbally abusing a customer and for insubordination with respect to an immediate supervisor: VIA Rule 25 provides in part;

DISLOYALTY, GAMBLING, DISHONESTY, INCOMPETENCY, DISRESPECT, GROSS CARELESSNESS, IMMORALITY, UNDUE FAMILIARITY, DESERTING DUTY, INSUBORDINATION, UNTRUTHFULNESS

All the foregoing are causes for discipline and depending on the seriousness of frequency of the infraction(s) may be cause for dismissal.

The Corporation did not invoke the disciplinary investigation procedure prior to its decision to assess the grievor 15 demerit marks with respect to his alleged misconduct. The Corporation relied upon article 24.2 which reads as follows:

24.2 Employees will not be held out of service for minor offenses. Minor offenses are defined as offenses not involving suspension or dismissal.

Accordingly, it is argued that since the 15 demerit marks assessed the grievor did not involve either his suspension or dismissal his acts of misconduct ought to be characterized as "minor". Or, more precisely, those acts of misconduct cannot be described as major.

There is no merit to the Corporation's position. The characterization of the infraction as "major" or "minor" for purposes of invoking the disciplinary investigation procedure must be determined at the time the charge of misconduct is made. The Corporation's own rules indicate (quite correctly) that abuse of customers (i.e., disrespect) and insubordination are "dismissible" offenses. Accordingly, since it is trite to say that because a "dismissible" offense constitutes a major act of misconduct the Corporation was obliged to have recourse to the procedures contemplated by articles 24.5 and 25.7 before assessing the grievor a disciplinary penalty.

It also follows that whether the grievor is ultimately dismissed or is assessed 15 demerit marks is irrelevant for purposes of articles 24.5 and 24.7. What is important is the notion that at the time the charge of misconduct was made the grievor stood to be potentially dismissed. Indeed, it is my view that is exactly what article 24.2 means as well. And that is the Corporation cannot take a grievor out of service for offenses that may neither result in suspension or dismissal. In other words, only "dismissible" offenses that potentially may or may not result in a suspension or dismissal will warrant taking a grievor out of service pending final disposition of the disciplinary investigation.

For all the foregoing reasons the grievor's penalty is vitiated and the grievance is allowed.

I shall remain seized.

**(signed) DAVID H. KATES**  
ARBITRATOR