

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1776

Heard at Montreal, Thursday, 14 April 1988

Concerning

VIA RAIL CANADA INC.

And

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

DISPUTE:

Discharge of Baggage Handler G. Johnston for irregularities in the handling of the sale of baggage coupons on January 29, 1987.

JOINT STATEMENT OF ISSUE:

While employed as a Baggage Handler, Mr. Johnston signed for and received B.8 Coupons 105601-105700 inclusive on March 16, 1986. Coupons 105601-105659 were reported, and the monies remitted. Coupons 105660-105700 were unaccounted for by Mr. Johnston.

Baggage Coupons 105668, 69, 70, 71, 72 and 73 were sold and attached to passengers' luggage on January 29, 1987, and the monies from the

sale of the coupons were not remitted in accordance with instructions dated December 29, 1986. Following an investigation on February 11, 1987, the grievor was discharged for irregularities in the handling of the sale of baggage coupons.

The Brotherhood contends that there is no proof that the grievor sold the coupons, and requests his immediate reinstatement with compensation and all other benefits.

The Corporation has denied the Brotherhood's request.

FOR THE BROTHERHOOD:

FOR THE CORPORATION:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

(SGD.) A. D. ANDREW
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. O. White	– Labour Relations Officer, Montreal
M. St. Jules	– Manager Labour Relations, Montreal
J. Kish	– Officer, Personnel and Labour Relations, Montreal
A. Painchaud	– Witness, Montreal
A. Viau	– Witness, Montreal
J. Bissonnette	– Witness, Montreal

And on behalf of the Brotherhood:

R. Emard	– Local Chairman, Montreal
G. Cote	– Regional Vice-President, Montreal
T. McGrath	– National Vice-President, Ottawa

F. Bison – Local Chairman, Montreal
 G. Johnston – Grievor

AWARD OF THE ARBITRATOR

The Corporation alleges that Mr. Johnston sold baggage coupons to a number of passengers on January 29, 1987, failing to remit the money received to the Corporation.

On January 29, 1987 Baggage Attendant D. Wistaff informed Senior Baggage Attendant André Painchaud that baggage coupons of an irregular series were attached to luggage in the baggage room. A further check revealed that a still greater number of coupons of the irregular series were so attached. When the passengers who owned the luggage returned to retrieve it, Mr. Painchaud asked for a description of the employee who had sold them the tags. They provided a description of a person resembling the grievor who, along with some five or six other baggage handlers, was on duty that day. Mr. Painchaud then arranged for the passengers to repeat their account of what had happened to his supervisor, Mr. Alain Carle. Subsequently the passengers repeated their story to Mr. Carle, as well as to General Supervisor J. Bissonnette and Station Supervisor R. Jutras. Because the customers were in a hurry to catch their train, the Corporation's officers were unable to question them more than briefly. Unfortunately the passengers, who ultimately numbered four, were not asked to leave their names or addresses with the Corporation, and they have therefore been unavailable to provide further information or direct eyewitness evidence of what actually took place, and in particular, who sold them the irregular coupons.

Further investigation by the Corporation subsequently revealed that the coupons which had been sold to the customers and for which no money had been returned to the Corporation had originally been signed out to Mr. Johnston in March of 1986. The material establishes that he worked as a baggage attendant until April 13, 1986 when he was temporarily promoted to the position of First-Aid Instructor, returning to a position in the baggage room on November 4, 1986.

It is common ground that it was the grievor's obligation to return all unused baggage coupons when he left the baggage room in April of 1986. Mr. Johnston's evidence is that upon departing from the station he returned all keys, corporation funds and coupons in his possession to Mr. Andre Viau, the station supervisor at the time. Mr. Viau was not normally charged with receiving such goods, but it is not disputed that he did handle the grievor's departure in the absence of the employee who would normally have done so.

A crucial aspect of the evidence is the return and subsequent custody of the baggage coupons in April of 1986 and afterwards. Mr. Johnston's evidence is that the coupons were in a sealed envelope which he gave to Mr. Viau at the time he left for his First-Aid Instructor's job. Mr. Viau, whose initial statement to the Corporation was that he would not have received the coupons, conceded in his testimony at the arbitration hearing that, although he is not sure, he is now inclined to believe that Mr. Johnston might have indeed returned a sealed envelope with the coupons in it on the day in question, suggesting that it would not have been unusual for Mr. Johnston to place the envelope inside the office safe himself while he was dealing with Mr. Viau. Mr. Viau, whose evidence is of some importance on this issue, stated that on the matter of the return of the envelope with the coupons he is inclined to give the benefit of the doubt to the grievor.

In this case the burden of proof is upon the Corporation. Theft is a serious allegation, the proof of which should require clear and cogent evidence. In the instant case a significant part of the

Corporation's evidence is of two kinds: hearsay and circumstantial. The evidence of the Corporation's officers with respect to what they were told by the passengers is the clearest form of hearsay evidence. No eyewitness to the sale of the coupons was called to testify. The hearsay account of the Corporation's officers respecting what they were told by the passengers leaves the Brotherhood in a position of some prejudice. It cannot probe, test or challenge what the passengers reportedly said because they were not at the arbitration hearing to be cross-examined, nor were they involved at any stage of the Corporation's formal investigation of the incident. While it is true that a board of arbitration, and in particular this Office, is not bound by the rules of evidence, as a matter of common sense and general prudence great care should be taken before drawing conclusions substantially prejudicial, whether to employer or employee, strictly on the basis of hearsay evidence the value of which cannot be tested at a hearing.

A second type of evidence brought to bear against Mr. Johnston is circumstantial. The Corporation asks the Arbitrator to infer from the fact that the impugned coupons were initially signed out to him, with no apparent

documentation to show that they had been returned, the conclusion should be drawn, in light of the hearsay evidence of the Corporation's officers and the fact that Mr. Johnston was on duty on the day in question, that he must have been the person to sell the irregular coupons which were discovered attached to the passengers' baggage.

As a general matter circumstantial evidence is admissible in proceedings governed by the rules of evidence. It is well established, however, that where the only evidence against an accused person is circumstantial, it can be relied upon only to the extent that such evidence is consistent with a conclusion of guilt on the part of the accused and is inconsistent with any other conclusion. In the Arbitrator's view, given the gravity of the allegation against the grievor, even though this is not a criminal proceeding, that evidentiary rule is an appropriate principle to apply in a case of this kind.

Can it be said that the circumstantial links between the irregular coupons conduce to no other conclusion but the wrongdoing of Mr. Johnston? I think not. As noted above, the evidence of the grievor, corroborated at least to some degree by the testimony of Mr. Viau, suggests that he did in fact return his unused coupons to the Corporation in April of 1986. There is no evidence to establish who would have had custody of or access to the coupons after their return. Given the evidence of Mr. Johnston and Mr. Viau, the possibility that some other person may have misused the coupons in question is no more or less plausible than the theory that Mr. Johnston misused them. While with respect to this issue the failure of any documentation showing the baggage coupons to have been returned might tend to support the Corporation's conclusion against the grievor, the fact that Mr. Viau received Mr. Johnston's goods upon his departure, with the apparent intention of later notifying the employee normally charged with that function so that their receipt could be duly noted leaves the value of the Corporation's documentary record in some doubt. Lastly, it appears that at least one other baggage attendant employed at the same location at the time would generally fit the description of the employee described by the passengers to the Corporation's officers.

In the Arbitrator's view the sum total of the foregoing evidence is that it leads to more doubts than conclusions. In a case such as this it is not open to a board of arbitration to convert a party's suspicion, however strong, into an evidentiary conclusion. In the circumstances I must conclude that the Corporation has not adduced evidence sufficient to discharge the onus of establishing, on the balance of probabilities, that Mr. Johnston was responsible for the sale of the irregular coupons.

The grievance must therefore be allowed. The grievor shall be reinstated into his employment forthwith, with compensation for all wages and benefits lost and without loss of seniority. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

April 15, 1988

(signed) MICHEL G. PICHER
ARBITRATOR