

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1866

Heard at Montreal, Tuesday, 10 January 1989

Concerning

VIA RAIL CANADA INC.

And

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

DISPUTE:

The assessment of thirty demerit marks to Mr. G. Smith for undue familiarity with, and sexual harassment of a female passenger while he was working as a Service Attendant on VIA Train 3, August 12 and 13, 1987, and his subsequent dismissal for accumulation of demerit marks in excess of sixty.

JOINT STATEMENT OF ISSUE:

Following a hearing convened in accordance with Article 24.7 of Agreement No. 2, the Corporation assessed thirty demerit marks to the record of Service Attendant G. Smith. This led to his dismissal for accumulation of demerit marks in excess of sixty.

The Brotherhood contends that the facts reveal that the Corporation attempted to entrap Mr. Smith. The Brotherhood further contends that the evidence clearly shows that the charges against the grievor were unfounded and without merit.

The Corporation contends that the evidence is conclusive as to the guilt of the grievor and feels that the discipline assessed was not excessive in these circumstances. The Corporation has denied the grievance at all steps of the grievance procedure.

FOR THE BROTHERHOOD:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(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. R. Kish	– Personnel & Labour Relations Officer
R. Malik	– Witness

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg
G. Smith	– Grievor

AWARD OF THE ARBITRATOR

The evidence reveals that while working on Via Train 3 from Winnipeg to Edmonton on August 12 and 13, 1987, the grievor, Service Attendant Mr. G. Smith made sexual advances on a female passenger. When the passenger in question embarked at Winnipeg the grievor stated to her "I'll be up to talk to you in a while." Later, as the passenger was making her way towards her sleeper car she passed the grievor who said hello to her, touched her hair and repeated his statement that he would come to see her at her berth to talk with her

Shortly afterwards Mr. Smith proceeded to the passenger's berth and suggested that it would be better if they went to talk in his room so as not to disturb the other passengers. Unbeknownst to the grievor the female passenger was a private investigator working for Pinkerton Security Inc., hired by the Corporation to monitor and report on the service and performance of on-board personnel. The passenger went with the grievor to his roomette where, initially, he shut only the curtain, allowing himself to hear any passengers who might need assistance. After about ten minutes of general conversation Mr. Smith closed the door of his roomette, purportedly to block out the noise. He then stated to the passenger that he liked her and went on to state that it was the modern 1980's, and that if two people liked each other they should be open about it, commenting on how in the past marriages had failed because people didn't sleep together before getting married. During this conversation the grievor took the passenger's hand, which he continued to hold as he spoke. He then turned out the lights so that they "could see the scenery". He told her that, given the chance, she would get to like him too. When she asked how that would be, he suggested that they could go out for lunch and movies and spend time together in Winnipeg. When the female passenger stated that she was tired and wanted to go back to her sleeper he asked her why she should go back, explaining "We could have a really nice night just lying and holding each other."

The passenger declined Mr. Smith's invitation. As she attempted to leave the roomette Mr. Smith twice attempted to kiss her, in consequence of which she simply turned her cheek. The following morning when the passenger awoke in her berth and said good morning to the grievor who was then making up upper berths, he offered her the use of his room in which to clean up. She declined. Later in the day, as she sat in a day coach, Mr. Smith approached her and suggested that she might travel with him to Vancouver where she could stay with him in his room, at his expense. When the passenger said "Thank you, but no" the grievor then asked her for a kiss, which she declined to give. When he asked why she explained that she was seeing someone in Winnipeg. Later, when she was leaving the train, the grievor clasped her hand and stated quietly that he couldn't be too friendly as others were around, but that they should get together when she returned to Winnipeg.

The Union submits that the grievor was unfairly entrapped by the Corporation. The Arbitrator finds that submission difficult to accept on the evidence. An inequitable degree of entrapment may be established if it can be shown that the employer or its agent has led an employee to do something in violation of his or her duties which the employee would not otherwise have done. In this case the grievor was at all times the instigator and prime mover. As the investigator explained in her evidence, her purpose was to observe what employees were doing during the course of their duty. She did not initiate any of the conversations or encounters related in evidence. At most, she showed herself willing to accept the grievor's invitation to sit with him in his roomette for the purpose of talking. There is no suggestion in the evidence that she provoked or encouraged his sexual advances.

Regrettably, the grievor's record discloses that he was acting pursuant to a pattern of making amorous overtures to female passengers, as reflected in the facts of an earlier incident. In **CROA 1865** this Office upheld the imposition of discipline against Mr. Smith for sexually harassing a seventeen year old female passenger who was travelling alone, resulting in a serious letter of complaint from the girl's father. The observations of the Arbitrator with respect to the standards of conduct to be expected from on-board service employees made in that case need not be repeated here. Suffice it to say that conduct tantamount to sexually propositioning a passenger is egregiously incompatible with the professional responsibilities of an on-board service employee. The assessment of thirty demerits against the grievor for his conduct on the occasion in question is not, in the Arbitrator's opinion, a disciplinary sanction that should be reduced by this Office in the circumstances of this case.

For these reasons the grievance must be dismissed.

January 13, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR