# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2060

Heard at Montreal, Wednesday, 10 October 1990

Concerning

## CANADIAN NATIONAL RAILWAY COMPANY

And

## UNITED TRANSPORTATION UNION

## EX PARTE

### DISPUTE:

Trainman B.T. Roffey was assessed with 20 demerits, effective 5 November 1989 for: willfully providing incorrect information during an employee statement obtained 5 November 1989.

This discipline was assessed by Assistant Superintendent T. Maw of CN's Southern Ontario District. The Union has appealed on the basis that CN Rail violated Article 82 of Agreement 4.16 in this matter and in addition, on the basis that the discipline assessed was completely unwarranted.

The Company, Canadian National Railway, has declined the Union's appeal throughout the grievance on the basis that this matter should be properly taken up with VIA Rail Inc.

### FOR THE UNION:

**(SGD.) M. P. GREGOTSKI**
**for: GENERAL CHAIRPERSON**

There appeared on behalf of the Company:

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| J. B. Bart | – Manager, Labour Relations, Montreal |
| S. F. McConville | – System Labour Relations Officer, Montreal |
| M. S. Hughes | – System Labour Relations Officer, Montreal |
| B. J. Mahoney | – Transportation Officer, Montreal |
| P. J. Thivierge | – Senior Negotiator & Advisor, VIA Rail, Montreal, Observer |

And on behalf of the Union:

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| M. P. Gregotski | – Vice-General Chairperson, St. Catharines |
| T. G. Hodges | – General Chairperson, St. Catharines |
| R. Lebel | – Vice-General Chairperson, Quebec |

# AWARD OF THE ARBITRATOR

The Company raises a preliminary objection to the arbitrability of this grievance. Its position is based on two grounds. Firstly it submits that the Union has failed to comply with the requirements of Clause 8 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration, in that it did not furnish the Company with forty-eight hours' written notice of its intention to apply for permission to proceed ex parte before this Office. Secondly, it maintains that the grievor, Conductor B.T. Roffey, was not an employee of CN at the times material to the instant grievance.

The Arbitrator finds it unnecessary to deal with the first ground of objection, because the second ground is amply justified. In October of 1989 the grievor was an employee of VIA Rail Canada Inc. (VIA). He was investigated and disciplined for an incident which occurred on a passenger train on October 12, 1989. VIA conducted a disciplinary investigation into the incident on October 20, 1989 while Mr. Roffey was still its employee, and thereafter on November 5, 1989 after he had transferred to service with CN. A further investigation hearing was conducted by VIA on November 15, 1989.

On November 15, 1989, the date of the grievor's final supplementary statement, VIA assessed fifteen demerits against him in relation to his alleged conduct as a passenger train conductor on October 12. Subsequently, on December 11, 1989 VIA assessed a further twenty demerits against the grievor's record for allegedly having provided false information during his employee statement of November 5, 1989.

The record reveals that the notices issued to the grievor to attend at the investigations were issued both by VIA and CN. The notice advising the grievor that twenty demerits were assessed against him for making a false statement did not issue from VIA, but came from CN on a Form 780 signed by an assistant superintendent of CN. The Company acknowledges that the issuing of the notice of discipline by CN was done in error and that the assessment of discipline, which was made by VIA, should have been communicated to the grievor by that Corporation.

It is common ground that pursuant to a special agreement between CN, VIA and the Union dated March 6, 1987 provision has been made for the movement of employees between VIA and CN, and that employees transferring from one Company to the other do so with protection of a number of vested rights, including seniority rights and the status of their disciplinary record. It appears manifest to the Arbitrator that the maintenance of that system of transfer is in the interest of both employers and employees. It was not argued that VIA could not continue its investigation in respect of the conduct of the grievor as a VIA Rail employee, or that the consequences of that investigation could not carry forward onto his disciplinary record after his transfer to CN. There is, moreover, no basis to conclude that the parties intended that an employee could evade his or her obligations or liabilities in respect of discipline merely by transferring from one company to the other, any more than the employers could claim to be absolved of their vested obligations by virtue of such a transfer.

The threshold question in this dispute is whether VIA is the proper party respondent to the grievance for the purposes of arbitration. I am satisfied that it is. CN was not a party to the disciplinary investigation conducted by VIA, is not privy to the information contained within it and did not make the decision to discipline the grievor. In the Arbitrator's view there is no basis upon which CN can be cast in the role of employer for the purposes of bearing the burden of proof to establish just cause for the discipline assessed against the grievor in this case. This grievance is one which must be litigated as between the Union and VIA. The events of November 5, 1989 involved a continuation of the fulfillment of the grievor's obligations as an employee of VIA. The Arbitrator notes, moreover, that VIA's representative who attended the hearing as an observer provided a verbal undertaking that VIA would not challenge the arbitrability of this grievance as against itself, either on the basis of the identification of the employer or of the issue of time limits and notices.

The preliminary objection of the Company must be allowed. For the purposes of clarity, the Arbitrator's decision allowing the objection of CN in respect of the arbitrability of this grievance as against it is entirely without prejudice to the rights of the grievor and his Union to progress the grievance on its merits against VIA.

For the foregoing reasons, insofar as the instant grievance is filed against CN, it must be dismissed.

12 October 1990

**(Sgd.) MICHEL G. PICHER**
**ARBITRATOR**