CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2576

Heard in Montreal, Thursday, 12 January 1995

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Appeal of discipline assessed the record of Conductor G.W. Milks of Hornepayne.

UNION'S STATEMENT OF ISSUE:

On October 17, 1993 Conductor Milks was called to operate VIA Train #1 Hornepayne to Sioux Lookout. Due to operational difficulties which resulted in the delay to Train #1 on this date, Mr. Milks refused to proceed past Savant Lake Station enroute to Sioux Lookout because of the Hours of Service Regulations established by Transport Canada which prohibits employees from working more than 12 hours.

A officer of the Corporation was contacted by CN Rail, this officer directed Mr. Milks to proceed to Sioux Lookout regardless of the Hours of Service Regulations.

Mr. Milks refused to follow the supervisor's instructions and he was subsequently required to attend a formal employee statement. Mr. Milks was then assessed 30 demerits for "failure to follow a supervisor's instructions resulting in delay to Train #1 on October 17, 1993 thus inconveniencing 172 passengers unnecessarily."

The Union appealed the assessment of discipline assessed Mr. Milks on the grounds that Mr. Milks was subject to the Hours of Service Regulations and therefore was prohibited from following the directions of his supervisor. In addition, the Union appealed the discipline assessed against Mr. Milks on the grounds that the Corporation violated the provisions of article 73.1 of agreement 12 because Mr. Milks did not receive a fair and impartial investigation.

The Corporation declined the Union's appeal

FOR THE UNION:

(SGD.) M. P. GEGOTSKI
GENERAL CHAIRPERSON

There appeared on behalf of the Corporation:

D. A. Watson	– Senior Labour Relations Officer, Montreal
Wm.. Radcliffe	– Transportation Officer, Customer Services, Corridor West, Toronto

And on behalf of the Union:

R. Beatty	– Vice-General Chairperson, Hornepayne
M. P. Gregotski	– General Chairperson, Fort Erie
W. G. Scarrow	– General Chairperson, Sarnia
R. Roy	– Local Chairperson, Capreol
R. Whoel	– Local Chairman, CCROU(BLE), Hornepayne
B. Mann	– Observer

AWARD OF THE ARBITRATOR

The evidence discloses that Conductor Milks and crew operated Train No. 1 as scheduled from Hornepayne to Sioux Lookout on October 17, 1993. Their train departed Hornepayne some three and one-half hours late by reason of time required to set off a bad order car. Upon arriving at Armstrong Conductor Milks decided to water one of the two day coaches in the consist as it no longer had water. While there is some conflict as to the time this required, the Arbitrator is satisfied that the taking on of water at Armstrong would not have occasioned much more than ten minutes' delay to Train No. 1.

Prior to departing Armstrong the crew judged that they could not reach Sioux Lookout within twelve hours of the commencement of their tour of duty. They therefore advised the rail traffic controller that they intended to book rest at the conclusion of the twelve hours, which in all likelihood would occur prior to their arrival in Sioux Lookout. It is common ground that the Corporation and crew were subject to a directive of Transport Canada dated August 26, 1993 which limits the on-duty time of a crew in any single tour of duty to twelve hours. An amendment to the order dated August 31, 1993 made an exception, whereby the hours on duty could extend to sixteen consecutive hours in an emergency. The Minister's order, issued pursuant to the Railway Safety Act, defines an emergency as follows:

> An emergency is where a casualty or unavoidable accident occurs, an Act of God or where a delay is as a result of a cause not known to the railway or its officers at the time employees left a terminal and which could not have been foreseen.

The Corporation took the position that the taking of water at Armstrong constituted an emergency which extended their tour of duty, and that they would therefore be within the purview of the ministerial order even if their arrival at Sioux Lookout should exceed the twelve hour limit. Upon being advised of that position, while held in a siding at Savant Lake, the crew took a contrary position, asserting that the Corporation was effectively requiring them to proceed in a manner contrary to law. In the result, the Corporation was required to deadhead a replacement crew to Savant Lake to take over from the grievor and his crew. It is not disputed that Train No. 1 arrived in Sioux Lookout subject to still further delay as a result of these events. On that basis, following an investigation, Mr. Milks was assessed thirty demerits for refusing to follow instructions, resulting in a delay to Train No. 1 and inconvenience to passengers.

The Corporation submits that in the circumstances the employees should have followed the rule to "work now – grieve later." With that submission the Arbitrator cannot agree. It is well recognized that an exception to the work now – grieve later rule arises where to obey the employer's directive would result in a violation of the law. At a minimum, in the case at hand, the employees acted out of a good faith belief that the directive given to them was in violation of the orders of Transport Canada. If it were necessary to resolve the case on this issue, the Arbitrator would, moreover, support the view of the employees that the replenishing of water in one car at Armstrong did not involve an "emergency" within the meaning of the Minister's order, and that the crew could not lawfully have complied with the Transport Canada directives by completing their tour of duty outside the twelve hour period. I am satisfied, however, that the fact that Mr. Milks acted in good faith is a sufficient defense in the case at hand, even it is arguable that honest persons may differ as to the proper definition of an emergency in such a circumstance. For the reasons related below, however, the case can be fully resolved on the basis of an alternative issue raised by the Union.

The Union asserts that the Corporation failed to afford the grievor the protection of a fair and impartial investigation as contemplated under the terms of article 73.1 of the collective agreement, which provides as follows:

> **73.1** Employees will not be discipline or dismissed until the charges against them have been investigated. Employees may, however, be held off for investigation not exceeding 3 days ***and will be properly notified, in writing and at least 48 hours in advance, of the charges against them***.
>
> (emphasis added)

It is common ground that the notice sent to the grievor with respect to the investigation of his conduct in relation to the events related above did not contain any specific charge or allegation. The notice sent to Mr. Milks stated:

> You are required to provide an Employee Statement in connection with circumstances surrounding the trip on October 17/93 on VIA Rain #1 between Hornepayne & Sioux Lookout.

At the investigation the Union's local chairman requested that the investigating officer give specifics as to the charge or allegation which the grievor was to meet. That request was declined, whereupon the grievor refused to answer any questions. The investigation proceeded without him and the Corporation subsequently issued discipline, assessing

thirty demerits for; "… failure to follow Supervisor's instructions, resulting in delay to Train #1, October 17, 1993, thus inconveniencing 172 passengers unnecessarily."

The Arbitrator is satisfied that in the circumstances of the case at hand the objection taken by the Union with respect to the regularity of the notice given to the grievor, and the refusal of the investigating officer to provide greater specificity, is well founded. In **CROA 2073** the following comments were made with respect to the fundamental purpose of collective agreement provisions relating to standards of fairness and impartiality in disciplinary proceedings:

> As previous awards of this Office have noted (*e.g.* ***CROA 1858***), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee ***to know the accusation against him***, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline.
>
> (emphasis added)

As is evident from the above, a fundamental element of fairness is that the employee have reasonable knowledge of the accusation or charge made against him or her. That standard is clearly reflected in the express language of article 73.1 of the collective agreement whereby the employee is entitled to be "… properly notified … of the charges against [him or her]." That requirement was plainly not met in the case at hand.

It appears from the material before the Arbitrator that there may have been some concern on the part of the investigating officer that to specify a particular charge might unduly limit the discretion or latitude of the Corporation in dealing with such facts as might ultimately be found. That concern is not well founded. As prior awards of this Office have found, discipline is not necessarily nullified merely because the facts found during the course of an investigation go beyond the charge or allegation contained in the notice issued to the employee. In **CROA 2562** the Arbitrator rejected the suggestion of a union that an employee's discipline was null and void because it was assessed for facts which differed slightly from the allegation contained in the original notice of investigation. The award reads, in part, as follows:

> Finally, the Arbitrator cannot sustain the suggestion of the Brotherhood that the investigation process is somehow flawed because the initial notice to the grievor in respect of a supplementary statement to be taken on April 8, 1994 stated that it was in connection with obtaining illegally imported liquor "while on duty and on Company property". The fact that the investigation disclosed Mr. Martin receiving smuggled alcohol on February 26, 1994 on Company property, when he was not on duty, changes nothing to the substance of the case. The Company was entitled to rely on the facts that emerged from the investigation, insofar as those facts were disclosed pursuant to a process consistent with the procedures established within the collective agreement. Clearly, the notice gave the grievor sufficient particularity as to the nature of the employer's concerns and the general matter to be investigated. There was no prejudice to Mr. Martin in the circumstances, nor any departure from the procedural protections of the collective agreement.

Further, should the investigation disclose some other entirely unforeseen event, such as a rules violation, the Corporation would retain the authority to issue a second notice and commence a separate investigation in that regard.

The tour of duty in which the grievor was involved on October 17, 1993 extended over some nine hours, and involved a number of events, including the setting off a bad order car. The notice of investigation provided to Mr. Milks gave him no indication of the nature of the allegation of wrong-doing being investigated. It would have been relatively simple, I think, to phrase the notice in terms of his involvement in the delay of Train No. 1 on that date. Clearly, however, the Corporation did not give the grievor proper notification of any charges against him, as required by article 73.1 of the collective agreement. For the reasons related in prior awards, the Arbitrator considers that flaw in the process to be a fundamental departure from the most basic requirements of a fair and impartial investigation implicit in artilce 73 of the collective agreement. On that basis alone the discipline must be found to be null and void.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the discipline assessed against Conductor Milks was processed in violation of article 73 of the collective agreement, and that the thirty demerits assessed against him are to be removed from his record forthwith. If it were necessary to so find, in the

alternative, I would conclude that the Corporation did not have just cause to assess discipline, as no emergency existed and the grievor acted in good faith, believing that the directive of the Corporation would have involved a violation of the law.

13 January 1995

(signed) MICHEL G. PICHER
ARBITRATOR