

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2653

Heard in Montreal, Tuesday, 12 September 1995

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)**

DISPUTE:

The appropriate level of discipline assessed to Mr. J.J. Gabriel.

JOINT STATEMENT OF ISSUE:

The grievor was assessed with thirty (30) demerit marks for "Consuming alcoholic beverages while assigned as Senior Service Attendant: and Discharge for withholding Corporation revenues, falsifying ICES report for trip no. 6892931, September 29-29, 1994, and improper handling of Corporation revenues and inventory".

The Union contends that the grievor's actions stem from his problem with alcohol and that discharge is excessive, given the circumstances.

The Corporation declined the grievance and maintains that the grievor was not discharged for consuming alcohol while on duty, but for intentionally withholding Corporation revenues and falsifying related documents, a dismissable offence.

FOR THE UNION:

(SGD.) A. S. WEPRUK
NATIONAL COORDINATOR
RESOURCES SERVICES

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS & HUMAN

There appeared on behalf of the Corporation:

C. Pollock	– Senior Labour Relations Officer, Montreal
D. DeWolfe	– Section Director, Customer Services, Halifax
R. B. Miller	– Supervisor of Security and Investigations, Pinkerton Security and Investigation Service, Dartmouth

And on behalf of the Union:

G. T. Murray	– National Representative, Moncton
K. Sing	– President, Local 4333, Halifax
J. J. Gabriel	– Grievor

AWARD OF THE ARBITRATOR

The discharge of the grievor arises as a result of events which transpired during the grievor's service on board trains no. 11 and 14 from Halifax to Montreal and return, September 26 to 29, 1994. Because previous accounting figures had caused it concern that the grievor's reported sales of confectionery products and beer were below the average of other employees, the Corporation assigned two Pinkerton investigators to observe Mr. Gabriel during the trip in question.

It is not disputed that during the course of the trip the investigators observed some forty-five cans of beer being sold to passengers. However, the grievor's sheets ultimately reported the sale of only ten cans of beer for the trip. Suspecting that the grievor was substituting his own beer for sale, in a profit making venture, the Corporation convened a disciplinary inquiry on October 5, 1994 at Halifax. During the course of the questions and answers Mr. Gabriel was asked if he could give an explanation for the discrepancy between the beer actually sold and the beer which he reported sold during the course of the trip. Mr. Gabriel replied "No comment". When he was further shown batch number records showing that in fact sixteen cans of Keith beer and twenty-six cans of Labatts beer had been sold, and not recorded on his report, he further replied that he had no comment. It is not disputed that the grievor did place some of his own beer into the stock on his train, as reflected in the report of the investigators who used a marking system to keep track of the stock.

Before the Arbitrator, the Union asserts that the grievor is a victim of alcoholism. Mr. Gabriel relates that in the months preceding the dates in question, as well as on the trip of September 26 to 29, 1994, he consumed some of the Corporation's beer while on duty and replenished it with his own beer, which he purchased for that purpose. The evidence further discloses that following his discharge Mr. Gabriel sought and obtained treatment for his condition as an alcoholic, and that he remains involved in ongoing support programs to the present time. At the hearing Mr. Gabriel denied ever having misappropriated Corporation funds, or involving himself in the sale of his own beer or confectionery products to passengers.

If, as the Union contends, the instant case was limited to an employee who consumed liquor while on duty, while that would be a serious charge, in light of mitigating circumstances it is arguable that the Corporation might not have had just cause to terminate Mr. Gabriel's services. Alcoholism has long been recognized as an illness by both boards of arbitration and the courts, and is indeed a form of physical disability in respect of which a duty of accommodation is owed under the **Canadian Human Rights Act**. Moreover, as an employee of some thirty years' service with a relatively positive disciplinary record, the grievor would, at the time of his discharge, have been entitled to very close consideration as to the appropriate standard of just cause.

Unfortunately, the case at hand involves considerably more. The evidence adduced by the Corporation establishes that for a considerable period of time the grievor's reported sales and cash receipts were substantially below those of other employees on similar trips. For example, during a ninety day period in the months of July, August and September of 1994 the average sales of chocolate bars by other employees per round trip was eighty-two, while Mr. Gabriel's reports of sales showed an average of twenty-nine. During the same period his reported sales of beer averaged twenty-three cans per round trip while the average sales of other employees was fifty-five cans per round trip. In the circumstances, and with all due respect to the fact that Mr. Gabriel may have, to some extent, been influenced by his alcoholism, the evidence before the Arbitrator as of the time of the hearing raises serious questions as to the grievor's candour.

The grievor has offered no explanation for the discrepancy in revenues recorded in respect of his own trips, over a substantial period of time, including the trip of September 26 to 29, 1994. His account that he simply used his own beer to replace cans which he consumed is, even if true, no explanation for the shortage of funds returned to the Corporation when regard is had to the September 26 to 29, 1994 trip. The fact that Mr. Gabriel may have consumed some beer and replaced it with his own, and may indeed have sometimes lost count in respect of his replacements, cannot explain the fact that the two on-board attendants supplied by him sold, collected and remitted to him cash for some forty-five cans of beer during the trip in question, while the grievor's cash receipts to the Corporation were reported only at the rate of ten cans of beer having been sold. Mr. Gabriel provides no good answer as to the whereabouts of the missing funds.

In the circumstances it is difficult to reject the inference drawn by the Corporation, based on direct evidence concerning the trip of September 26 to 29, 1994, as well as on the pattern of the past, that Mr. Gabriel was in fact involved in substituting and selling his own confectionery and alcohol products for profit during the period in

question. At a minimum, in this case it was incumbent upon Mr. Gabriel to give some good explanation of the revenue discrepancy for the forty-five cans of beer actually sold on the trip of September 26 to 29, 1994. Even if the Arbitrator should disregard the evidence of the Pinkerton investigator, Mr. Miller, to the effect that he did not observe Mr. Gabriel to be intoxicated, nothing in the grievor's evidence accounts for or explains the missing funds. Indeed, his denial of any profit taking does little to rebut the inference drawn by the employer.

In all of the circumstances the Arbitrator is compelled to conclude, on the balance of probabilities, that apart from his own consumption of liquor, and notwithstanding his denials, Mr. Gabriel was involved in the wrongful misappropriation of funds through the sale of his own beer to passengers on the occasion of the Halifax-Montreal return trip of September 26 to 29, 1994. As I am regrettably compelled to conclude that Mr. Gabriel has sought to deceive both the Corporation and the Arbitrator with regard to the discrepancy in sales reported, it is difficult to find mitigating factors which would justify the reinstatement of Mr. Gabriel into a position of obvious trust, which involves the unsupervised collection of money for the Corporation (**CROA 2195**).

For all of the foregoing reasons the grievance must be dismissed.

September 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR