CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2689

Heard in Montreal, Wednesday, 13 December 1995

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Discipline assessed to Mr. Claude Roussel.

JOINT STATEMENT OF ISSUE:

Following an investigation on November 8, 1994, the grievor was discharged from the Corporation for: « comportement inacceptable vers 1 cliente - TR604, 94-08-04/ comportement inacceptable envers 2 clientes - TR604, 94-10-13. Avoir accepté une bouteille de vin à titre de paiement pour l'occupation d'une accommodation [sic] TR604, 94-10-13. Avoir consommé ladite bouteille durant vos heures de service en présence des clientes TR604, 94-10-13. »

The Union seeks the grievor's reinstatement and claims that Mr. Roussel has been unjustly dealt with, as it believes the discipline assessed is too severe.

The Corporation declined the Union's request.

FOR THE UNION:	FOR THE CORPORATION:
(SGD.) A. S. WEPRUK	(SGD.) C. C. MUGGERIDGE
NATIONAL COORDINATOR	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock	– Senior Labour Relations Officer, Montreal
L. Savoie	– Manager, Customer Services, Montreal
J-P Maheux	– Manager, Customer Services, Montreal
G. Beaudoin	– Train Coordinator, Montreal

And on behalf of the Union:

A. Rosner	– National Coordinator, Montreal
C. Roussel	– Grievor

AWARD OF THE ARBITRATOR

As reflected in the joint statement, the grievor was discharged for undue familiarity towards two female passengers, for having allegedly accepted a bottle of wine as payment for providing them with sleeping berths and having consumed the wine while on duty.

There is no direct evidence, in the form of eye-witness testimony, before the Arbitrator as to what occurred during the course of events which unfolded on Train 604 between Hervé and Senneterre on October 13, 1994, nor what transpired some weeks earlier on the same train, on August 4, 1994. The disciplinary action taken by the Corporation was prompted by letters of complaint written jointly by Ms. Maryse Tremblay and her travelling companion, Ms. Micheline Leblanc. It does not appear disputed that the two women in question, along with their two children, boarded Train 604 for travel in coach accommodation. When Ms. Tremblay asked Mr. Roussel, who was then responsible for bar service, whether it would be possible to obtain sleeping berths, the grievor took the passengers to the sleeping car. The letters of complaint indicate that once the children were put to bed Mr. Roussel sat with the female passengers. The letter of complaint signed by Ms. Tremblay asserts that he touched her knee and thigh while sitting with the female passengers, and that at one point he tried to give her a hug. Ms. Leblanc then recounts that she gave him a bottle of wine for the sleeping accommodation, although he asked her for some form of receipt or I.O.U. The brief note signed by Ms. Leblanc confirms what is alleged by Ms. Tremblay, and further states that on an earlier trip Mr. Roussel had also made advances toward her.

It is not denied that Mr. Roussel did place the passengers in question into sleeping accommodation, and that he did so out of keeping with proper procedures. Some conflict exists as to whether he obtained permission from the sleeping car attendant, or simply told him after the fact that he had given the berth accommodations to the two women and their children. The sleeping car attendant was not present at the hearing to give evidence, although his recorded testimony during the course of the Corporation's investigation is to the effect that Mr. Roussel effectively presented him with a *fait accompli*, explaining that the passengers in question had suffered disturbances from other passengers on a prior trip, and that he wanted to give them better accommodation. The grievor, who was present at the hearing to testify, states that in fact he asked the sleeping car attendant, Mr. Lavoie, for permission to place the women and their children in the berth accommodations and acted with his approval.

A report prepared by Train Conductor Guy Beaudoin, who was present at the hearing, confirms that during the course of the trip Mr. Lavoie did express to him some consternation that Mr. Roussel had placed four passengers in berth accommodation, apparently based on his concern that they had been disturbed on a previous trip. Mr. Beaudoin further relates that some days later, on October 25, 1994 the same two female passengers related to him and to another conductor what had taken place on October 13, whereupon they advised the passengers to make up a formal complaint.

Subsequently Corporation officers conducted telephone interviews with the two female passengers, as a result of which the officers prepared written reports dated October 31, 1994. According to the report prepared by the two officers, Mr. Léo Savoie and Mr. Jean-Philippe Maheux, Ms. Leblanc confirmed that the grievor sat next to her on Train 604 on August 4, 1994 and that he began to flirt and touched her leg with his hand. When she protested, he stopped and left within a few minutes. According to the report of Mr. Savoie and Mr. Maheux, Ms Leblanc stated "I did not report the incident because I rebuffed him and he did not persist". [translation] According to the report of the two officers, Ms. Leblanc further indicated that the grievor did consume the bottle of wine which the women gave to him.

The telephone conversation conducted with Maryse Tremblay results in a report relating further statements by her to the effect that the grievor acted in a forward fashion, sat with the women, tried to touch her thigh and hug her, and consumed the bottle of wine which she gave him.

The grievor does not deny that he gave the passengers the sleeping car accommodation during the course of the night of October 13, 1994. He denies, however, that he was unduly familiar or flirtatious, or that he either accepted or consumed a bottle of wine.

The Union's representative submits that the Corporation's case cannot succeed, as all of the evidence with respect to the grievor's conduct towards the two female passengers is in the form of hearsay evidence. He stresses that the passengers in question were not made available at the time of the disciplinary investigation, and were not present at the arbitration. In these circumstances, stressing the severity of the charge against the grievor, he submits

that no weight should be given to hearsay evidence. The Union maintains that the denials of the grievor, who was present at the hearing to be cross-examined, should, in these circumstances, be preferred to the written complaints of the two passengers.

The Arbitrator accepts that, as a general rule, where hearsay evidence is contradicted by direct testimony, direct testimony should be preferred. That is not to say, however, that hearsay evidence is not admissible, particularly where it is in some degree corroborated by other direct testimony. Further, in a business operation such as the Corporation's, which deals with a large body of the travelling public, there may well be circumstances where hearsay evidence in the form of written complaints from passengers may be the only basis for a disciplinary investigation undertaken by the Corporation. In keeping with recent pronouncements by the Courts in respect of the use of hearsay evidence, it is important to appreciate that hearsay can be used at times, particularly where there are reasons to believe that such hearsay is reliable. In the instant case the original letters of complaint filed by the two female passengers do not stand alone. They are, to some extent, albeit still by hearsay, corroborated by the reports of telephone conversations with the two complaining passengers conducted by the Corporation's officers.

By the same token, there is much validity to the concerns raised by the representative for the Union. Given the absence of any direct testimony as to what occurred, either at the stage of the Corporation's disciplinary investigation, or at the arbitration hearing, there is no ability to cross-examine the complaining passengers, to resolve questions, if any, with respect to the nuances of conduct exhibited by Mr. Roussel. That, it appears to the Arbitrator, is relatively important as the line between friendliness and undue familiarity may be variously defined by different individuals, in different circumstances. Moreover, if, as the complainants maintain, they gave the grievor a bottle of wine, there may be some basis to wonder as to the nature of their conduct and the mood which prevailed at the time. These comments are not intended to condone actions such as those which they maintain occurred. They are, however, intended to stress the importance of clear and compelling evidence in the light of charges as serious as those in the instant case. That caution is especially important when, as in the instant case, the passengers made no complaint to any responsible Corporation representative aboard the train at or immediately after the time of either of the two incidents, but made their complaints only much later.

What then is to be made of the totality of the evidence before me, including the hearsay complaints and hearsay reports of the two Corporation officers? On the whole I am satisfied that in fact the grievor was guilty of a degree of unacceptable familiarity or forward conduct in respect of the two passengers in question, on both dates specified in their written complaints. Given the hearsay nature of the evidence, however, the Arbitrator is unable to draw reliable conclusions that the specific words and actions of the grievor were, on either occasion, so extreme as to justify the discharge of an employee with fourteen years' service, who it is agreed never before been disciplined for any infraction. It appears to the Arbitrator that an appropriate outcome in the case at hand is the assessment of a substantial period of suspension against Mr. Roussel for being unduly familiar and for socializing inappropriately with two passengers on both occasions specified. Given the limits of the hearsay evidence, and the fact that the first written complaint makes no mention of his having consumed the bottle of wine given to him, I am not prepared to conclude that his conduct went that far.

The grievor was discharged on November 8, 1994. In the Arbitrator's view his removal from service for a period in excess of one year should, in the circumstances, be viewed as the appropriate measure of discipline to bring home to him the importance of not becoming unduly familiar or forward towards passengers during the course of his duties. He must appreciate that any further such incidents will have the most serious of consequences. The Arbitrator therefore directs that the grievor be reinstated into his employment, without compensation or benefits, and without loss of seniority.

December 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR