

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3011

Heard in Montreal, Wednesday, 9 December 1998 & Wednesday, 13 January 1999

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Dismissal of Conductor S. Boivin on June 30, 1997 as a result of an alleged incident occurring on December 12, 1996.

EX PARTE STATEMENT OF ISSUE:

On December 12, 1996 Conductor S. Boivin was the conductor on train no. 60 operating between Toronto and Montreal. Some time in February 1997, the Corporation received a complaint from a female passenger who had travelled on train no. 60 on December 12, 1996. On June 9, 1997 the Corporation held an investigation regarding the complaint filed in February 1997.

On June 30, 1997 Conductor Boivin was advised by the Corporation that his record had been assessed 60 demerits and subsequently he was dismissed from the Corporation.

The Brotherhood appealed the dismissal of Conductor Boivin on August 6, 1997. The Corporation refused to respond to this appeal and on October 2, 1997 the Brotherhood requested that the Corporation join the Brotherhood in preparing a Joint Statement of Issue.

The Brotherhood appealed the dismissal of Conductor Boivin on the grounds that he did not receive a fair and impartial investigation, including the fact that the Corporation violated the collective agreement by not holding an investigation in a timely manner. The Brotherhood further contends that the evidence does not support the Corporation's position that dismissal was warranted and we request that Conductor Boivin be reinstated with full compensation and no loss of seniority or benefits. Furthermore, the Brotherhood is requesting the payment of all costs incurred by Conductor Boivin as a result of have to defend himself against a charge of sexual assault arising from the alleged incident on December 12, 1996.

The Corporation has refused to respond and answer the appeal on behalf of Conductor Boivin.

FOR THE BROTHERHOOD:

(SGD.) J. R. TOFFLEMIRE
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

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| E. J. Houlihan | – Senior Manager, Labour Relations, Montreal |
| B. E. Woods | – Director, Human Resources and Labour Relations, Montreal |
| J. C. Grenier | – Consultant |
| J. N. Morello | – Legal Counsel, Montreal |

And on behalf of the Brotherhood:

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| D. Ellickson | – Counsel, Toronto |
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J. R. Tofflemire – General Chairman, Oakville
 S. Boivin – Grievor

At the request of the Corporation, the hearing was adjourned to January 1999.

On Wednesday, January 13, 1999, there appeared on behalf of the Corporation:

E. J. Houlihan – Senior Manager, Labour Relations, Montreal
 G. Benn – Labour Relations Officer, Montreal
 J. N. Morello – Legal Counsel, VIA, Montreal
 OPP Constable M. Meehan – Witness
 “V” – Witness

And on behalf of the Brotherhood:

D. Ellickson – Counsel, Toronto
 J. R. Tofflemire – General Chairman, Oakville
 S. Boivin – Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns the discharge of Conductor S. Boivin for the alleged sexual assault of a passenger during his tour of duty on Train No. 60 operating between Toronto and Montreal on December 12, 1996. The passenger, to be referred to as “V”, alleges that the grievor kissed her and fondled her breasts while the two were standing in a vestibule as the train approached Belleville where she intended to detrain. According to her account she requested Conductor Boivin’s assistance to leave the train, as she has disabled knees. She relates that Conductor Boivin led her to the vestibule between two cars, carrying her baggage for her. She states that as they stood together awaiting the train’s arrival in the Belleville station he leaned forward and kissed her on the lips. Thereafter, according to her account, he moved his hands upwards under her top and touched both of her breasts. She describes her condition as “frozen” at the time. According to her account Mr. Boivin then told her that he has occasion to lay over in Toronto, and gave her his name and pager number which she wrote on a piece of paper, suggesting that he give her a call sometime so that they might get together.

“V” did not report the incident for a considerable period of time. She states that initially she declined to tell her husband about it, as she feared both the impact it might have on him, as he had a heart condition, as well as the violent reaction which it might provoke. According to “V”, she began to have nightmares about the incident, and eventually grew apprehensive about her next trip on a VIA train. It is common ground that “V” was herself the victim of assault and rape as a minor. According to her account her nightmares took the form of her rapist playing the role of a train conductor. She finally disclosed the alleged incident to the Corporation in a telephone call made on February 3, 1997 when she provided an initial statement to Complaints Officer Lise Richard.

Unfortunately, the Corporation took no initiative to investigate the complaint in a formal way for a considerable period of time. It does not appear disputed that nothing was done internally by the Corporation between February 3rd and late April. At that point, as a result of a separate complaint made by “V” to the Ontario Provincial Police, the police got in touch with the Corporation. It does not appear disputed that as of late April the further delay in the Corporation’s investigation was in part occasioned by its wish to honour the request of the investigating police not to compromise the police investigation by commencing formal proceedings of its own. In the result, Mr. Boivin who is alleged to have misconducted himself on December 12, 1996 had no notice of “V”’s complaint until he was arrested and charged by the Ontario Provincial Police on May 29, 1997. The Corporation’s own formal investigation into the incident was held only on June 9, 1997, some seven months after the alleged incident.

Mr. Boivin denies any recollection of the incident involving “V”, and denies any wrongdoing whatsoever. His testimony, given in the criminal proceedings which resulted in an acquittal, is to the effect that he could not, in the circumstances disclosed by “V”’s account, have been to able assault her in the manner described. He relates that the normal procedure for detaining a handicapped person would have been to await the stopping of the train, and that in any event he would have been observed by other passengers and staff in the circumstances which she described. The trial judge in the criminal proceedings accepted the veracity of Mr. Boivin’s denial, and entered an acquittal. A review of the trial transcript indicates that he tended to view both “V” and Mr. Boivin as credible witnesses, in which circumstance he was compelled to acquit.

The initial position advanced by the Brotherhood is that the Corporation violated the grievor's right to a fair and impartial investigation, to be held without undue delay, as protected by article 73 of the collective agreement which provides, in part, as follows:

73.1 Employees will not be disciplined 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.

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73.6 It is understood that the investigation will be held as quickly as possible, and the layover time will be used as far as practicable.

The allegations against Mr. Boivin are, needless to say, among the most serious possible, which if proved would clearly justify the termination of his services. That consequence is obviously graver still in this case, as it would affect an employee of some twenty years' standing who, it is not disputed, received only one minor measure of discipline on a single occasion in all of his years of railway service. As a long service exemplary employee in his late fifties, Mr. Boivin has an enormous amount to lose should the allegations against him be established. Unfortunately, for reasons which the Corporation best appreciates, nothing was done with respect to bringing this complaint to his attention for approximately seven months following the incident, an occurrence of less than one minute alleged to have happened on December 12, 1996 at Belleville. It is not disputed that the initial period of delay, from February 3 to the end of April of 1997 was entirely the Corporation's own responsibility. Thereafter, such delay as occurred was the result of its decision to await the outcome of the criminal investigation being conducted by the Ontario Provincial Police.

Upon a careful review of the facts, the Arbitrator is compelled to sustain the preliminary position of the Brotherhood with respect to the issue of undue delay in the Corporation's own investigation of the grievor. If, as Mr. Boivin insists, he was innocent of any wrongdoing, it is evident that he would have been substantially prejudiced in his ability to recall and reconstruct the events of December 12, 1996, as the complaint was not brought to his attention, and he otherwise would have had no occasion to think about or recall his encounter with "V", for a period of some seven months. For reasons touched upon in other awards of this Office, including one award interpreting article 73.6, it is inconsistent with the precepts of a fair and impartial investigation for an employer to withhold from an employee a complaint of serious allegations of misconduct for a substantial period of months, thereby depriving that individual from adveting as freshly as possible to the date and incident in question, so as to be able to fairly respond to the allegation made.

Apart from hampering a person's own ability to recall, such a delay would also hamper, if not destroy, the employee's ability to identify and confer with other persons or witnesses who might assist in his or her defence. These principles have been repeatedly sustained both in this Office and in Canadian arbitration jurisprudence generally (see **CROA 2615, 2822, and 2823; Re Corporation of Borough of North York** (1979), 20 L.A.C. (2d) 289 (Schiff); **Re Brunswick Bottling Ltd.** (1984), 2 L.A.C. (4th) 36 (Iwanicki); **Re Miracle Food Mart** (1988), 2 L.A.C. (4th) (Haefling); **Re Air Canada** (1993), 34 L.A.C. (4th) 13 (Frumkin); **Re Aliments Delisle Itée** (1994) 41 L.A.C. 115 (Frumkin).

In the alternative, if it were necessary to deal with this matter on the merits, the Arbitrator would also conclude that the Corporation has failed to discharge the burden of proof in the matter at hand. As noted by the judge at the criminal trial, where the standard of proof is admittedly different, both "V" and Mr. Boivin are credible witnesses, in a dispute where there are no other witness to the alleged event. If, as I am persuaded, the evidence of "V" and Mr. Boivin stand in effective equilibrium, the case must ultimately be resolved against that party which has the burden of proof. On that basis I would be compelled to allow the grievance.

Further, if it were necessary to choose as between the grievor's evidence and the account provided by "V", there are substantial reasons for concern as to the reliability of "V"'s account. Firstly, a degree of concern arises from the fact that "V" made no complaint about the incident for a period of almost two months. By her account she told no one about it, including her husband. While that fact alone might not be fatal to the credibility of her evidence, a degree of concern also flows from the fact that her eventual complaint to the Corporation and to the police was prompted by recurring nightmares which mixed events and related back to an unfortunate incident in which she was the victim of an assault and rape at the age of fourteen. Without diminishing the pain and mental suffering plainly experienced by "V", the overall sequence of events and the manner in which her complaint emerged does tend to raise questions about the reliability of her account of events. Unfortunately, for the reasons related above, the delay

in bringing this matter to the grievor's attention was such as to undermine his own ability to have any independent direct recall of what may have transpired. In these circumstances, were it necessary to choose as between the account of the grievor and the account provided by "V", the Arbitrator would be inclined to accept the grievor's denial. However, the Arbitrator rejects the submission of the Brotherhood to the effect that the grievor's legal costs and defence of the criminal action should be awarded as damages. That matter was the result of a complaint between "V" and the provincial police authorities not initiated by the Corporation.

For all of the foregoing reasons the grievance is allowed. The Arbitrator directs that Mr. Boivin be reinstated forthwith into his employment, without loss of seniority, and with compensation for all wages and benefits lost.

January 18, 1999

(signed) MICHEL G. PICHER
ARBITRATOR

SUMMARY– CROA 3011

Discharge – sexual assault of passenger – balance of probabilities – delay in initiating investigation – reinstate with compensation – GRIEVANCE ALLOWED

KEYWORDS– 3011

Discipline discharge sexual assault balance probabilities delay investigation compensation allowed

VIA – BLE – December 9 1998 – award dated January 18 1999