

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3184

Heard in Montreal, Wednesday, 14 February 2001

concerning

**VIA RAIL CANADA INC.**

and

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

**EX PARTE**

### **DISPUTE:**

Concerning the assessment of 60 demerits to Counter Sales Agent Danny Stephenson leading to his dismissal.

### **UNION'S STATEMENT OF ISSUE:**

Following an investigative statement held on September 16, 1999, Mr. Stephenson was dismissed from the Corporation for allegedly issuing free tickets to unauthorized persons under "Fare Notice 9081 Exchange Students".

It is the Union's position that the Corporation did not conduct a "fair and impartial" hearing in the circumstances. First, Mr. Stephenson was accused of issuing free tickets to a fellow employee (Employee "R") who acknowledged using the tickets under the name of "Morrison". The chairperson of the Union was never notified of the investigations conducted by Manager R. Doherty on July 26, 1999 or on September 22, 1999 and with Employee "R". In this regard the Union cites a violation of article 24.2 of Agreement No. 1. Furthermore, given that Employee "R" was the benefactor of the free tickets as well as the grievor's accuser, it would have been proper in the circumstances for the Corporation to have Employee "R" present at Mr. Stephenson's hearing on September 16, 1999. In this regard the Union cites a violation of article 24.1 of Agreement No. 1. Insofar as the tickets used by Employee "R" are concerned, it is the Union's position that the evidence is far stronger that Employee "R" issued the tickets himself, on Mr. Stephenson's computer.

As regards any irregularities, on any other exchange student tickets, which may have been issued by Mr. Stephenson; the Union cites the lack of proper instructions to the staff on the issuing of such tickets, as the reason for any mistakes in issuing said tickets.

The Union seeks reinstatement with no loss of earnings, benefits or seniority.

### **FOR THE UNION:**

**(SGD.) D. OLSHEWSKI**  
**FOR: PRESIDENT, COUNCIL 4000**

There appeared on behalf of the Corporation:

- |                |                                              |
|----------------|----------------------------------------------|
| L. Laplante    | – Senior Officer, Labour Relations, Montreal |
| E. J. Houlihan | – Senior Manager, Labour Relations, Montreal |
| R. Doherty     | – Manager, Customer Services, Montreal       |

And on behalf of the Union:

D. Olszewski	– National
D. Andru	– Bargaining Representative, Toronto
R. Massé	– Bargaining Representative, Montreal
E. Spratt	– Witness
Wm. D. Stephenson	– Grievor

### **AWARD OF THE ARBITRATOR**

The Corporation alleges that the grievor, Counter Sales Agent/Station Services Agent Danny Stephenson, fraudulently issued two return train tickets between London and Sarnia to another employee, Employee "R". Following an investigation it assessed sixty demerits against his record, resulting in his termination from employment.

Certain facts are not disputed. It appears that on July 20, 1999 two return tickets, London to Sarnia, for travel on the 20th and 21st were issued in the name of P. Morrison. The tickets were apparently issued under a code designated for the issuing of tickets without charge to certain designated exchange students. It would seem that because the tickets were not issued according to proper procedure, they were in fact returned to the Senior Manager of Customer Services at London, Mr. Ron Doherty. It appears that during a performance evaluation meeting with Employee "R", Mr. Doherty learned that Employee "R", a summer student on temporary employment with the Corporation, had recently travelled between London and Sarnia by train along with his roommate. Having coincidentally received the tickets issued under the name of P. Morrison from the Corporation's head office, Mr. Doherty asked Employee "R" whether the Morrison tickets were the ones that he and his roommate had used, to which Employee "R" responded in the affirmative. It appears that Employee "R" then advised Mr. Doherty that Mr. Stephenson had issued the tickets for himself and his roommate, improperly using the fare notice intended for free tickets to which exchange students were entitled.

That information caused the Corporation to make further inquiries into all fare notices issued by Mr. Stephenson between May 1, 1999 and July 31, 1999. The audit results were received on September 7, 1999 and an investigative interview with the grievor followed on September 16. Mr. Stephenson denied any wrongdoing on his part, and any knowledge as to how Employee "R" might have obtained the tickets in question. As noted above, it is common ground that the tickets were in fact issued on the grievor's computer, a fact verified through the computer records. They were in fact issued at 14:34 on July 20, 1999.

As a result of the investigation the Corporation concluded that the grievor did improperly issue tickets to a fellow employee, resulting in the assessment of sixty demerits and his ensuing discharge. Following the grievor's termination, on September 17, 1999 the Corporation held a separate investigation interview with Employee "R" on September 22, 1999. It appears that in the face of the investigation Employee "R" resigned his employment, and the record does not confirm any ultimate assessment of discipline against him.

In this matter, as in any matter of discipline, the burden of proof is upon the Corporation. It must satisfy the Arbitrator, on the balance of probabilities, that the grievor did improperly issue the two tickets in question to Employee "R", as he alleges. It should be stressed at the outset that in the Arbitrator's view the Corporation acted in the best of good faith in the handling of this matter, acting as it did on the basis of the information provided to it by Employee "R", information which was apparently confirmed by computer records which indicated that the tickets in question were in fact issued on the grievor's computer.

There are, however, substantial questions of credibility and plausibility which arise in the instant case, calling into question the Corporation's conclusion as to the grievor's guilt. Firstly, it is common ground that the grievor's work station was adjacent to that of Employee "R", who was a short term employee. It does not appear disputed that on certain occasions during the course of the day Mr. Stephenson, like other counter sales agents at London, would briefly absent himself from his work station without necessarily logging off his computer. This he might do, for example, during a smoke or meal break, or while he was attending to the entraining or detraining of passengers while a train was in the station, a part of his regular duties.

The computer records tendered in evidence confirm that the fraudulent tickets were issued on the grievor's computer at 14:34 on July 20, 1999. It is not disputed that the time in question would generally coincide with the period of time Train No. 73, en route from Toronto to Windsor, would have stopped in the station at London. That

timing lends substantial plausibility to the suggestion of the Union's representative to the effect that Employee "R" might himself have misused the grievor's computer while he was away from his work station attending to the train or, as he often did, taking his lunch break immediately afterwards.

There are other parts of the evidence which give the Arbitrator pause. These principally concern the general credibility of Employee "R". For reasons which he best appreciates, Employee "R" declined to have any Union representation at the time of his own disciplinary investigation. He also refused to attend at the Corporation's premises in London for the investigation, causing it to be held in a hotel to accommodate his unexplained concerns.

Secondly, the investigative interview of Employee "R" contains an arguably self-serving statement which is contradictory to a statement provided to the Corporation, and repeated before the Arbitrator, by London Counter Sales Agent Eileen Spratt. Ms. Spratt relates that on one occasion Employee "R" asked her to print him a free return ticket to Woodstock, so that he could travel there to help her move on October 2, 1999 in exchange for working his shift on Sunday September 12, 1999. Ms. Spratt relates that she told Employee "R" that she would not do what he requested, and that he need only ask Mr. Doherty for a trip pass. It appears that Ms. Spratt related this incident to Mr. Doherty. When he questioned Employee "R" about it during the course of his investigation the latter suggested that it was Ms. Spratt who first proposed to issue him a free ticket, and that he never asked for it. Employee "R" was not at the arbitration hearing to contradict the content of the conversation between himself and Ms. Spratt. Given Ms. Spratt's evidence to support her version of the events, and what I judge to be her general credibility, I am compelled to prefer her account of what transpired between herself and Employee "R". So doing, I am left to draw adverse inferences as to Employee "R"'s general credibility and honesty.

Fraud or theft is a serious charge which demands a high standard of evidence. In the Arbitrator's view the evidence would equally support the inference that Employee "R" did make improper use of Mr. Stephenson's computer at a moment in time when Train No. 73 was in the station at London, being serviced by Mr. Stephenson, when his computer, admittedly improperly, was not logged off. When regard is had to the doubtful credibility of Employee "R", the contrary evidence of Mr. Stephenson and Ms. Spratt, and the documented computer records which indicate that the tickets may well have been printed at a time when the grievor was not at his work station, I am satisfied that the Corporation has not discharged its onus to establish, on the balance of probabilities, that Mr. Stephenson did fraudulently issue exchange student tickets to Employee "R" on July 20, 1999. In the result, the employer has not established just cause for any discipline.

The grievance is therefore allowed. The conclusion in this matter makes it unnecessary for the Arbitrator to consider the submissions of the Union with respect to alleged irregularities in the investigation process. If it were necessary to rule upon it, I would have difficulty sustaining the Union's position in that regard. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost, and without loss of seniority.

February 19, 2001

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

#### **SUMMARY – 3184**

Counter Sales Agent Danny Stephenson – discipline discharge – fraudulently issuing tickets – employee discharged for using travel vouchers for which he was not entitled stated that they had been issued by the grievor – arbitrator discusses burden of proof, circumstantial evidence, viva voce evidence, credibility of self-serving statement – no just cause for discipline – reinstate with compensation – GRIEVANCE ALLOWED

#### **KEYWORDS – 3184**

VIA – CAW February 2001 discipline discharge theft fraud burden proof balance probabilities circumstantial viva voce evidence fair impartial investigation reinstate compensation allowed