

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3426

Heard in Montreal, Wednesday, 12 May 2004

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 20 demerits to the record of Ms. Deborah Lee, culminating in her dismissal.

UNION'S STATEMENT OF ISSUE:

On June 18th, 2003, Ms. Deborah Lee was called for an investigative statement concerning a customer complaint regarding her alleged "unbecoming behaviour" on March 22nd, 2003. She was subsequently assessed 20 demerits for the alleged infraction bringing her total demerits to 75 and resulting in her dismissal.

It is the Union's position that the complaint originated largely as a result of Ms. Lee's adherence to the rules involving the purchase of tickets with a student card (ISIC) and the use of promotional tickets. Ms. Lee's enforcement of the Corporation's rules caused the complainant customer to file a formal complaint with VIA. The customer's anger is understandable from the point of view of her being a student, unable to achieve a student fare; but that anger should not automatically result in discipline to the grievor. The Corporation had in recent months dismissed employees, at the Kingston station for the illegal use of promotional tickets. Ms. Lee's adherence to the rules is understandable in those circumstances.

Ms. Lee acted at all times professionally and in accordance with VIA's policies. She should not have been disciplined in the circumstances and we request that the discipline assessed be expunged from her record and that she be compensated for any lost wages or benefits.

CORPORATION' STATEMENT OF ISSUE:

The Corporation held an investigation on June 18, 2003 following a customer complaint and concerning Ms. Lee's behaviour while on duty March 22, 2003. In her dealings with two customers on March 22, 2003, Ms. Lee was rude and treated them with little respect. To try to

defend her conduct, Ms. Lee alleged that the customers acted in conspiracy with another employee. No objective evidence of the “conspiracy” was ever brought forward by Ms. Lee. The assessment of demerit points to Ms. Lee was reasonable and progressive in nature. Ms. Lee had at the time of this last incident shown no improvement in her conduct, notwithstanding the previous two-week suspension and prior assessments of discipline.

For the above reasons the Corporation has denied the grievance.

Further the grievance is untimely as it was only filed and received by the Corporation on October 9, 2003. On this basis alone, the grievance must be denied.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

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| L. Béchamp | – Counsel, Montreal |
| L. Laplante | – Sr. Officer, Labour Relations, Montreal |
| C. DiGrazia | – Manager, Customer Service, Ottawa |

And on behalf of the Union:

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|--------------|--------------------------------------|
| D. Olshewski | – National Representative, Winnipeg |
| T. Blanchard | – Bargaining Representative, Toronto |
| D. Delcloe | – Vice-President, Local 4003 |
| D. Lee | – Grievor |

FOR THE CORPORATION:

(SGD.) B. E. WOODS
DIRECTOR, LABOUR RELATIONS

AWARD OF THE ARBITRATOR

The Corporation raised a preliminary objection as to timeliness. It is not disputed that the grievor had twenty-one days to file her grievance following her dismissal, communicated to her on June 25, 2003. In fact the Corporation did not receive the step 2 grievance document filed by the Union until October of 2003. The Union submits that in fact the grievance document was placed in the internal Corporation mail in a timely fashion, but was apparently lost. The Arbitrator is satisfied that that explanation cannot justify what was, in effect, the failure of the Union. It is the responsibility of the bargaining agent to ensure that a grievance reaches the employer in a timely fashion, something which was obviously not done in the case at hand.

The real issue, however, is whether the Arbitrator should exercise his discretion under the **Canada Labour Code** to relieve against the time limits in the circumstances disclosed. I am satisfied that I should. This case concerns the termination of an employee of twenty-five years' service. Even accepting that there may have been an administrative error committed by a Union representative in the technical handling of the grievance, it would be unduly harsh for the grievor to lose her access to arbitration by reason of that error. Moreover, if the circumstance were one in which the grievor were to be reinstated with an order of compensation, the issue of prejudice to the Corporation could be dealt with by relieving the employer of any liability for compensation in relation to the period of delay occasioned by the Union's error. On the whole, therefore, I am satisfied that this is an appropriate case for the extending of the time limits, and I so direct.

Based on the prior awards of this Office, (**CROA 3423, 3434 and 3425**) at the time of the incident of March 22, 2003, which is the subject of this grievance, the grievor's discipline record would have stood at forty demerits. At the time, however, the Corporation viewed the grievor's record as standing at fifty-five demerits. It then received a written customer complaint which resulted in the assessment of twenty demerits and the termination of Ms. Lee for the assessment of what the Corporation then viewed as a total accumulation of seventy-five demerits.

The grievor's discharge after twenty-five years of service was prompted by a letter of complaint written on April 1, 2003, by Ms. Claire Ferguson, who was then a first-year university student. Ms. Ferguson's complaint is not entirely based on her own treatment at the hands of Ms. Lee, but largely based her witnessing the grievor's treatment of her traveling companion, university student Scott Harvey. Her letter of complaint relates that Mr. Harvey attempted to use an unused ticket from a previous trip, only to be informed that it had expired. Her letter of complaint relates, in part: "We asked the employee why this was not a valid ticket and why we would have to pay another \$60.00 for a ticket that we already had. The employee was not impressed. She immediately got very upset with us, noting that we "spoiled students" are all alike. She proceeded to tell us that she had recently been suspended without pay for two days for trying to be nice to these students, and she was not about to let that happen again. When we asked to speak to her supervisor, she refused to get him, she also refused to tell me her name when I asked her for it. ... She continued to berate and embarrass us for 15 minutes before we were finally able to pay the full fare, of \$103.00, and leave."

The grievor denies having been disrespectful in her dealings with the two students on the occasion related. However, there is objective evidence to suggest that she herself saw the incident as troubling. The record confirms that on the same day of the incident Ms. Lee entered her own notes into the VIA computer system concerning her encounter with Mr. Harvey and Ms. Ferguson. Those notes confirm that the students asked for her name but that she refused to give it and also confirm that the students stated to Ms. Lee that she was yelling at them. Although her notes state, in

part, "In fact they were the ones yelling at me" the overall impression would appear to be corroborative of the account of events related in the complaint of Ms. Ferguson.

In the Arbitrator's view the grievor was deserving of discipline for the incident in question. Firstly, grievor's record causes concern, to the extent that only two months previous, in March of 2003, Ms. Lee had received a two week suspension for improper conduct in the handling of student travelers, a sanction reduced to fifteen demerits by the award of this Office in **CROA 3425**. She had, in addition, been previously disciplined, and repeatedly counselled, concerning the need to communicate with fellow employees and customers at all times in a respectful manner. In the case at hand, just as she had done in the incident which is the subject of **CROA 3425**, Ms. Lee refused to provide her name to the customers when they felt dissatisfied with the treatment she was giving them. As noted in the prior award, the failure to provide even a first name can cause little but the impression that the employee is attempting to frustrate the ability of the customer to make a complaint to higher management. It also leaves open inferences of defensiveness which can undermine the credibility of the employee's account of the incident.

The Union's representative attempted to submit evidence, albeit in a hearsay form, to mitigate the assessment of twenty demerits and the resulting discharge of the grievor. He submitted, in part, that according to information which he obtained Ms. Ferguson made the complaint only because she was given to understand that she might be compensated with a free ticket. Additionally, the Union submitted to the Arbitrator a copy of a letter of support for Ms. Lee signed by a frequent traveler who became aware

of her discharge, and a supporting petition, signed by some seventy-five VIA customers, all objecting to the termination of Ms. Lee, who is described in extremely positive terms in the text of the petition which cites, among other things, “her courtesy, efficiency, knowledge and capability that she has shown to VIA Rail customers.” In addition, the Union’s representative placed before the Arbitrator a news item from the Kingston Whig Standard of April 8, 2002, in the form of a letter from a VIA customer expressing his appreciation of the quality of Ms. Lee’s service over the years and recording his pleasure that she had returned to work after a long period of sick leave.

How is that evidence to be dealt with? Firstly, the evidence concerning the motive for the complaint made by Ms. Claire Ferguson, resulting in the discharge of an employee of twenty-five years’ service, is highly problematic. It is difficult to believe that any customer would be so careless with the job security of a long standing employee so as to knowingly be prepared to place that individual at the risk of discharge in exchange for a free rail ticket. In the Arbitrator’s view no weight whatever can be accorded to that aspect of the Union’s submission, absent good and compelling evidence to substantiate it, no such evidence being advanced in the case at hand. However, in considering whether to substitute a penalty other than discharge, bearing in mind that even following the prior awards in **CROA 3423, 3424** and **3425** the grievor’s record stood at forty demerits, and the assessment of twenty demerits would have justified the termination of her services, the evidence of prior commendations and the customer petition is admissible, along with other evidence, in mitigation of the penalty in the circumstances.

What then does the whole of the evidence disclose? Firstly, Ms. Lee is a long service employee, having been employed twenty-five years to the day on the date of the arbitration of this grievance. For the great bulk of that period she was an exemplary employee free of any discipline. Commencing in the year 2000 she did incur discipline, at least two instances of which were not grieved, for her conduct in relation to other employees as well as with customers. At least one of the incidents on her recent record prompted a written customer complaint. Against that background, the event of March 22, 2003 must be viewed as serious and deserving of a significant level of penalty. On the other hand, the Arbitrator is satisfied that the grievor's prior long service, taken together with the strongly worded and documented statements of customer support for Ms. Lee, can fairly be viewed as warranting a reduction of penalty in the circumstances.

I am therefore satisfied that it is appropriate, in the whole of the circumstances disclosed, to substitute a penalty less severe than discharge. The Arbitrator directs that the grievor be reinstated into her employment forthwith, without loss of seniority and without compensation for wages and benefits lost. The period between her termination and the date of her reinstatement shall be registered as a suspension for conduct unbecoming an employee.

May 17, 2004

(signed) MICHEL G. PICHER
ARBITRATOR