

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3496

Heard in Montreal Thursday, 16 June 2005

Concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

The assessment of ten demerits and twenty demerits to the discipline record of Mr. Kenneth Fleming which resulted in his dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

Mr. Fleming's discipline record was assessed ten demerits for damaging equipment and failing to follow procedures in reporting an incident on January 15, 2004. His record was assessed twenty demerits for damaging equipment and failing to follow procedures in reporting an incident on January 23, 2004. This final offence resulted in his dismissal for accumulation of demerits.

The Union maintains that the investigative statement was not fair and impartial contrary to article 24.1, collective agreement no. 1. The Corporation relied upon videotaped evidence to support its allegations. Given that the Corporation installed video cameras for the sole purpose of security and had promised the Union that the cameras would not be used "to monitor employee activity" they contend that the discipline assessed should be declared a nullity and expunged from the grievor's record.

In the alternative, Mr. Fleming acknowledges that the damage done to the tow motor (Gator) on or about January 23, 2004 was done by him. He further admitted in the investigation held on February 10, 2004 that: "I apologize for what I did and in the future will be more careful and also fill out an incident report on anything that occurs to VIA Rail property/machinery. In the Union's opinion the grievor's misdemeanour must be mitigated by his 32 years of service. Further, the grievor has been experiencing serious personal problems during the past several years. The penalty is exceedingly harsh when it is considered that the grievor is just three years from retirement.

The Union asks that the discipline be expunged and the grievor be compensated for all wages and benefits lost.

The Corporation maintains that the investigation was both fair and impartial. The use of videotaped evidence was appropriate and warranted. They rely upon the doctrine of culminating incident. They submit the discipline assessed was appropriate in the circumstances.

FOR THE UNION:

(SGD.) WM. COOLEN
NATIONAL SECRETARY/TREASURER

There appeared on behalf of the Corporation:

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| L. Béchamp | – Counsel, Montreal |
| E. J. Houlihan | – Senior Manager, Labour Relations, Montreal |
| A. Livingstone | – Manager, Customer Services, Halifax |

And on behalf of the Union:

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|-------------|--------------------------------------|
| B. McDonagh | – National Representative, Vancouver |
| R. Massé | – Regional Representative, Montreal |
| Wm. Coolen | – National Secretary/Treasurer, |
| K. Fleming | – Grievor |

FOR THE CORPORATION:

(SGD.) G. MARCHAND
FOR: DIRECTOR, LABOUR RELATIONS

AWARD OF THE ARBITRATOR

The Union raises a preliminary issue with respect to its allegation that the Corporation failed to observe the mandatory requirements of article 24 of the collective agreement which governs the investigation process. It is common ground that during the course of the grievor's investigation the Corporation showed him a video tape. The tape was taken from the security camera system installed within the Halifax Station, a system generally intended to safeguard against theft or damage to the Corporation's property and premises, as well as to ensure the safety of employees and the public.

The Union does not challenge the legitimacy of the security video system. It does, however, maintain that the Corporation could not use material obtained through the videotape system for the purposes of assessing discipline against an employee. With respect to the allegation concerning article 24 of the collective agreement, it also submits that it was the obligation of the Corporation to provide a copy of the videotape which was used in the

investigation to the Union's representative. It is common ground that when the Corporation purported to provide to the Union and the grievor a copy of the statement of Mr. Fleming it did not include any copy of the video which was used as part of his interrogation. It is also not disputed that the Union's request for a copy of the video was made considerably after the investigation, in anticipation of the arbitration hearing, at which time the Corporation asserted that it did not have technical ability to copy the video which, apparently, was recorded electronically within a computer system.

It is well established within the jurisprudence of the CROA&DR that a failure to adhere to the mandatory requirement to conduct a fair and impartial investigation, an element essential to the integrity of the administration of discipline and the expedited arbitration process of the CROA&DR, can result in discipline\ being found to be null and void. (See, **CROA 2858, 3221, 3322 and 3420**) In determining whether there has been adherence to the standards of a fair and impartial investigation first regard must be had to the specific provisions of the collective agreement at issue. In the instant case article 24.2 of the collective agreement reads as follows:

24.2 Investigation in connection with alleged irregularities will be held as quickly as possible. An employee may be held out of service for investigation (not exceeding three working days). He will be given at least 48 hours' notice in writing of the investigation and notified of the specific charges against him in writing. Where possible, investigations will be held during the employee's normal working hours. The Local Chairperson shall receive a copy of such notice. This shall not be construed to mean that a proper officer of the Corporation, who may be on the ground when the cause for investigation occurs, shall be prevented from making an immediate investigation. An employee may, if he so desires, have the assistance of one or two fellow employees, Local Chairperson or authorized Committee person, at the investigation. The employee being investigated shall be furnished with a copy of his own statement, if it is made a matter of record at the investigation. The decision will be rendered within 21 calendar days from the date the statement is taken from the employee being investigated. No discipline will apply if discipline is not assessed within 21 days from the date the statement is taken. An employee will not be held out of service pending the rendering of a decision, except in the case of a dismissable offence.

It is not disputed that, as a general rule, where an employee is to be provided a copy of his or her statement the employee is also provided with copies of all documents or exhibits referred to within in the statement. That is obviously necessary for the documentary record which is provided to the employee to have any significant meaning. It has also been the practice within the industry, in the Arbitrator's experience, for an employer which makes use of a videotape to scrupulously provide a copy of the video used in the investigation to the employee and his bargaining agent. It is not disputed that that was not done in the case at hand where the Company's security camera video tape was used to find the origins of the damage to one of its vehicles. More significantly, there was an express refusal on the part of the Corporation to provide a copy of the video to the union when it was specifically requested, albeit considerably after the investigation process, in anticipation of the arbitration hearing.

On the whole I am satisfied that the material before me discloses a failure to comply with the mandatory requirements of article 24.2 of the collective agreement. The copy of the grievor's statement which was provided to him after the end of the investigation should have included, without any specific request, a copy of any photographs, video excerpts or any other documentation, whether paper or electronic, utilized by the Corporation during the course of his statement. Indeed, in the case at hand, the failure to have provided a copy of the video has arguably been prejudicial to the Union, to the extent that the parties seem to be in disagreement as to whether there was damage to one of the two vehicles which formed part of the discipline assessed against Mr. Fleming.

I am satisfied that this is not a case of bad faith by the Corporation. As is evident from the record, there was no request by the Union for a copy of the video at the time of the statement or immediately afterwards. That failure does not, however, relieve the Corporation of its obligation to provided a meaningful copy of the employee's statement, including exhibits, in

compliance with the requirements of article 24.2 of the collective agreement. For these reasons the Arbitrator is compelled to the conclusion that the discipline assessed against Mr. Fleming must be viewed as null and void.

While this finding obviates the need for a ruling on the Union's objection to any use of the videotape, the Arbitrator would have some difficulty finding that the Corporation could not utilize the record from a security video system to investigate of theft or damage to its property, as it did in this case.

Exceptionally, in the case at hand, this is not a case for the payment of compensation. As noted above, the Union made no objection to the Corporation's failure to provide a copy of the video material either at the investigation or afterwards, when a copy of the grievor's statement without the video excerpt, was provided to the grievor and to his Union. It was not until many months later, in preparation for the arbitration proceedings, that the Union made its request and was communicated the Corporation's express refusal. While there is no suggestion before the Arbitrator that this is a case of the Union "lying in the bushes" in an attempt to gain an order of compensation for the grievor dating back over a considerable period of time, I am satisfied that it would be inequitable in these circumstances to direct an order of compensation given the Union's silence on the matter for such a long period of time.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for his wages and benefits lost. The grievor should nevertheless appreciate that this decision does not represent a victory on the merits of the dispute. But for the violation of his substantive rights under article 24 of the collective agreement, Mr. Fleming might well have lost his employment.

Any conduct on his part in the future which attracts discipline may have the most serious of consequences.

June 20, 2005

(signed) MICHEL G. PICHER
ARBITRATOR