

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

CASE NO. 3512

Heard in Montreal

Concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE:

The assessment of 30 demerit marks to Mr. Dulong for the misuse of company property with the intent of discrediting the Corporation.

CORPORATION'S STATEMENT OF ISSUE:

On August 22, 2003, Mr. Dulong bought a ticket from the automatic ticket machine under the name of Oussama Ben Laden and posted a copy of the ticket on the Union board in Central Station. Mr. Dulong also filed a safety complaint alleging that the Corporation was in violation of Part II of the Canada Labour Code by not implementing an identification procedure as a security measure to identify passengers when they purchased a ticket. A copy of the purchased ticket was also forwarded to his supervisor by internal mail. Mr. Dulong subsequently forwarded a complaint to the Health & Safety Committee to address the issue.

On September 29, 2003, Mr. Dulong was called to an investigation to explain his alleged misuse of company property with the intent to discredit the Corporation.

The Union contends that: **1)** The investigation was not fair and impartial; **2)** The investigation was not held in a timely manner; **3)** Mr. Dulong was unjustly accused of falsifying the train ticket; **4)** Mr. Dulong was discriminated against as he was a Union representative responsible for reporting various irregularities in the workplace.

The Corporation maintains that Mr. Dulong's actions were inappropriate and a deliberate attempt to discredit and embarrass VIA Rail. Consequently, his behaviour warranted the assessment of 30 demerit marks.

FOR THE CORPORATION:**(SGD.) L. LAPLANTE****FOR: DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

Me. L. Béchamp – Counsel, Montreal
E. J. Houlihan – Sr. Manager, Labour Relations Montreal
G. Sarazin – Sr. Officer, Labour Relations Montreal

And on behalf of the Union:

A. Rosner – National Representative, Montreal
R. Massé – National Representative, Montreal
B. Dulong – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms, beyond dispute, that the grievor engaged in what the Union characterizes as a piece of theatre in an attempt to shock the Corporation into action. It appears that the grievor, Mr. Benoît Dulong, an employee who also held office in the local Union, had concerns with the security of ticket sales in the wake of the events of September 11, 2001. Among his concerns was the ease with which an individual might purchase a VIA ticket without being required to prove their identity. In what he considered a reasonable gesture to make his point, and as part of a planned complaint under Part II of the **Canada Labour Code** in respect of safe operations, Mr. Dulong proceeded to Central Station in Montreal where he utilized an automated kiosk to purchase a ticket on September 11, 2003 in the name of Oussama Ben Laden, one way from Montreal to Ottawa. He immediately voided the ticket which he then posted on the Union's bulletin board, along with a copy of the draft complaint alleging a violation of the workplace safety provisions of Part II of the **Canada Labour Code**.

Understandably, the Corporation had concerns about a stunt carried out to the knowledge of up to 200 employees who would have access to the bulletin board, in a manner which could have brought substantial negative publicity to the Corporation had it become known publicly or through the media. The prospect of a national rail carrier issuing a ticket in the name of Oussama Ben Laden would be sensitive, to say the least, and might well cause substantial concern among the travelling public. Following a disciplinary investigation the grievor was assessed thirty demerits. The Arbitrator is satisfied that the grievor was given a fair and impartial hearing as contemplated under the collective agreement.

The Union argues that the grievor was acting in furtherance of his obligations as a member of the Union executive, with a view to enhancing safety in the ticket sales system of the Corporation. Its representative stresses that the Ben Laden ticket was not posted in a location where it could be seen by the public, but rather within an area restricted to employees and managers of the Corporation, on a bulletin board effectively owned by the Union. Its representative draws to the Arbitrator's attention the relatively extensive jurisprudence acknowledging the right of free speech of Union representatives and the need to allow such representatives a greater latitude than might otherwise be available to rank and file employees. Its brief explains Mr. Dulong's actions as intended "... to maximize his chances of getting managements attention". In that regard, the Union cites the fact that earlier attempts to raise this issue with the Corporation had apparently fallen on deaf ears.

The record reveals that the grievor's draft complaint under the **Canada Labour Code** first proceeded to be considered by the Joint Health & Safety Committee. The Committee ultimately ruled that there was no danger to employees arising from the fact that passengers might be able to purchase tickets under assumed names. Faced with that outcome, the grievor

carried the complaint no further and it never matured into a complaint registered with the Canadian Industrial Relations Board.

This Office is well aware of the need to reserve to Union representatives the ability to speak candidly and sometimes in strong terms to members of management in the representation of employees. It is also legitimate for unions and union representatives to communicate with the media or the public, whether through picketing, through press releases or otherwise in the furtherance of their legitimate objectives. There is, nevertheless, a general balance to be struck in the relationship between an employer and its employees who are members of a union executive. As an employee, an individual owes a degree of fidelity to his or her employer, so as not to undermine unduly the public image, credibility, reputation or operations of the employer. While there may be legitimate circumstances in which an employee, whether or not he or she is a union representative, may assume the role of "whistle blower" on an improper or unsafe practice, it should seem self-evident that some care and discretion should be taken in the manner in which whistle blowing takes place.

The Arbitrator cannot dismiss out of hand the Corporation's concern, given the method utilized by Mr Dulong in the case at hand. While fortunately the ticket issued in the name of Oussama Ben Laden on September 11, 2003 never surfaced in the media or the public eye, the posting of the ticket to the attention of as many as 200 employees was perilously close to releasing feathers in the wind, with little ability to control where they might eventually light. The Arbitrator must therefore agree with the Corporation's characterization of the grievor's action as being reckless, and can appreciate its concern at the prospect of an embarrassing headline or news item which could easily cause undue concern among the travelling public. It is less than clear why the grievor's plan could not have been just as effective if he had quietly purchased and voided the ticket and taken his ticket and complaint to a properly scheduled meeting of the

Joint Health & Safety Committee, or otherwise forwarded the material to an appropriate Corporation officer. Setting aside the risk of public embarrassment, at a minimum Mr. Dulong's actions were calculated to embarrass the Corporation in the eyes of its own employees.

After careful consideration, the Arbitrator is compelled to conclude that Mr. Dulong's actions crossed the line of what is permissible as a form of expression on behalf of a trade union in the circumstances disclosed. Whatever his intention, the grievor's actions were calculated to prompt fear, not entirely unlike raising cries of "fire" in a crowded theatre. Freedom of expression does not extend so far.

The issue then becomes the appropriate measure of discipline. The Arbitrator must agree with the Union's representatives that the assessment of thirty demerits, which is half-way to dismissal under the Brown system, is excessive in the case at hand. That is particularly so given the fact that the grievor has never previously been the subject of any discipline by the Corporation since he was hired in May of 1987. Given the grievor's record, and the somewhat attenuating factor of his general motive which was to advance a Union interest, I am satisfied that the assessment of fifteen demerits would have been appropriate in the circumstances. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor's disciplinary record be amended to reflect the assessment of fifteen demerits for the misuse of a bulletin board in the workplace in such a manner as to bring discredit to the Corporation.

September 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR