CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3513

Heard in Montreal, Thursday, 15 September 2005

Concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE:

Dispute concerning the assessment of a two year demotion from the position of Service Manager to employee Réjean Martineau.

UNION'S STATEMENT OF ISSUE:

On July 2nd and 3rd, 2004, employees Blanchet and LeBlond refused to take passengers, by bus, from New Carlisle to Gaspé. Although the grievor, Réjean Martineau, was the Service Manager on board and instructed the two employees to travel by bus to Gaspé, they refused, citing their right to refuse unsafe work pursuant to Section 128 of the **Canada Labour Code**. Their refusal was apparently as a result of an irate customer who would be travelling on the same bus. In a telephone conversation with Supervisor Patrick Mathon, Mr. Martineau was instructed to refuse Blanchet's and LeBlond's rail passes and force them to pay for their return trip home. Mr. Martineau allowed the two employees to return home on the train without charging them and in effect honoured their rail passes.

Blanchet and LeBlond were subsequently disciplined for their work refusals. Mr. Martineau was subjected to an investigation on August 31, 2004 and was removed from the position of Service Manager for a period of two years.

It is the Union's position that there was no justification for discipline in the instant case. It is further the Union's position that if discipline was justified, a demotion is not proper in such a case, and the demotion serves no educational purpose but is purely punitive. The Union also cites a violation of article 24.7, in that the investigative hearing was held some eight weeks following the incident.

The Union asks that the discipline be expunged from the grievor's record and that he be compensated for any loss of earnings or benefits.

The Corporation denies the Union's request and any violation of the collective agreement.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

G. Sarazin	– Senior Officer, Labour Relations, Montreal
E. J. Houlihan	– Sr. Manager, Labour Relations, Montreal

And on behalf of the Union:

R. Massé	– National Representative, Montreal
A. Rosner	– National Representative, Montreal
R. Martineau	– Grievor

AWARD OF THE ARBITRATOR

The grievor, Mr. Réjean Martineau, was issued a two year demotion, in part because he refused to abandon two of his Montreal based crew members at the away from home location of New Carlisle, in the Gaspé Peninsula, when ordered to do so by his immediate supervisor. The Union submits that in the circumstances the penalty of demotion was highly excessive. The Corporation maintains that the grievor was insubordinate and was therefore deserving of the discipline assessed. While the Union also alleged an improper delay in the investigation, the Arbitrator is satisfied that the scheduling of the investigation was reasonable, given the vacation schedule.

The facts are not in dispute. The grievor was working as Service Manager on trains 16 and 17 operating between Montreal and Gaspé on July 2 and 3, 2004. During the overnight run between Montreal and New Carlisle the grievor was called upon to handle a complaint concerning an unruly male passenger who had allegedly improperly touched a female passenger. He spoke to both individuals, assuring the female passenger that she was not in any

danger, and that the offending client was in another car. He further spoke in clear and strong terms to the male passenger, instructing the bar car attendant to no longer serve him any liquor. He also cautioned his crew members to be watchful of any movements by the individual in question. It does not appear disputed that the offending client was well behaved thereafter, although it subsequently emerged that he had also pushed an On Board Service employee, apparently some two hours previous, and had made loud verbal complaints about the Corporation in the bar car, apparently prompted by the lateness of the train.

When the train reached New Carlisle several hours later, the grievor was instructed that the passengers were to disembark and to continue onwards to Gaspé in buses which were provided at that location. It was directed that two On Board Service employees should accompany the passengers on the buses. When no volunteers could be found to take on the bus trip the grievor instructed the two junior-most employees, Mr. Vincent LeBlond and Mr. Gerald Blanchet, to accompany the passengers. Both employees refused. The grievor's trip report states that the reason they gave is that they did not want to be on the buses with fifty angry passengers. Mr. Martineau then canvassed the remaining employees and found two more senior employees willing to undertake the task.

At that point Mr. Martineau was instructed by his manager, Mr. Jean-Christian Miron, in Montreal that the two junior employees were to be immediately removed from service, and that their VIA Rail passes were to be immediately suspended. In other words, they were to be required to pay for their return passage to Montreal or be abandoned at New Carlisle. According to the unchallenged representation of the Union, neither employee had the money to pay for their tickets back to Montreal nor to pay for another means of transportation home. Faced with that reality, Mr Martineau declined to implement the directive of Mr. Miron which was to

effectively abandon the two employees at the away-from-home location. Rather, he allowed them to deadhead back to Montreal on the train.

Following a disciplinary investigation held on August 31, 2004 the Corporation assessed a two year demotion from the position of Service Manager against Mr. Martineau. That sanction, which had substantial financial ramifications said to be equivalent to a six month suspension, was stated by the Corporation to be "… based on the incident on board train 16 on July 2 & 3, 2004". As appears from the Corporation's brief, there are two elements of wrong-doing alleged against the grievor: firstly, his handling of the problem of the unruly passenger and, secondly, his failure to enforce the directive of Mr. Miron which would have effectively left two junior employees stranded in New Carlisle, Quebec.

Upon a review of the evidence, the Arbitrator can see some basis for a degree of discipline being assessed against Mr. Martineau, but not at that degree of severity which the Corporation elected to impose. Firstly, I am satisfied that there was no dereliction of duty on the part of the grievor in his handling of the problem of the unruly male passenger. The Corporation has placed no passenger complaint, whether verbal or written, before the Arbitrator to substantiate any passenger dissatisfaction with the grievor's actions, and indeed the uncontroverted evidence appears to be that the male passenger settled down immediately upon being spoken to by Mr. Martineau. That aspect of the Corporation's allegations against the grievor cannot be sustained.

The Arbitrator also has considerable difficulty with the charge of insubordination against Mr. Martineau. In this Arbitrator's experience there is an implicit rule in the transportation industry, be it rail, road or air, to the effect that an employer remains responsible for the return

transportation of any employees in its service, notwithstanding that it may choose to assess discipline against them for alleged errors or improprieties committed during the course of their duty. It is not uncommon, in the experience of this Office, for a railway to suspend an employee from service at an away from home terminal for some alleged wrongdoing. In those circumstances, however, the employee is generally deadheaded home at the employer's expense to face the ensuing disciplinary investigation and any consequences which might flow from it. The Arbitrator is aware of no precedent in which a railway has not only suspended from service an employee at an away from home location, but has effectively denied them return passage to their home terminal. The Corporation's representative was unable to point the Arbitrator to any such precedent, in a disciplinary context. Nor is this Office aware of any such precedent in parallel industries such as bus operations, trucking or aviation.

The prospect of a transportation employer effectively abandoning its employees in a remote location, without their own means to return to their home base is disturbing, to say the least. While the discretion of an employer in respect of discipline may be broad, it does not include an implicit right of forced physical relocation, absent some clear provision to that effect in a collective agreement. While in an extraordinary case an employee's ungovernable behaviour might justify such an extreme result, no such element is disclosed in the case at hand. In the result, the Arbitrator is satisfied that, at a minimum, the grievor's compassionate reaction to the abandonment of the two junior employees at New Carlisle, Quebec, is understandable and is a mitigating factor to be considered. This is not, in the Arbitrator's view, a case where the "obey now – grieve later" rule should apply, to the extent that the physical relocation of the two employees at a point distant from home for what might have become an indefinite period of time could not readily be repaired through the normal grievance and arbitration process.

On the opposite side of the ledger, however, there are concerns with the grievor's management of the situation which he faced. It would appear that the refusal of the two junior employees to travel on the buses from New Carlisle to Gaspé was initially expressed by them to be because of their fatigue and the unpleasant prospect of being in the close company of disgruntled passengers. It would appear that subsequently the two employees and the grievor re-characterized their refusal as an invoking of the provisions of Part II of the **Canada Labour Code** to refuse unsafe work. That allegation matured into a complaint to the Canadian Industrial Relations Board and resulted in a decision of the Board dated June 3, 2005. That decision categorically denied the complaints of Messrs. LeBlond and Blanchet for the lack of any compelling evidence indicating that they cited personal danger as a reason for declining the assignment. The parallel complaint of Mr. Martineau was dismissed as being out of time.

The grievor was plainly not disciplined because he filed a complaint under the **Code**, as indeed he could not be. But a review of the general record, including the decision of the CIRB and the Corporation's own investigation, does suggest that Mr. Martineau was less than candid with the Corporation in his account of the statements and motives of Mr. LeBlond and Mr. Blanchet. He was, to that extent, subject to a degree of discipline. To the extent that his failure of candour bears centrally on his duty of trust in the role of service manager responsible for other employees, I am satisfied that a demotion, for a period of time, was not inappropriate.

However, for the reasons touched upon above, I am also satisfied that the Corporation was in grave error in its decision to effectively abandon its employees at a remote location. As a participant in that event, the grievor understandably declined to follow the orders of his supervisor, Mr. Miron. In the Arbitrator's view he should not have been subject to any discipline for that decision. To say the least, Mr. Martineau was then saving the Corporation from a very

questionable course of action, arguably in violation of one of the most basic implied terms of employment in the transportation industry.

In the result, the grievance is allowed, in part. The Arbitrator is satisfied that a demotion for a period of six months would have been ample in the circumstances to bring home to Mr. Martineau the need to be fully candid in his dealings with his employer, particularly as regards the actions of employees under his supervision. The Arbitrator therefore directs that the discipline assessed against the grievor be amended to a six month demotion, with Mr. Martineau to be reinstated to the rank of Service Manager effective immediately, with compensation for corresponding wages and benefits lost.

September 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR