CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION

CASE NO. 3690

Heard in Montreal, Wednesday, 10 September 2008

Concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Assessment of 20 demerits to the disciplinary record of Benoit Dulong.

JOINT STATEMENT OF ISSUE:

On September 13, 2004, the grievor was convened to a disciplinary investigation In order to present his version of the facts relative to his alleged misconduct with respect to Mr. Denis Hamilton in letters to him dated July 2 and 15, 2004.

On October 9, 2004, the grievor acknowledged receipt of a Disciplinary Measure form indicating that his record had been assessed with 20 demerits related to the event mentioned above.

The Union submits that prior to the assessment of demerits, the grievor addressed a letter to the investigating officer on September 30, 2004 in which he apologized to Denis Hamilton, Marc Beaulieu and Marc Tessier for remarks made in his letters dated July 2 and 15, 2004 and August 11, 2004.

The Union contends that under all the circumstances, the nature and context of the grievor's written communications with Mr. Hamilton were not such as to attract any disciplinary sanction. Accordingly, the Union maintains that the discipline ought to be expunged in Its entirety, In the alternative, the union submits that the disciplinary sanction is excessive.

The Corporation submits that in his July 2, 2004 Health and safety complaint the grievor questions Mr. Hamilton's intentions by implying that he was trying to intimidate or seduce another employee. In the grievor's July 15, 2004 follow-up to the July 2, 2004 Health and Safety complaint, he uses vulgar language and reiterates that Mr. Hamilton's intentions are questionable. It is the Corporation's opinion that those statements and insinuations are disrespectful and that such behaviour constitutes a serious offence leading to conduct unbecoming.

The Corporation submits that the fact that the grievor is a local chairman does not enable him to respond in a disrespectful manner towards his supervisor and to engage in conduct unbecoming.

The Corporation maintains that due to the serious nature of the offence the discipline assessed was justified and appropriate under the circumstances.

FOR THE UNION:	FOR THE CORPORATION:
(SGD.) A. ROSNER	**(SGD.) B. A. BLAIR**
NATIONAL REPRESENTATIVE	**SR. ADVISOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
D. Hamilton	– Sr. Manager, Support & Live Points, Montreal
J. Rondeau	– Labour Relations Officer, Montreal
A. Richard	– Sr. Advisor, Labour Relations, Montreal

And on behalf of the Union:

A.Rosner	– National Representative, Montreal
S. Auger	– Regional Representative, Montreal
B. Dulong	– Grievor

AWARD OF THE ARBITRATOR

This grievance reveals a disturbing course of events. On June 18, 2004, employee Marcel Gagnon, a heavy duty mechanic – lead hand, submitted a written Health & Safety complaint, arguing that the Corporation was failing in its health and safety obligations by not obtaining sun screen for employees working outdoors. On June 21, 2004, the grievor, Union Committee member Benoit Dulong made the same complaint to the Corporation's Controller, Mr. Claude Nadeau, invoking the provisions of articles 127.1(1) and 127.1(2) of the **Canada Labour Code** and demanding that sunscreen be provided to employees working outside. That same day, the Corporation obtained sunscreen for distribution to employees outdoors.

It appears that shortly after sunscreen was provided, on June 23, 2004, Supervisor Denis Hamilton spoke briefly with Mr. Gagnon. During that conversation he touched Mr. Gagnon's arm and face and inquired whether he was wearing sunscreen. That action and statement prompted a complaint by Mr. Dulong. On July 2, 2004 Mr. Dulong filed with the employer a Health & Safety complaint under the provisions of the

Canada Labour Code. In his complaint, which took the form of an email delivered to a total of six Union and Corporation officers, he specifically objected to the touching of Mr. Gagnon by Mr. Hamilton on July 23, 2004.

Regrettably, Mr. Dulong's letter of complaint stated, in part:

> Mr. Hamilton,
>
> This physical contact causes me doubts and to ask you the following questions.
>
> - Was this physical contact an attempt at intimidation?
> - Was this physical contact an attempt at seduction?
> - Considering that I also filed a complaint (like Marcel), do you have the intention of subjecting me to your fondling?
> - Will you subject all workers to this same fate?
>
> (translated by the Arbitrator)

Mr. Dulong goes on to inform Mr. Hamilton that he "… does not have the right to caress, stroke or fondle any part of an employee … without their consent." (translation) Mr. Dulong then stated to Mr. Hamilton that he insisted that he provide him assurances that such an incident would never happen again, indicating that he expected a written response no later than July 12, 2004. Not surprisingly, no answer to the scurrilous innuendo was ever forthcoming from Mr. Hamilton. It appears that ultimately the complaint filed with the Canadian Industrial Relations Board by Mr. Gagnon was withdrawn, on the basis of a settlement made between the Corporation and the Union.

The failure of a reply from Mr. Hamilton provoked yet another letter from Mr. Dulong, in the form of an email dated July 15, 2004, copied to the same six Corporation and Union officers. In that letter he stated, in part:

> Mr. Hamilton,
>
> The way in which this complaint is being handled prompts grave and worrisome consequences: many employees are nervously shitting in their pants at the thought of filing an eventual health and safety complaint.
>
> (translated by the Arbitrator)

In the light of these communications the Corporation conducted a disciplinary investigation into what it characterized as alleged disrespectful conduct towards Supervisor Denis Hamilton in his letters to him of July 2 and 15, 2004. It may be noted that a further letter, with equally disturbing innuendo was forwarded by Mr. Dulong to Mr. Marc Tessier, the Corporation's Director of Health & Safety on August 11, 2004. That letter, however, was not the subject of the disciplinary investigation and the discipline ultimately given to Mr. Dulong.

In fairness to the grievor, some time after the investigation hearings held by the Corporation on September 13 and 14, 2004, he sent a letter of apology to Mr. Hoang Tran, the officer who conducted the investigation. In that letter he stated, in part:

> After a complete review of this file during my holidays, I now realize that my writing could have been interpreted as a lack of respect. I withdraw my remarks judged to be acerbic and disrespectful in my writing of July 2 and 15 as well as August 11, 2004.
>
> I offer my honest and sincere apology to Denis Hamilton, Marc Beaulieu, Marc Tessier as well as to any other person who I might have offended by what I wrote.

> I undertake to change my approach in order to promote the settlement of disputes in labour relations using mechanism appropriate for the settlement of conflicts.
>
> (translated by the Arbitrator)

Apparently unimpressed with the grievor's apology, the Corporation assessed twenty demerits against his record on October 13, 2004.

In these proceedings the Union does not seek to defend the correctness of anything written by Mr. Dulong. It openly deplores the choice of words which he utilized. Its defence of the case, in essence, is that the utterances of Mr. Dulong were made in the course of his duties as a Union delegate with responsibilities to represent the interests of his members. The Union's representative cites to the attention of the Arbitrator the jurisprudence relating to the protection of Union officers for utterances made in the course of fulfilling their duties. In that regard reference is made to **CROA 632, 2391, 3037** and to **Re Burns Meats Ltd. and Canadian Food and Allied Workers, Local P139** (1980), 26 L.A.C. (2d) 379 (M.G. Picher).

The thrust of the jurisprudence is that, as it was stated by Brown & Beatty, *Canadian Labour Arbitration* at 9:1530:

> … union officers who direct abusive and profane language against a member of management in the course of discharging their union responsibilities may be sheltered from the usual tenets of industrial discipline.

As was determined in the **Burns Meats** case, the sometimes heated give and take of industrial relations requires a degree of protection for the communications of both

union and management officers in the course of their duties. In that context, communications which may be disrespectful and insulting are not to be actionable or the subject of discipline unless it can be shown that they are malicious, in the sense that the person who utters or writes the words does so knowing them to be false or out of a reckless disregard for their truth or falsehood.

How does that standard apply to the instant case? Unfortunately, in the Arbitrator's view it must be said that this case crosses the line. I am satisfied that twice, in writing, Mr. Dulong deliberately or recklessly insinuated that Mr. Hamilton is a sexual predator who strokes and fondles other men for his own sexual gratification.

Firstly, it should be stressed that Mr. Dulong's statements were not made verbally, in the heat of the moment. They were written, after reflection, at some remove from the factual incident. What is a reader to take from the questions "Do you have the intention of subjecting me to your fondling? Will you subject all workers to this same fate?" other than to conclude that Mr. Hamilton is being exposed as a sexual predator who uses his supervisory position as a vehicle for sexual abuse?

While the grievor artfully suggests that these are mere questions to be answered, the effect is as clear as it is devastating. Reckless of the truth, or knowingly out of deliberate falsehood, Mr. Dulong twice wrote damaging innuendo concerning Mr. Hamilton's character, effectively accusing him of sexual predation in the workplace. That false or reckless personal attack is plainly malicious and is not sheltered by Mr.

Dulong's role as a Union officer. Indeed, this Office has on at least one occasion characterized the false suggestion of homosexual activity in the workplace to itself be a form of sexual harassment (see **CROA 2751**).

The Arbitrator well understands the outrage of the Corporation in the face of written communications which can only be described as beneath human dignity. For the reasons related above the Arbitrator must conclude that the communications of Mr. Dulong were malicious and were not protected by his status as a Union officer. On that basis, I must conclude that the Corporation did have just cause to assess discipline against Mr. Dulong in the circumstances.

In considering the quantum of discipline, I believe that the full and unqualified apology made by Mr. Dulong is significant as a mitigating factor. In light of his apology and his written undertaking to change his ways of communicating, I am satisfied that a written reprimand would suffice for this first offence, and that the grievor can be expected to avoid such excesses in the future.

The Arbitrator therefore directs that the twenty demerits registered against Mr. Dulong's record be removed, to be replaced by a written reprimand.

September 15, 2008

signed MICHEL G. PICHER
ARBITRATOR