

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

CASE NO. 3952

Heard in Calgary, Wednesday, 10 November 2010

Concerning

VIA RAIL CANADA INC.

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE UNION:

Appeal the assessment of discipline resulting in the discharge of Locomotive Engineer Carl Pingitore of Winnipeg, MB, "for your conduct unbecoming an employee during a telephone conversation with the CMC on February 12, 2010 and February 13, 2010 when you threatened job action against the Corporation."

DISPUTE CORPORATION:

The assessment of 40 demerit marks to the discipline record of Mr. Carl Pingitore.

UNION'S STATEMENT OF ISSUE:

On February 12, 2010, Mr. Pingitore was required to deadhead to Sioux Lookout due to a derailment on the CN line on February 11, 2010 that resulted in delays to VIA's operation. On arrival at Sioux Lookout Mr. Pingitore booked 8 hours rest and requested a 2 hour call in order to properly prepare for an all night trip back to Winnipeg. When Mr. Pingitore and his crewmate Locomotive Engineer Art Buisson booked in on arrival at 16:25, February 12, 2010, VIA Rail Crew Management Centre advised Mr. Pingitore that they would be on duty at 00:41 on February 13, 2010 despite the rest not expiring until 00:25. Mr. Buisson advised CMC of the lack of a 2 hour call and CMC claimed that they could be called "ASAP" to circumvent the requirement for a 2 hour call. Mr. Pingitore reported for duty as soon possible after his rest, minimizing any train delay. During a further telephone conversation between CMC and Mr. Pingitore when called for the return trip, Mr. Pingitore advised CMC that he felt VIA needed more men for the type of circumstances occurring since the February 11, 2010 CN train derailment.

The Corporation felt that Mr. Pingitore was intentionally delaying the train and the reference to more men was a threat of job action and was considered as conduct unbecoming. As a result, Mr. Pingitore was subsequently assessed 40 demerits resulting in his discharge.

The Union contends that the Corporation did not prove any guilt with regards to intentionally delaying the train or threatening any form of one man job action. The Union further contends that the investigation was not fair and impartial in violation of article 20 of agreement 1.4 given the two previous investigations stemming from the same round trip.

It is the Union's position that Mr. Pingitore's discipline is unwarranted and should be expunged or, in the alternative, the discipline should be significantly reduced. Mr. Pingitore should be compensated for all loss of wages or benefits.

The Corporation's responses have been the acknowledgement of the Union's grievance, which was submitted at Step III of the grievance procedure on May 11, 2010.

CORPORATION'S STATEMENT OF ISSUE:

On February 13, 2010, Mr. Pingitore deliberately delayed the departure of Train No. 1 by 57 minutes. On March 25, 2010, an investigation was held concerning the refusal to follow instructions and conduct unbecoming towards a Company officer during his [sic] tour of duty on February 12 and 13, 2010. Following the investigation Mr. Pingitore was assessed forty demerit marks culminating in is termination of employment.

The corporation submits that during telephone conversation held on February 12 and 13, 2010, with a company officer, Mr. Pingitore's conduct was unbecoming. In addition, Mr. Pingitore deliberately failed to follow a Company officer's instructions resulting in a 57 minute delay to the departure of Train No. 1 on February 13, 2010. The Corporation further submits that under the circumstances the discipline culminating in Mr. Pingitore's discharge was warranted and appropriate.

FOR THE UNION:
(SGD.) T. MARKEWICH
FOR: GENERAL CHAIRMAN

FOR THE CORPORATION:
(SGD.) D. STROKA
SENIOR ADVISOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

D. Stroka	– Sr. Advisor, Labour Relations, Montreal
B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
Wm. Mann	– Manager, Train Operations – East

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Vice-General Chairman, Edmonton
G. Mensaghi	– Local Chairman, Division 854
C. Pingitore	– Grievor

AWARD OF THE ARBITRATOR

The grievor was assessed forty demerits, and discharged for the accumulation of demerits, for the following stated reasons: “for your conduct unbecoming an employee during a telephone conversation with the CMC on February 12, 2010 and February 13, 2010 when you threatened job action against the Corporation.”

Certain of the background facts relating to this grievance are related in **CROA&DR 3950** and **3951**. It is common ground that the grievor arrived in Sioux Lookout at 16:25 hours on February 12, 2010 to enable him to handle Train no. 1 westward from Sioux Lookout to Winnipeg, departing at 01:16 on the morning of February 13, 2010. The grievor then booked eight hours rest as well as a two hour call for the following morning. However, during the course of his conversation with the CMC he was advised that he would have to report for work at 00:41 hours. As his wake-up call after eight hours of rest would come at 00:25 hours, it was clearly going to be impossible for him to be at work on time for the timely departure of Train no. 1. That is so even if it is acknowledged that while the Corporation cannot interfere with the eight hour period of rest, it can shorten the calling period in situations where a two hour advance call is not practicable or where there is an emergency. That is reflected in article 110.1 of the collective agreement which reads as follows:

110.1 Locomotive engineers will be called **as far as practicable** 2 hours in advance of the time required to report for duty, except in cases of emergency. At a home station, final inspection time of the preceding tour of duty will not be included in determining availability for a 2-hour call. Where telephone service is available locomotive engineers will be called by telephone, except that other means may be used in cases of telephone system failure or when locomotive

engineers are accommodated in facilities provided by the Corporation. Locomotive engineers assigned to regular runs will be called if request is made.

(emphasis added)

The record reveals that the grievor was called in his hotel room at 00:25 hours, at the conclusion of his eight hours of rest. He was then effectively told that he must go immediately to the station to prepare for his train's departure, scheduled for 01:16 hours. During his telephone conversation with the crew officer he indicated that he could not reasonably be on his train in the short time expected. The transcript of the conversation reveals the following exchange between the grievor and the crew officer:

Crew Officer: Ok. So you're not taking an ASAP call? I instructed you both that I expected you to be there at 00h41 and that I would call you at the expiration of your rest.

After a brief additional exchange the grievor responded:

O, okay. I think you guys need to have the proper amount of men in this terminal.

The grievor then hung up the telephone. It appears that thereafter the crew officer was unable to reach him either on his cell phone or on his hotel room telephone.

The crew officer then interceded by telephone with the grievor's workmate. Apparently after speaking with his workmate the grievor did call the crew officer back. An exchange occurred between them concerning the delay that might be required in obtaining a taxi and how long it would take the grievor to get to his train. One of the answers Mr. Pingitore made to the officer was: "So are we still on a schedule or are we on a spareboard now?"

In fact the grievor and his mate arrived at their locomotive some fifty minutes after the first telephone call, at 01:15, one minute before the scheduled departure time of their train. It appears that the train was then held, in any event, by reason of the arrival into the terminal of a freight train whose movement blocked the main line. In fact Train no. 1 departed Sioux Lookout at 02:13 hours, which represented a fifty-seven minute delay.

The theory of the Corporation is that the grievor deliberately conducted himself in such a manner as to ensure the late departure of Train no. 1 from Sioux Lookout on the morning of February 13, 2010. It supports that theory by reference to the fact that the grievor failed to report a delay in the taxi which transported him from Winnipeg to Sioux Lookout, took a thirty minute break during that deadhead trip and used the maximum period of eight hours rest, making it impossible for him to be on his locomotive at the assigned time of 00:41 hours on the morning of the 13th. It also submits that he was plainly disrespectful towards the crew officer by hanging up and thereafter failing to answer either his hotel room telephone or his cell phone when the officer attempted to reach him again.

By notice dated February 25, 2010 the grievor was advised that he must attend an employee statement "... surrounding the circumstances your alleged conduct unbecoming a VIA Rail employee during a telephone conversation between yourself and a VIA Rail Crew manager on February 13, 2010 while assigned as locomotive

engineer on VIA train #1.” In fact the disciplinary investigation unfolded in a very different manner. That is reflected, for example, in question 13 put to the grievor by the investigating officer during the course of the grievor’s statement.

Q.13 Mr. Pingitore, the actions that you took are perceived as threatening job action as demonstrated by your pre meditated [sic] delays that took place right from the time you were called to dead head from Winnipeg to Sioux Lookout. You actively contributed to the delay of your taxi at Winnipeg by not advising either the taxi company or your manager that the taxi had failed to arrive as previously scheduled. You further delayed your assignment en route when you knew that you were now behind schedule but yet you still demanded the taxi stop for a further 30 minutes delay. Upon arrival at Sioux Lookout, you were 1 hour and 30 minutes later than a normal dead heard trip to Sioux Lookout. You then contact CMC and book 8 hours rest as well as a 2 hour call knowingly placing yourself in a position where train #1 would be delayed waiting for you to arrive at the station. In addition to these actions, or lack of actions, you make statements to CMC indicating your discontent with the number of employees in the terminal.

These instances appear to the company that your actions were in fact a pre-meditated actions [sic] to force the corporation to place more men on the working board which would then allow you to work less than your current schedule provides.

Is this correct?

Counsel for the Union submits that the grievor was in fact denied a fair and impartial investigation in accordance with the requirements of article 20.2 of the collective agreement which reads as follows:

20.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established.

He brings to the Arbitrator’s attention the following comments from **CROA 2934** with respect to the standard of a fair and impartial investigation:

Secondly, it is difficult to view the comments made by the investigating officer, who by his own account on at least one occasion accused the grievor of lying,

and threatened to continue the investigation until midnight if necessary, to get the facts, as complying with the standards of a fair and impartial investigation. Obviously, an investigating officer may well have an opinion about the answers provided by an employee, and should be given some latitude to probe unclear answers. **However, as a general rule the process of questions and answers must be open-minded and conducted in such a manner as to reflect general impartiality and a withholding of judgement.** Unfortunately that did not occur in the case at hand. The Arbitrator accepts the evidence of Mr. Lorman that Mr. Edgar's accusations and threat caused him considerable discomfort and uncertainty.

(emphasis added)

Counsel submits that the investigating officer failed utterly in maintaining the standard of a fair and impartial inquiry, clearly expressing that he had already drawn conclusions that the grievor was involved in a personal form of job action or slowdown. On that basis counsel submits that the discipline assessed against the grievor should be viewed as void, *ab initio*, in keeping with the prior awards of this Office.

With respect to the merits of the Corporation's position, the Arbitrator has substantial difficulty, bearing in mind that the employer bears the onus of proof. The grievor was discharged, in part, for having "threatened job action against the Corporation." With respect, I cannot find that allegation sustained in the evidence before me. It appears to be drawn from the Corporation's reading of the grievor's comment to the crew officer with respect to what he perceived as questionable manpower management on the part of the employer, an observation made in a single comment over the telephone. That, coupled with the fact that the grievor booked rest as he was entitled to do is seen by the Corporation as compelling evidence of a one man slowdown deserving of forty-five demerits and termination. It couples the events at Sioux Lookout with the delays incurred on the previous day by the grievor having failed

to report the late arrival of a taxi and having taken a thirty minute break during his deadhead trip to Sioux Lookout from Winnipeg. Very simply, having very closely examined the whole of the evidence, I cannot find that the Corporation's theory of the grievor having deliberately plotted to delay his train to be made out. While it is true, as the Corporation argues, that an abusive use of the collective agreement right to book rest can, in certain circumstances, justify the assessment of discipline, I do not find that this is such a case. As to a conspiracy to delay his train, I find that difficult to square with the fact that the grievor operated his train from Sioux Lookout to Winnipeg in such a way as to make up fully forty minutes of a fifty-seven minute delay.

A different conclusion, however, must be drawn with respect to the allegation that the grievor did conduct himself in a manner unbecoming. By his own admission at the arbitration hearing, it was not appropriate for him to hang up on the crew officer as he did. I am satisfied that that, standing alone, does constitute insubordination which, but for the issue of the conduct of the investigating officer, would in my view have justified the assessment of twenty demerits. The grievor knew, or reasonably should have known, that the crew officer was attempting desperately to have Mr. Pingitore and his crew mate get to their train as quickly as possible, to minimize any delay in its departure. It was clearly not appropriate for the grievor to summarily end their conversation by hanging up and, as I am satisfied, thereafter refuse to answer his hotel room telephone. I do not find the grievor's explanation that he was in the shower at that time to be convincing.

However, in the Arbitrator's view, the Union is correct in its submission that the discipline assessed against the grievor cannot stand by reason of the Corporation's failure to conduct a fair and impartial investigation as contemplated under the collective agreement. It is clear from the record reviewed above that the investigating officer clearly did not, to use the words of **CROA 2934**, pose questions which were "... conducted in such a manner as to reflect general impartiality and a withholding of judgement." Far from maintaining that standard, the investigating officer formulated questions which simply asserted that he had drawn negative conclusions with respect to the grievor's conduct. His questions in fact were accusations and conclusions followed by the question "Is that correct?". That is clearly not within the standard of a fair and impartial investigation as contemplated under the collective agreement.

Secondly, and of equal importance, is the fact that the grievor was given no advance notice whatsoever that he would be accused or investigated in relation to a deliberate plan to delay Train no. 1 on February 13, 2010. The notice provided to him with respect to the investigation indicated that the Corporation would investigate only: "... your alleged conduct unbecoming a VIA Rail employee during a telephone conversation between yourself and a VIA Rail Crew manager February 13, 2010 while assigned as locomotive engineer on VIA Train #1." The investigation obviously went far beyond the scope of conduct unbecoming. At a minimum, the grievor was entitled to advance notice that he was being charged with effectively engaging in a one person work slowdown with a deliberate intent to cause a delay to his train. As reflected in the prior awards of this Office, proper advance notice of the charge to be met is one of the

most essential elements of a fair and impartial investigation. (See, for example, **CROA 2073, 2576** and **2957, CROA&DR 3568** and **3782**, and **AH 521**)

For the foregoing reasons the Arbitrator is compelled to the conclusion that the Union is correct in its view that the discipline in the instant grievance must be viewed as void *ab initio*. The grievance must therefore be allowed. The Arbitrator directs that the forty demerits assessed against the grievor be struck from his record, that he be reinstated into his employment forthwith with no loss of seniority and with compensation for all wages and benefits lost.

November 15, 2010

(signed) MICHEL G. PICHER
ARBITRATOR