

CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4330

Heard in Montreal, July 10, 2014

Concerning

VIA RAIL CANADA INC.

And

UNIFOR

DISPUTE:

Discharge of Mr. JL for alleged irregular time reporting as well as time theft from August, 2013 until the present and also for alleged breach of security at the Toronto Maintenance Centre for the same period.

UNION'S EXPARTE STATEMENT OF ISSUE:

It is the Union contention that discipline in this case is unwarranted, excessive and that the Corporation is in violation of Article 24.1, 24.2, 24.5, 27.12 of the collective agreement #1 and Section 5(3) of the Personal and Electronics as well as Section 4.2 4.8 and 4.9

The Union requests immediate reinstatement of Mr. JL with full seniority; and reimburse him any and all lost wages and benefits in a make whole fashion.

The Corporation disagrees with the Union and denied the grievance.

FOR THE UNION:

(SGD.) R. Fitzgerald
National Representative

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

M. Boyer	– Senior Advisor, Labour Relations, Montreal
B. Blair	– Senior Advisor, Labour Relations, Montreal
L. Calhau	– Senior Manager Customer Experience, Toronto
L. Selesnic	– Manager Customer Experience, Toronto
M. Martens	– Senior Advisor Employee Relations, Montreal
S. Centoni	– Student, Labour Relations, Montreal

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
D. Andru	– Regional Representative, Toronto
J. L.	– Grievor, Toronto
N. L.	– Observer, Toronto
V. B.	– Observer, Toronto

AWARD OF THE ARBITRATOR

The Corporation assessed sixty demerits against the grievor Mr. JL for his alleged time theft, irregular time reporting and breach of security at the Corporation's Toronto Maintenance Centre (TMC) in Mimico, Ontario. In fact the Corporation's investigation also resulted in the termination of two other employees, Mr. NL and Ms. VB whose grievances were heard concurrently with the instant matter and are separately dealt with in **CROA&DR 4331** and **4332**, respectively.

The grievor, as well as the two other employees mentioned above, is employed as a Stock Checker at the Employee Service Centre at the Corporation's Toronto Maintenance Facility Centre. Mr. JL is one of some forty-one stock-checkers whose duties include assembling products, including food and drink supplies, and organizing them into carts for loading onto Via passenger trains. The duties of the stock checker also extend into checking refrigerators and monitoring supplies, as well as other general responsibilities.

Significantly, the Employee Service Centre operates a night shift which is virtually without management supervision. The highest authority is said to be present is a Lead-Hand, who is also a bargaining unit employee. As the premises are understandably secure, employees are required to use a personal access card to enter and leave both the Toronto Maintenance Facility Centre and as well as Employees Service Centre. While they do not punch a time a clock, employees are, on the basis of an honour

system, required to fill in a TMC Employee Service Centre sign-in and sign-out sheet upon their arrival and departure from the premises.

As a result of complaints made by some employees and a review of card swipe access reports the Corporation made a review of security video tapes of two separate main access gates to the Employee Service Centre. The video tape evidence gathered reveals that the grievor, as well as his brother Mr. NL and employee VB were observed leaving work early, before the completion of their shift but nevertheless claiming unreduced pay for their entire period of scheduled duty.

As appears from the Corporation's investigation, it emerged that JL left early some fifty-four times in the period between November 27 and June 11, 2013. The grievor's method of operating does not appear to be in substantial dispute. When all of his work duties were complete, JL would effectively leave the premises, manipulating the gate and his swipe card in such a way as not to be detected, while all the while recording a full eight hour tour of duty for the purposes of his remuneration. This he did without obtaining authorization from any Corporation supervisor and without informing his lead hand. In the result, JL realized the payment of wages for which in fact he performed no work, albeit the work originally assigned to him was completed and he obviously made no attempt, through the lead hand or otherwise, to see whether any further work could be given to him. While there is no clear pattern, it would appear that the early quits so engineered were generally in the order of one to two hours, although on some occasions they were longer.

Based on the video evidence obtained, the Corporation convened a disciplinary investigation in respect of the early quit practices of the grievor. It appears that that investigation was chaired by a retired Corporation executive whose spouse, Ms. Leslie Selesnic, is a manager of the ESC. The Union submits that the relationship between the Ms. Selesnic and her retired husband, who was in charge of the investigations, establishes that the Corporation violated the obligation to provide a fair and impartial investigation. The Arbitrator cannot agree. There is no suggestion of bias or apprehended bias in the material before me, nor can I second-guess the Corporation's decision to use a retired executive familiar with the Corporation's operations to conduct the investigation in question. The Arbitrator cannot sustain the Union's submission that the grievor was denied a proper investigation in accordance with the requirements of the collective agreement.

In my view a more significant piece of evidence is what the Union describes as a lax or permissive atmosphere in the workplace with respect to time keeping by employees generally. In support of its position the Union has tabled before the Arbitrator a statement signed by the Corporation's Senior Manager, Customer Experience Central Region, which confirms, without challenge, that some seven employees were provided with coaching letters relating to improper practices, including lateness, leaving early, and departures from the proper procedures for entry and departure from the premises. A further six employees were given ten demerit marks in accordance with the Appendix

J Procedure, also for improper arrivals and departures, including the failure to swipe out properly.

On the whole, the Arbitrator is satisfied that the unsupervised night shift which is here under consideration was marked by a substantial degree of laxity in time keeping of a number of employees which, I am satisfied on the balance of probabilities, amounted to a form of tolerance by the Corporation of unduly permissive employee practices in relation to strict attendance and time keeping.

As a general rule, this Office has recognized that improper time keeping constitutes a form of fraud, if not theft. It is trite to say, however, that each case must be considered on its particular facts. I am compelled to agree with the Corporation that the grievor, as well as the two other employees who engaged in the same scheme as him (CROA&DR 4331 & 4332) engaged in a form of misconduct that went beyond the occasional transgressions of the employees who either received coaching letters or ten demerits for minor time keeping infractions. The Arbitrator also agrees with the Corporation that another significant dimension of the actions of employee JL is that he deliberately left a security gate ajar to facilitate leaving the premises without being detected. Bearing in mind that the Corporation was not long ago the target of a plot by a terrorist group, the seriousness of the grievor compromising the security of the premises by deliberately leaving the gate ajar is a matter of some seriousness.

When the whole of the record is examined, however, I must agree with the Union's representative that there are significant mitigating factors to be taken into account. As touched upon above, there clearly was a culture of laxity tolerated by the Corporation within the workplace with respect to time keeping by employees generally. Additionally, I do not consider it insignificant that the grievor, who is not described as having a particularly negative discipline record, has some twenty three years of service with the Corporation. On the whole I am not persuaded that JL is beyond rehabilitation or that his bond of trust with the Corporation should necessarily be viewed as irreparably broken. While what occurred can fairly be characterized as a form of misappropriation of company time, given that the grievor's work was at all times fully and satisfactorily completed, it may equally be characterized as a form of unacceptable sharp practice.

I am therefore drawn to the conclusion that the grievor's employment relationship can be restored, subject to a substantial penalty, although he must appreciate that any similar misconduct in the future will have the most negative of circumstances.

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 any wages or benefits lost.

July 14, 2014

MICHEL G. PICHER
ARBITRATOR