

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

CASE NO. 4500

Heard in Montreal, October 12, 2016

Concerning

VIA RAIL CANADA INC.

And

UNIFOR

DISPUTE:

Termination of F. Beebejuaun of alleged breach of trust, misuse of a customer credit card and for theft while on duty July 21, 2015 as well as alleged breach of trust, misuse of customer credit cards and for theft while on duty May 2015 to August 21, 2015.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Corporation conducted four investigations for the allegation(s) covering May 2015 to August 21, 2015 and assessed duplicate discipline of sixty demerit marks for a total of one-hundred-twenty demerit marks, twice the amount required for discharge.

It is the Union's position that the Corporation failed in its burden of proof and did not make out its case. The Union further asserted that the Corporation violated the mandatory time limits provision of the collective agreement and that the investigations were not fair or impartial to the point that the discipline must be nullified. And finally that the Corporation's response to this matter was arbitrary, discriminatory and in bad faith.

The Union requested that Ms. Beebejaun be reinstated without loss of seniority, and compensated for any and all lost wages and benefits and other appropriate damages.

The Corporation denies the Union's contention and declined the grievance.

THE CORPORATIONS EXPARTE STATEMENT OF ISSUE:

Following a customer complaint concerning the altered total of her credit card invoice on July 21, 2015, the Corporation conducted an investigation on August 26, 2015 regarding the misuse of a customer credit card and theft. A supplemental investigation was held on September 21, 2015.

On September 21, 2015 the Corporation conducted an investigation for the misuse of customer credit cards and theft during the period from May 2015 to August 21, 2015. On September 30, 2015 it conducted a Supplemental investigation on this matter.

The Corporation assessed sixty demerit marks for the incident of July 21, 2015 and an additional sixty demerit marks for the incidents occurring between May and August, 2015, for a total of one-hundred-twenty demerit marks.

The employee's employment was terminated on October 6, 2015.

The Union requested that Ms. Beebeejaun be reinstated without loss of seniority, and compensation for all lost wages and benefits and other appropriate damages.

The Corporation submits that following an unsolicited customer complaint advising that an unauthorized gratuity had been added to the manual credit card slip, the Corporation investigated the matter and determined that, on the balance of probabilities, Ms. Beebeejaun had indeed fraudulently modified the customer's credit card slip and stolen money from the customer.

Furthermore, the Corporation investigated the period of May to August 2015 and also determined, on the balance of probabilities, that multiple additional fraudulent charges were made to customers' credit card slips.

Ms. Beebeejaun, who had two and half years of service, was terminated from her employment following the investigations for breach of trust, misuse of customer credit card and theft while on duty.

The Corporation submits the investigations were proper, that it discharged its obligations, and there has been no violation of the collective agreement.

It is the Corporation's position, the dismissal of Ms. Beebeejaun was justified, and the bond of trust with Ms. Beebeejaun is irrevocably broken and cannot be restored.

FOR THE UNION:

(SGD.) R. J. Fitzgerald

National Staff Representative

FOR THE COMPANY:

(SGD.) B. A. Blair

Senior Advisor Labour Relations

There appeared on behalf of the Company:

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|----------------|---|
| B. A. Blair | – Senior Advisor Labour Relations, Montreal |
| L. K. Selesnic | – Manager Customer Experience, Toronto |
| T. Kahnert | – Manager Customer Experience, Toronto |

And on behalf of the Union:

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|---------------|--|
| R. Fitzgerald | – National Staff Representative, Toronto |
| A. Stephen | – Regional Representative, Toronto |
| D. Andru | – Secretary Treasurer, Toronto |
| F. Beebeejaun | – Grievor, Toronto |

AWARD OF THE ARBITRATOR

1. In light of the parties' expectations for expeditious decisions, the long standing practice at CROA and current jurisprudence, the reasons in these cases must always be read in conjunction with the extensive record the parties filed: [Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador \(Treasury Board\), \[2011\] 3 SCR 708, 2011 SCC 62.](#)

2. The parties have raised four (4) issues which require determination: i) did VIA Rail Canada Inc. (VIA) have just cause to discipline Ms. Beebeejaun?; ii) what standard of proof was VIA required to meet?; iii) did VIA respect the collective agreement's time limits? and iv) if VIA had just cause for discipline, should the arbitrator modify the penalty of termination?

Did VIA Rail Canada Inc. (VIA) have just cause to discipline Ms. Beebeejaun?

3. A VIA customer had complained about her credit card slip from a trip being altered. Her original slip had been for \$5.50. However, her card was charged \$8.00. VIA does not yet use chip technology on its trains; employees complete the credit card receipts manually.

4. While it might be careless for travellers to forget to strike out the line for the tip and to ensure the paper receipt's box for the total has been filled in, some apparently do not. Evidently, customer oversight does not justify the addition of a tip to the slip.

5. The customer complaint led VIA to investigate both the specific circumstances of that trip, as well as look at a random time period during which Ms. Beebeejaun submitted credit card slips.

6. The evidence from both investigations demonstrated that alterations had been made to customer credit card slips. The alterations were in a different colour ink and

added a tip to the receipts. Ms. Beebeejaun, who reconciled then deposited these receipts and cash with VIA, benefited financially from the changes. She would also retain a copy of the deposit envelope confirming her reconciliation in case there was any later discrepancy after a remittance officer's review.

7. Ms. Beebeejaun denied she had added any tips to the credit card receipts. However, the amounts she submitted to VIA did not turn up any discrepancy. If someone else had added the tips after the fact, then there would have been a discrepancy in the paperwork. Ms. Beebeejuan indicated that she could not produce her original receipts, since they had been misplaced during a move. She also had no explanation for why she received tips far more often than did her colleagues.

8. While Unifor suggested VIA's investigations were, *inter alia*, unfair and arbitrary, it presented no evidence in support of these conclusions. There were no examples put forward demonstrating in what way Unifor took issue with VIA's investigation and conclusions.

9. VIA has demonstrated that it had just cause to impose discipline in these circumstances.

What standard of proof was VIA required to meet?

10. Unifor argued during its able representation of Ms. Beebejuan that a higher standard of proof is required for theft and assault cases. Unifor suggested that VIA had to prove its case by providing “clear and cogent evidence” (Brief, Tab 17).

11. The Supreme Court of Canada in [F.H. v. McDougall, \[2008\] 3 SCR 41, 2008 SCC 53](#) has confirmed that in Canada “there is only one civil standard of proof at common law and that is proof on a balance of probabilities” (paras 39-40). That general rule does not prevent a statute from imposing a higher burden of proof, such as for police misconduct matters, but that is not the situation here: [Jacobs v. Ottawa \(Police Service\), 2016 ONCA 345](#).

12. The arbitrator agrees with Unifor that VIA could not act based on mere suspicion. VIA had to present evidence which demonstrated that Ms. Beebejuan had added the tips to the customers’ credit card slips.

13. VIA has demonstrated, on a balance of probabilities, that Ms. Beebejuan was solely responsible for the cash and credit card receipts she submitted to VIA. For each grievance, it is more likely than not that she altered paper credit card receipts, as demonstrated by the different colour ink, among other things, to give herself tips to which she was not entitled.

Did VIA respect the collective agreement's time limits?

14. Unifor argued the grievances should be allowed because VIA violated article 24.18 of the collective agreement which states: "Decisions following hearings will be rendered within 21 calendar days from date of hearing...". VIA argued the delay arose while it waited for Ms. Beebejuan to return from a long planned vacation related to her daughter's engagement (Brief, Tab 13).

15. The arbitrator agrees with the reasoning found in [CROA&DR 2830](#) that "...there is no explicit language to indicate any specific adverse consequences in the event the Company does not meet the twenty-one calendar day time limit for issuing a decision following a disciplinary investigation."

16. The parties are free to negotiate consequences for missed time limits, as they have done for the grievance procedure in article 24.23 of their collective agreement. No similar consequences exist for missing the 21-day time limit found in article 24.18.

If VIA had just cause for discipline, should the arbitrator modify the penalty of termination?

17. This Office's decisions are clear that theft does not automatically lead to termination. However, the presumptive penalty for theft is discharge: [CROA&DR 1814](#). Numerous CROA cases emphasize how theft destroys the trust necessary for continued employment: see, for example, [CROA&DR 3735](#).

18. In [CROA&DR 1814](#), this Office reinstated an employee with thirty-two years of service for an isolated incident of theft in part due to “(t)he longevity of his service, the irreproachable quality of his prior record...(and) his frank admission of wrongdoing”.

19. Conversely, in [CROA&DR 2495](#), this Office did not reinstate having regard to the grievor’s “prior disciplinary record, and most particularly of the extended pattern of deception and concealment in which he engaged”.

20. Do any factors exist in this case to modify the usual presumptive penalty when it comes to theft?

21. Despite the amounts involved being small, the circumstances of this case do not satisfy the arbitrator that intervention would be appropriate for either grievance. Ms. Beebejuan is a short service employee. The incidents involved Ms. Beebejuan modifying VIA’s customers’ credit card receipts to give herself tips. This impacts not only VIA’s relationship with Ms. Beebejuan, but also the vital relationship it has with its customers.

22. Ms. Beebejuan did not demonstrate any remorse for these incidents, a factor which can be relevant if the theft relates to a single, isolated incident.

23. Whether for the single incident which led to the investigation, or the other examples resulting from VIA's three-month analysis, there are no compelling reasons to modify the discipline.

24. Accordingly, the two grievances, which were heard together, are both dismissed.

November 3, 2016



GRAHAM J. CLARKE
ARBITRATOR