CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4616

Heard in Edmonton, March 13, 2018

Concerning

VIA RAIL INC.

And

UNIFOR

DISPUTE:

The demotion of Denise Hampden from her permanent position of In-Charge Agent at Union Station in Toronto following an investigation that was held on January 29, 2016.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Union submits that the discipline assessed against the grievor is both excessive and punitive. Furthermore, the Union contends that the Corporation's investigation was motivated by the grievor's role on the Health and Safety Committee for Union Station and a surreptitious survey that was distributed in 2015 by another VIA Rail employee titled, "Rate your In-Charge", which at the time the Union believed was intended to discredit some employees who occupied In-Charge positions. And the Union further contends that the Corporation violated Sections 94 and 147(c) of the *Canada Labour Code* by these actions.

The Union requests that the Corporation reinstate the grievor back to her previous position of In-Charge Agent at Union Station and compensate her retroactively for all wage loss during the period of this unjust demotion, and for any lost benefits that may be applicable for the period of demotion.

The Corporation denies the Union's contentions and has declined the grievance to date.

THE CORPORATION'S EXPARTE STATEMENT:

On December 16, 2015, during a meeting with other In Charge Agents, Ms. Hampden's behaviour was contrary to the expectations of the Corporation of an In Charge Agent. Ms. Hampden screamed and pointed at Manager Andrew Kiggundu, and derailed the meeting by raising health and safety issues.

Ms. Hampden had been coached several times for her behaviour and communication skills which she has failed to rectify. Despite the Corporation's efforts to help her, Ms. Hampden is and has been the subject of many investigations by the Corporation.

Therefore, Ms. Hampden's behaviour at the meeting was considered as a culminating incident, which led to her demotion for failure to perform her duties to the level expected from an

In Charge Agent, as well as for being insubordinate following instructions from her manager over the previous year.

The Corporation denies that its investigation was motivated by Ms. Hampden's role on the health and safety committee or by a survey that was distributed in 2015, for which, the Corporation adds, discipline was issued to several employees. Furthermore, the Corporation contends that the December 16, 2015 meeting was not the right forum to discuss health and safety.

Finally, the Corporation submits that Ms. Hampden's demotion was justified and reasonable, and that at all times respected the *Canada Labour Code.*

Therefore, the grievance should be dismissed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. Kennedy	**(SGD.) E. Houlihan**
National Representative	**Director, Labour Relations**

There appeared on behalf of the Company:

E. Houlihan	– Director, Labour Relations, Montreal
B. Blair	– Human Resources, Business Partner, Montreal

There appeared on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
A. Stephen	– Regional Representative, Toronto
D. Kissack	– President, Winnipeg
J. Murray	– Regional Representative, Moncton
D. Hampden	– Grievor, Toronto

AWARD OF THE ARBITRATOR

The grievor is a long term employee who has worked for Via since 1987. Until this incident, she held an In-Charge position in Via Rail's ticket sales at Toronto's Union Station. Ms. Hampden has also been very active in her Union as a Shop Steward and member of the local joint health and safety committee. The In-Charge position is akin to a working foreman. The grievor and other In-Charge personnel reported to Via's Managers - Customer Experience. Mr. Andrew Kiggundu was one such manager.

An In-Charge is the conduit between managers and line staff. Shop stewards and health and safety representatives act as a conduit in the other direction, bringing concerns from or on behalf of employees to management. These two roles and the

inherent “role reversal” sometimes involved, have potential to cause conflict. An In-Charge also deals with the public, and polite and helpful communications with customers and other employees is central to Via’s Code of Ethics and its Behavioural Standards.

Like many older buildings, Toronto’s Union Station was built using asbestos in the walls, flooring, insulation, and so on. For about eight years, it has been undergoing renovations that require the isolation of certain areas as the asbestos is removed. This work is being undertaken by contractors to the City of Toronto, the owner of Union Station, not by Via Rail. It was Ms. Hampden’s opinion, passionately held and at times vigourously expressed, that the asbestos abatement included inadequate protection for employees in the area. Further, she felt that Via’s communication to its employees about the issue had, throughout, been inadequate. These questions had been a topic of discussion at the Via-Unifor labour management health and safety committee meetings that the grievor attended as a member. There was a history of frustration over these issues.

On December 12, 2015, Mr. Kiggundu sent the grievor and her cohorts a notice of a 2 hour meeting of In-Charge personnel to be held on December 16, including an agenda which read:

1. Site Safety Briefing – Theresa Kahnert
2. November 2015 IC meeting recap – Theresa Kahnert
3. UP Express – Andrew Kiggundu
4. Holiday Plan – Andrew Kiggundu/Theresa Kahnert
5. Construction – Andrew Kiggundu
6. Roundtable

Ground Rules:

- Please speak one person at time
- Please show respect for the opinions of others
- Please arrive on-time

Point 5 was about the lower concourse construction project. It involved type 3 asbestos removal, three being the highest level in terms of the potential for exposure. Mr. Kiggundu and another, and new, Customer Experience Manager Paula Mugford, provided written accounts of what took place at the meeting, which they had chaired. The grievor arrived 10 minutes late. They described to the group the location changes and anticipated schedule of work that would affect Via's location during construction. Mr. Kiggundu described Ms. Hampden's conduct as follows:

> Denise Hampden … started voicing her displeasure with the construction plans. I informed Denise that she would be given an opportunity to ask any questions once we were finished going through all of the documents. We then read through the document titled VIA Concourse Type 3 Asbestos Plaster Abatement Plan in order for the In-Charge's to have more of an understanding of the type of work which the project would consist of. Once we had finished reading through the document, I provided each In-Charge with an opportunity to ask questions and I advised them that these questions would be recorded and discussed with Vlad Jean-Pierre (CE Manager) as he is the VIA contact surrounding this project. I also informed the In-Charge's that if Vlad couldn't answer specific questions, we would work together to find out the answers. Sina Piluso asked the first question in relation to whether the construction plans would be following Federal legislation because VIA is a Crown Corporation. Sina's demeanor illustrated being concerned, however she maintained professionalism. At this point Denise Hampden became extremely overly aggressive. Denise began shouting and pointing her fingers at me in an attempt to threaten or intimidate me about the contents of the construction project. While in this state, Denise was asking me what VIA Rail was going to do to protect the employees, all while questioning the validity of the construction documents that we

> had just read through. Denise then asked (while still shouting) where the document was that had a VIA Rail logo on it with information surrounding the construction. I informed Denise that the construction group was doing their work in a safe manner not only for VIA, but also for other patrons walking through Union station, and for those who are employed by other businesses at Union station. I asked Denise if she had any further questions and she then asked the same questions which Sina had previously asked surrounding the legislative body the construction group was mandated to follow. While Denise asked me this question she continued to shout and point her fingers at me once again. I then informed Denise that this question had already been asked, and that if she was going to continue to shout and point her fingers at me she could leave the meeting. Denise then informed me that she was leaving. She then stood-up and picked-up her work items off of the meeting room table. I then informed Denise that she was excused and the meeting continued.

Mr. Kiggundu spoke to Mr. Vlad Jean-Pierre later that day, and added:

> Vlad informed me that he had a briefing session the previous day (Tuesday December 15, 2015) with Denise explaining to her the various elements of the project. Based on Denise's behavior in the meeting I was surprised to learn that she had previously been made aware of the information surrounding the removal of asbestos, as she made no reference to this while we were meeting as a group. I was also surprised that she was unable to control herself and displayed an angry outburst in front of her colleagues, her own manager (myself), as well as a new manager who she was meeting for the first time (Paula Mugford).

Ms. Mugford's statement alleges much the same thing. However, it was not written until four weeks after the event. I take no account of a memorandum from a "concerned co-worker" because it was anonymous and because of some history of inappropriate "poisoned per" activity in the workplace.

The grievor's answers during the investigation reveal that her being late was due to a death on the subway. Given that, I take no account of her lack of punctuality. As to her demeanour during the meeting, she said at A.39:

> A.39 I would not characterize my behavior as overly aggressive. I am an assertive person and am required to be in many aspects of my job. In particular, and especially as a member of the Health and Safety Committee, I am very passionate in my defense of members' health/safety and their three rights with respect to said health and safety. I will admit that I was gesturing with my hands as one does in a heated conversation. When Manager Andrew told me not to point at him, I immediately realized that I was in fact doing so. I stopped talking mid-sentence, put my finger down and gestured in a manner that suggested I hadn't even realized that I had been pointing. I did continue to defend the members' three rights: the right to know, the right to refuse and the right to participate as we were at the point of the meeting when we were talking about asbestos removal and abatement in our work area.

When asked of her tone was "appropriate" she said it was "hard to say". She went on to describe her deep frustration at what she felt was a lack of any clear explanation, from Via Rail, free of impenetrable jargon and acronyms, as to what was being done to protect employees during this project. She also asserted that Mr. Kiggundu was smirking at her during her interventions. She felt he was being disrespectful and condescending. She says she said to him, "I do not appreciate your smirking at me when I am talking about people's health and safety and their potential to catch a life-threatening illness in their workplace because of asbestos removal".

The Employer argues that the grievor was raising her concerns in an inappropriate forum. Instead, it argues she should have waited to raise them at the joint health and safety committee. This topic was not as divorced from the In-Charge

meeting as the Employer argues. The agenda includes the issue. Part of an In-Charge's job, and a reason for the information being given out at the meeting, is to pass that information on to other employees. Questions as to whether the information, on such an important topic, was understandable and adequate where appropriate, and were in fact addressed by the managers agreeing to bring in experts.

The inappropriateness of the grievor's manner in conveying her views is a legitimate subject of concern. The managers present believed her comments went well beyond what was acceptable and amounted to insubordination and disrespect. The Union argues that her comments were protected Union activity and appropriate to her role as a health and safety representative. The Union referred to the Arbitrator's comments in **CROA 3670** where an employee, who was also the Union Legislative Representative for Manitoba, spoke bluntly to a Transport Canada inspector. He said, of the communication in question:

> Even accepting that Mr. Geiler used the words alleged by the inspector, stating that if a serious accident should occur, blood would be on her hands, that is plainly the kind of hard communication which might reasonably be expected of a union representative transacting business that is adversarial or controversial. In the context of the relationship between Mr. Geiler and the inspector, I do not consider that he was in fact crossing the line of harassment and bullying. Boards of arbitration, including this Office, have well recognized the need for a certain leeway in the communications of union officers discharging their duty.

Several cases outside the railway industry have dealt with the scope of and limitations upon this "union officer-union business leeway". This law is well summarized

by Brown and Beatty, *Canadian Labour Arbitration*, at 9:1530 – Disciplinary Standards, where they say:

> Because collective bargaining is adversarial in nature, arbitrators have generally accorded union officials some latitude in the ways in which they may carry out their duties and challenge management without fear of being disciplined. For example, a union official may be exonerated of any wrongdoing for refusing to follow his or her employer's instructions if the decision was a legitimate exercise of his or her authority and responsibility to the union. Similarly, intemperate and/or insulting language directed against a member of management may be found not to be insubordinate if it is uttered by an official in the course of performing his or her union responsibilities. However, while arbitrators have generally been very protective of the freedom of action that union officers require to perform their duties in a way that will preserve the integrity of collective bargaining, this protection is not absolute. The right of a union official to vigorously push the union's point of view in dealings with the employer must be balanced against the latter's right to conduct its business free of harassment and abuse. As a result, union officials will be liable to discipline, like any other employee, for statements that are malicious, in the sense that they are knowingly or recklessly false, or that threaten or intimidate, or publicly attack their employers or a member of management.

Weighing all the evidence, while I find the grievor had legitimate issues over the asbestos removal plans and related communications, her conduct during the meeting went beyond what was appropriate, even considering her Union roles. "Passionate advocacy" can also be belittling and disruptive. The grievor, in my view, allowed her anger and frustration to spill over into an unjustified attack on Mr. Kiggundu when, to a significant degree, he was only the messenger. Some points, for example, the insistence upon Via Rail branded documents and an unwillingness to accept information from others, was "over the top". The grievor's points could have been made without pointing (even if just once) or gesticulating and speaking in a louder voice than

necessary, in being “boisterous” to use the grievor’s own term. In making this finding, I have considered the surrounding circumstances discussed below. I find the grievor’s conduct justified some form of disciplinary response. The question is whether it justified a demotion. I find demotion was inappropriate.

The Employer maintains that demotion is a permitted, and in this case appropriate, form of discipline based on Article 12.19:

> Unless otherwise locally arranged, an employee who is removed from his regular position as a disciplinary measure will not be permitted to displace any regularly assigned employee within the first 12 months of cumulative compensated service after the discipline was assessed, but will be permitted to apply for any vacancies within that group.
>
> Upon completion of the said 12-month period, the employee may apply for his former position if it is vacant at the time. If his former position is not vacant, he may displace a junior employee in the same position at the end of the 23 months, but not later than 24 months after the assessment of discipline.

It relies on AH-219 for a description of the relevant principles.

> *B.C. Rail and CUTE Local 6, Donald Russell Smith Arbitration*, AH-219 (Hope)

It suggests demotion is justified “when the employer can show an inability on the part of the employee to meet or maintain an acceptable standard”. However, that synopsis misses a crucial element, which is that it must be indicative of an inability to do the job. As the case says, referring to:

> *Re Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1973), 2 L.A.C. (2d) 178 (Rayner)

> That decision stands for the proposition that a disciplinary demotion can only be justified if it is based upon facts which support the conclusion that the employee was unable to perform her/his job. The arbitrator wrote as follows on p. 181:
>
> > If the action is classed as disciplinary, then the board must consider the generally accepted arbitrable rule that demotion is not a proper form of discipline partly because it abridges seniority rights and partly because it is for an indefinite period of time. See **Re Int'l Assn of Machinists and Gabriel of Canada Ltd.** (1968), 19 L.A.C. 22 (Christie); and **Re U.A.W. Local 27, and Tecumseh Products of Canada Ltd.** (1968), 19 L.A.C. 180 (Weatherill). However, even if the board classifies the demotion as disciplinary, the board recognizes that in some cases the demotion may be appropriate as a discipline. See, for example, **Re International Chemical Workers, Local 721, and Brockville Chemical Industries Ltd.** (1971), 23 L.A.C. 336, where a board of arbitration chaired by Mr. O. Shime, came to the conclusion that **if the conduct which gave rise to discipline indicated an inability to do the job, demotion may be appropriate**. In considering the latter case, the board feels that the real issue in cases of this nature is the question of determining when the decision taken by management is a purely disciplinary decision as opposed to the decision that the employee no longer is suited to the job that he had. The line between these two questions, in many instances, quite fine.
>
> As stated, the determining factor in such cases is the extent to which the employer is able to prove that the employee was not able to perform the work.

The Employer admits its demotion was disciplinary. The Union objects that it has not followed the "no disruption" aspects of Article 12.19. I agree. The Union also points to the difference between the notice of investigation and the resulting finding, and the lack of any real reason for imposing an Article 12.19 demotion. These points are well taken, but really amount to this. What was inappropriate was the grievor's verbal assault on Mr. Kiggundu in an intemperate and overly aggressive (albeit passionate)

manner while he was delivering information not of his own making and while he was cooperating in getting additional information. This was insulting and disrespectful and he clearly took it to be so. It was not “holding the company to account”; he was not at the level of management where he had any capacity to provided that accountability.

I find little in the evidence to suggest the conduct on December 16, 2015 was indicative of the grievor’s ability to do her job in a general sense. The issue was her going overboard in her advocacy role and in assuming that her Union role justified her being overly aggressive towards a manager. In these circumstances at least, it did not. However, I agree with the Union’s submission that a virtually indefinite demotion is harsh and excessive, and that the Brown system should have been used in the circumstances.

In assessing an appropriate level of discipline, I have considered points raised by both sides.

The Employer asserts that the events of this meeting were a culminating incident, to be assessed in light of prior incidents in 2015. Mr. Kiggundu recorded an incident where the grievor, in an one-on-one discussion had referred to “thick headed managers”. He challenged her on the point and he says she acknowledged she was wrong, but she said in the investigation that she had used the term “hard headed” not “thick headed” managers. In one-on-one discussions on August 11, 2015, she was advised she needed to develop her communication skills and use a more polite and

professional tone. This did not involve discipline. On September 29, 2015, she was assessed 10 demerits for "failure to complete station In-Charge job duty and insubordination of a manager." On October 16, 2015 Ms. Hampden completed a "Working Better Together" course. The letter advising her to attend a further course on October 29, 2015 described the course's purpose:

> We consider civility and respect are present in a work environment where employees are respectful in their interactions with one another, as well as with customers, and the public. Working in such an environment is also more enjoyable and supportive, which in turn leads to better teamwork and customer service delivery.
>
> However, when a workplace lacks civility and respect, employees are more at risk to experience emotional exhaustion. In addition to health problems, a rude and disrespectful workplace is associated with greater conflict and job withdrawal. At VIA Rail, we take this very seriously and we are about your psychological health.
>
> As such, we partnered with our EAP provider, Morneau Shepell, to offer our employees this training module on socially acceptable behaviours in the work place. Basically, this training will help you to understand, recognize, prevent and react better to anti-social or disrespectful behaviours in the work place.

The 10 demerits are a significant factor, and involve a related offence. The other matters are less significant from a disciplinary perspective. It can be argued that inappropriate communication in this meeting illustrated a penchant for inappropriate communication generally, but that is mostly outweighed by the link between the subject matter and her Union roles.

The grievor raised two issues that had obviously left her sensitive. A year before she had been the subject of another employee's "rate your In-Charge" survey which she

saw as an anonymous campaign to injure her. Also, she explained “my work life has been made so difficult that it has affected my personal life.” She denied anger at the meeting preferring “frustrated and passionate”. She referred to asbestos removal as exposing employees to the potential of a “lethal disease” which, while asbestos exposure is a concern, is rather hyperbolic given the controlled abatement measures being undertaken. The grievor said at A.88, when asked about her workplace interaction:

> A.88 I will grant you that people have characterized my behavior as disrespectful. I would characterize my behavior as vigorous advocacy for the health and safety of my members.

She felt that they had experienced a socially unhealthy workplace for some time, with many carrying responsibility for that, not just her. She said her behavior would be different in the future, but only because she felt she had been “figuratively beaten-down and broken”. She described a formal complaint process involving an earlier interaction with Mr. Kiggundu. She said at A112.:

> 2015 has been a rough year at VIA Rail for me, other In-Charges, and other people of colour who work here. If your implication is that my behavior at the meeting in my capacity as a Health and Safety committee member, Grievance Officer, and as an In-Charge were inappropriate, then I can only owe it to the stress and strain of the last year.

As to the failure, she continued at A116:

> A116. I have already acknowledged that I was, during a heated discussion, pointing a finger, not several fingers at Manager Andrew. When it was pointed out to me, I immediately stopped doing it and apologized for doing so. It may not have been as loud and boisterious as the conversation but in the context of what happened, it was completely appropriate. Manager Andrew and I are long pass

> the point of being able to return to the working relationship we had in August 2013 when he first got here. And at this point, I do not see any way to repair that. I have also stated already that I will not be the same person that I was yesterday, as I will be tomorrow. I cannot predict what will happen in the future. I will do my best to make sure that nothing like this happens again, however I will not be held responsible for other people's inaccurate assessments of my behavior or the policing of my tone.

I have taken into account Ms. Hampden's Union representative's submissions when he drew the investigating officer's attention to:

> … the concept of "tone policing" in which women are frequently chastised or criticized for engaging in passionate discourse. This is the sort of activity in which men engage all the time, and yet when a woman attempts to meet the tone of her male counterparts, or to mimic the conversation-style of those men she is singled-out as a trouble-maker or as someone who has overstepped her boundaries.

It is clear the grievor and Mr. Kiggundu have had a less than healthy relationship for some time and this contributed both to the grievor's action and to the Employer's response.

Having weighed these matters, I set aside the greivor's demotion and order that she be returned to her former In-Charge position, and that she be made whole. In its place, I substitute a 20 point penalty and a warning for "Inappropriate conduct and excessive criticism of a manager, in a meeting environment, beyond what was reasonable in the circumstances, even accepting your legitimate role as a Union representative".

I find no violation of s. 94 or s. 147(c) of the *Canada Labour Code*. Had the evidence suggested the Employer's actions were a direct result of what rather than how she was advocating, these sections might apply. Instead, it suggests the concern was over the disruption, and over-aggressive way she expressed her concerns. I remain seized in order to finalize any of the necessary remedial steps, should the parties fail to agree.

April 3, 2018

ANDREW C.L. SIMS, Q.C.
ARBITRATOR