# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 4624

Heard in Montreal, April 10, 2018

Concerning

**VIA RAIL CANADA INC.**

And

**UNIFOR NATIONAL COUNCIL 4000**

**DISPUTE:**

The Corporation's assessment of 60 demerit marks and subsequent discharge of Senior Service Attendant A. Naudeer for his "alleged conduct unbecoming a VIA Rail employee regarding VIA Rail's E-mail Usage Policy, VIA Rail's Computer Network and Internet Usage Policy and VIA Rail's Cellular Devices Usage Policy, while working Train No. 69 on July 31, 2016", and, "Supplemental investigation as per Article 24, regarding the answers you gave in your investigation on August 19, 2016".

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

The Union contends that the Corporation's investigation was unfair and not in keeping with its obligations under Article 24.5 of Collective Agreement No. 2, and that the instant discipline was assessed approximately 35 days beyond the time frame the Corporation is to a render a decision, as is stipulated in Article 24.18 of the collective agreement.

The Union further contends that the Corporation has been lax in its enforcement of its policies relative to the use of corporate email and electronic devices, and that it is accordingly unfair to hold the grievor to this uncommon standard.

The Union seeks as redress that the quantum of discipline issued to the grievor be reduced significantly, that he be reinstated to service without loss of salary, benefits, or seniority, and that he be made whole.

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

**THE CORPORATION'S EXPARTE STATEMENT OF ISSUE:**

Mr. Naudeer began his employment with the Corporation on July 21, 2008. At the time of his termination, he held the position of Senior Service Attendant.

On or around August 1, 2015, the Corporation received a complaint from a VIA employee regarding a blank email she had received from Mr. Naudeer which contained a video that was explicit and offensive. The VIA employee stated that even though an email was sent by Mr. Naudeer minutes later to apologize, she took it as a personal insult.

Following the complaint, on or around August 19, 2016, an investigation was held by the Corporation regarding Mr. Naudeer's alleged conduct unbecoming a VIA Rail employee regarding VIA Rail's E-mail Usage Policy, VIA Rail's Computer Network and Internet Usage

Policy. A supplemental investigation was held on August 26, 2016 following further investigation into statements made by Mr. Naudeer during the first investigation, and additional explicit content identified on his work email.

The Corporation concluded that Mr. Naudeer failed to comply with its policies, of which he was aware, including the E-mail Usage Policy, the Computer Network and Internet Usage Policy and the Cellular Devices Usage Policy. Furthermore, the Corporation concluded that Mr. Naudeer had made false statements in his first investigation. The Corporation therefore imposed 60 demerit marks, which resulted in his termination of employment with VIA.

In light of the above, the Corporation contends that the demerit marks imposed and correlated termination was reasonable and justified in the circumstances.

Furthermore, the Corporation contends that it did not violate the collective agreement and that Mr. Naudeer was held out of service based on clear misconduct which was evident at the time of the investigation.

Therefore, the grievance should be dismissed.

| **FOR THE UNION:** | **FOR THE COMPANY:** |
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| **(SGD.) B. W. Kennedy** | **(SGD.) E. Houlihan** |
| National Representative | Director Employee Relations |

There appeared on behalf of the Company:

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| W. Hlibchuk | – Counsel, Norton Rose Fullbright, Montreal |
| E. Houlihan | – Director, Employee Relations, Montreal |

And on behalf of the Union:

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| B. Kennedy | – National Representative, Edmonton |
| A. Stephen | – Regional Representative, Toronto |
| D. Kissack | – President, Winnipeg |
| D. Andru | – Secretary Treasurer, Toronto |
| M. Robinson | – Regional Reprensentative, Mississauga |
| A. Naudeer | – Grievor, Etobicoke |

## AWARD OF THE ARBITRATOR

### Nature of case

1. VIA imposed 60 demerit points and terminated Mr. Naudeer's employment for conduct unbecoming. Specifically, on July 31, 2016, Mr. Naudeer had emailed an inappropriate GIF file to a colleague undergoing gender reassignment. VIA alleged that Mr. Naudeer had violated its "E-mail Usage Policy, VIA Rail's Computer Network and Internet Usage Policy" (Policies).

2. Unifor did not dispute the events to any great extent but contested the penalty of termination for an employee who had acknowledged his inappropriate conduct, repeatedly apologized and had no demerit points on his record at the time of his termination.

3. For the reasons which follow, the arbitrator concludes that VIA had just cause to discipline Mr. Naudeer. However, the circumstances confirm that VIA ought to have applied progressive discipline under the Brown System. The arbitrator substitutes a time-served suspension for the dismissal.

## Analysis and Decision

4. The arbitrator will first deal with Unifor's procedural objections, followed by an analysis of the penalty imposed on Mr. Naudeer.

### Unifor's Procedural Objections

5. Unifor objected to paragraphs 6-10 in VIA's brief on the basis that they had never been raised before. Those paragraphs referred to a separate alleged incident between the complainant and Mr. Naudeer.

6. The arbitrator sustains Unifor's objection and will not consider those paragraphs. There are several reasons for this conclusion.

7. There is a general prohibition against employers adding new grounds for termination at arbitration. VIA based its discipline on a violation of the Policies it had listed. Unifor prepared its case on that basis.

8. This Office has noted that new grounds cannot be added at a CROA hearing. In CROA&DR 3488, Arbitrator Picher noted:

> With respect to the second objection, however, the Arbitrator is satisfied that the Company is correct. The jurisdiction of the Arbitrator under of the memorandum of agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution expressly limits the Arbitrator's jurisdiction to those matters contained within a joint statement of issue. As is clear from the text of that document in the case at hand, the alleged acts of harassment contained within the letter of April 26, 2005 prepared by the grievor fall entirely outside the issues identified within the joint statement of issue and cannot be properly said to fall within the jurisdiction of this Office in respect of the grievance at hand…

9. In the instant case, VIA's ex parte statement, which was signed just 4 days prior to the hearing, made no mention of the events found in paragraphs 6-10 of its Brief. This is not to say that new issues can be added just 4 days prior to the hearing. The time to identify which issues will be debated at a CROA hearing occurs long before the hearing.

10. The parties have agreed to follow the Memorandum of Agreement Establishing the CROA&DR which notes at article 10:

> 10. The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the

> collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.

11. In CROA&DR 4548, this Office noted that new issues cannot be added in a late ex parte statement or in a Brief:

> 16. This decision should not be taken as an indication that this Office will automatically allow any ex parte statement to be filed mere days before the hearing, or at the hearing itself. The ex parte's content will determine how this Office resolves objections.
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> 17. CN's ex parte did not attempt to add a new issue which would have caught TCRC by surprise. This differs from a situation where a party raises a novel issue in a late ex parte, or in its hearing brief. Novel issues first raised at a hearing could cause prejudice and lead to an arbitrator upholding an objection, depending on the circumstances.
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> (emphasis added)

12. VIA is not entitled to add new grounds in its Brief. This decision will examine only those issues which have divided the parties throughout the steps leading up to this hearing.

13. Unifor had raised other procedural objections throughout the process leading to this arbitration.

14. The arbitrator accepts Unifor's argument that VIA did not respect articles 24.6 and 24.8 of the collective agreement. Article 24.6 notes that employees cannot be suspended or dismissed without a hearing. Article 24.8 allows employees to be held out

of service for up to 5 days pending a hearing. VIA provided no contrary argument either during the grievance process or at the hearing. VIA held Mr. Naudeer out of service and suspended him from August 5, to November 14, 2016. Mr. Naudeer is entitled to compensation for this period, less the 5 allowed days.

15. Unifor did not persuade the arbitrator that the investigation was unfair and partial.

16. For example, Unifor alleged that VIA withheld evidence during its initial investigation of other instances where Mr. Naudeer violated the Policies. While this could be a valid objection if supported by evidence, the arbitrator concludes that VIA conducted a second investigation to verify some of the answers Mr. Naudeer gave during his first interview. Barring evidence to the contrary, checking into explanations or affirmations constitutes a normal aspect of investigations.

17. Similarly, Unifor also argued that VIA failed to respect the 21-day calendar limit to impose discipline as set out in article 24.18 of the collective agreement. VIA satisfied the arbitrator that this delay occurred while it was waiting for medical information Mr. Naudeer claimed was relevant to the case. That information never came.

18. In the special circumstances of VIA waiting to receive information which Unifor and Mr. Naudeer had advised was important for the investigation, the arbitrator was not persuaded that the time delay rendered the discipline void *ab initio*. This conclusion might well be different if VIA, without any comparable representation from Unifor on

which it relied, had failed to respect the time limits the parties had negotiated into their collective agreement.

**Should the arbitrator modify the penalty VIA imposed?**

19. VIA demonstrated it had grounds for discipline. VIA cannot tolerate the harassment of its employees. VIA's Policies represent just one of the ways in which it seeks to prevent harassment and other inappropriate conduct.

20. Mr. Naudeer, whether mistakenly or not, sent an offensive GIF file to the complainant. That GIF file, which is a short video-like clip, displayed a 5-second moving image of an erect male member striking a woman's face.

21. Mr. Naudeer also had other inappropriate material on his cell phone in further violation of the Policies. Despite Mr. Naudeer's initial denials at his first investigation that he had no other inappropriate material on his phone, and had never sent the GIF to anyone else, VIA later found otherwise.

22. Mr. Naudeer claims that he sent the GIF file to the complainant in error and that he had meant to send it to someone else on his contact list. That person's name had alleged appeared on his phone's contact list just above the former male name of the complainant.

23. Mr. Naudeer, however, had erased all his contacts following the incident. Unifor argued this was a natural reaction once Mr. Naudeer realized he had been using the VIA-issued phone inappropriately.

24. The arbitral jurisprudence for these matters is clear. In some situations, particularly those where an apology has followed almost immediately, arbitrators will apply progressive discipline. In MSSC Canada (Chatham) v Unifor And Its Local 127, 2017 CanLII 61806, the arbitrator noted:

> 15. The grievor's co-worker is entitled to a workplace free from sexual harassment. By acting as he did towards her on October 28, the grievor violated her right, in that regard. In so doing, the grievor engaged in serious misconduct he ought reasonably to have known to be unwelcome. His unjustifiable conduct towards his co- worker is antithetical to a workplace free from sexual harassment. It undermines the Company's obligation to provide a safe work environment free from discrimination for its bargaining unit employees. The assessment about whether to substitute another penalty here must be contextual and include the consideration of deterrence not only for the grievor, but for the bargaining unit at large.
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> 16. The grievor is a long service employee with a discipline-free record, within the 12-month sunset provision of the collective agreement. He has never denied what occurred on October 28. At the hearing, he testified he should be held accountable for the statements he made. He would have apologized to his co-worker, had she attended the hearing. From the foregoing, it appears the grievor has learned from this experience and has insight into his conduct. On the other hand, the grievor's stated belief at the hearing there was a chance his bipolar disorder could have been a factor in this incident because he was taking ephedrine causes concern. This was not supported by the known medical evidence the Union had in its possession before the hearing. Further, it suggests the grievor may not be taking full unqualified ownership of his actions.
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> 17. However, on the whole, I believe the grievor is genuinely contrite and genuinely remorseful for his conduct on October 28, and that he is unlikely to act in this way again. Nevertheless, I am concerned an award with back pay would convey a mixed message to the grievor about the gravity of his culpable misconduct, and about the importance of taking full unqualified ownership of his actions. In turn, this may undermine his rehabilitative prospects. Given that, I am of

> the view the foregoing concerns can be most effectively neutralized by substituting a suspension without pay for the discharge with conditions, in these particular circumstances. The suspension also serves the rehabilitative and deterrent purposes of progressive discipline. The grievor is reinstated to employment without loss of seniority, service and benefits.
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> (Emphasis added)

25. In other situations, such as in CROA&DR 4166, and particularly where a grievor denies wholly inappropriate conduct, termination of employment may follow. In Ottawa (City) v Ottawa-Carleton Public Employees' Union, Local 503, 2016 CanLII 59377, after examining different categories of sexual harassment, the arbitrator concluded that progressive discipline was not available to the grievor:

> The question that remains to be answered is whether the penalty is just and reasonable in all the circumstances. In the spectrum of sexual annoyance misconduct, Mr. Elmi's behaviour is of the most serious type, such that it left Mr. Elmi subject to discharge. **However, if it could be found that Mr. Elmi now understands the seriousness of his misconduct and is genuinely remorseful for what he did, an argument could be made, based on his prior good record, that a lengthy suspension would serve both the deterrent and the rehabilitative purposes of corrective discipline. However, this finding cannot be made. Mr. Elmi, consistent with his blanket denial, has never acknowledged his wrongdoing nor apologized to his female co-workers.** Indeed, having accused these females of conspiracy to perjure themselves for the purpose of causing his termination, it is difficult to think that he could work cooperatively with them if reinstated. This is particularly problematic in a work setting where a single male often works with a single female without direct supervision. In these circumstances, the arbitrator cannot predict with an acceptable degree of certainty that, if returned to the workforce after a lengthy suspension, Mr. Elmi would restrain himself and work cooperatively with his female accusers. Accordingly, consistent with the approach taken in Canadian Airlines International Ltd. v. IAM & AW, District Lodge 140 (supra), Community Living South Muskoka v. OPSEU (supra), Nestle Canada Inc. (supra) and Trillium Health Centre (supra) and as referenced in Brown and Beatty, Canadian Labour Arbitration, 4th ed., Canada Law Book, 7:3432, I hereby find that the termination of the grievor was just and reasonable in all the circumstances and hereby dismiss the grievance.
> (Emphasis added)

26. There are several reasons which persuade the arbitrator to substitute a significant suspension for the 60-demerit points VIA imposed for this incident.

27. First, just 2 minutes after sending the GIF file, Mr. Naudeer sent another email apologizing to the complainant. This conduct is consistent with his suggestion that his sending of the GIF file to her was an error. That does not excuse Mr. Naudeer's conduct, but it does provide essential context.

28. Second, after receiving no response, Mr. Naudeer later called the complainant on August 4, 2016 to apologize. She advised him not to call her again, a request which he respected.

29. Third, a review of the investigation transcript shows that Mr. Naudeer apologized repeatedly to VIA and further acknowledged the gravity of his actions (E-1; VIA Brief; Tab 1 QA74).

30. Fourth, the arbitrator cannot ignore Mr. Naudeer's discipline record (E-2; Discipline Record). That discipline record indicates that Mr. Naudeer had had 4 consecutive years without discipline. This resulted in demerit points being reduced for each of those years and Mr. Naudeer having no active demerit points at the time of the incident.

31. Fifth, VIA hired Mr. Naudeer in July 2008 as a Senior Service Attendant. While not a long service employee, he nonetheless had a length of service which impacts the progressive discipline analysis.

32. In these circumstances, Unifor persuaded the arbitrator to modify the penalty imposed. The arbitrator substitutes a lengthy time-served suspension for the termination and orders VIA to reinstate Mr. Naudeer. Except for the period in which VIA failed to respect article 24.8 of the collective agreement, that reinstatement will be without compensation for wages and benefits lost, but without loss of seniority. Moreover, Mr. Naudeer will not be scheduled to work with the complainant until such time, if ever, that she agrees to work with him.

33. This lengthy suspension reflects both the seriousness of sending to the complainant a wholly inappropriate GIF file and Mr. Naudeer's lack of candour at times during the investigation. It also recognizes the need to deter others from violating VIA's Policies which are designed, among other things, to prevent employees using VIA equipment to store offensive material and harass others in the workplace.

34. The arbitrator remains seized for any questions which may arise from this award.

April 23, 2018

**GRAHAM J. CLARKE**
**ARBITRATOR**