

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

CASE NO. 4693

Heard in Montreal, July 9, 2019

Concerning

VIA RAIL CANADA INC.

And

UNIFOR NATIONAL COUNCIL 4000

DISPUTE:

The assessment of 30 demerits and the subsequent discharge of Senior Station Attendant, C. Duval on January 26, 2018, regarding the removal of a lost and found item – a coffee mug – found in a bag with other items left at the VIA Rail Station in Winnipeg, Manitoba on December 14, 15, 2017.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Union submits that the grievor's actions were not done with a malicious intent to steal. The grievor did not attempt to conceal his actions from the security cameras. He held onto this coffee mug for another work colleague whom he believed would be interested in it. All other items that were in the bag that the mug came from were discarded and the grievor believed that the mug too would be discarded. The Union further submits that the process of discarding lost and found items is casual at best, whereas individual employees are left to determine what items are deemed as garbage and logged as lost that are eventually disposed of by different means and at different times.

The Union contends that given the mitigating circumstances of this case, the assessment of discipline that resulted in the grievor's discharge is excessive. The Union requests that the 30 demerits be expunged and reinstate the grievor back into service with the Corporation.

The Corporation contends that the level of discipline is appropriate and has therefore declined the Union's contentions and grievances.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

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The Union contends that given the mitigating circumstances of this case, the assessment of discipline that resulted in the grievor's discharge is excessive. The Union requests that the 30 demerits be expunged and reinstate the grievor back into service with the Corporation.

The Corporation contends that the decision to terminate the grievor's employment was appropriate given that the investigation revealed that he intentionally removed the item in question, having been observed on video taking the item and placing it in his bag, before leaving the premises. The grievor acknowledged knowing the procedures for the correct handling of lost and found items and had been previously counselled on same in the context of an earlier alleged incident where an item was removed from lost and found.

In considering what if any aggravating factors may have existed in the grievor's case, the Corporation considered the grievor's complete disciplinary history and other complaints that had been made against the grievor, including to the Ombudsman. Additionally, the Corporation considered as aggravating factors the fact that the grievor showed no remorse, accepted no responsibility for wrong-doing and was not honest and forthright during the investigation.

The Corporation disagrees with the Union's description of the process for handling lost and found items and considers that VIA Rail's Code of Ethics and other related policies are such that the grievor's behaviour is considered theft and is a serious matter.

The Corporation contends that the given the facts and the disciplinary history of the grievor, the level of discipline is appropriate and has therefore declined the Union's contentions and grievances.

FOR THE UNION:
(SGD.) B. W. Kennedy

National Representative

FOR THE COMPANY:
(SGD.) K. Chapados

Specialist Advisor, Employee Relations

There appeared on behalf of the Company:

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| W. Hlibchuk | – Counsel, Norton Rose, Montreal |
| L. Mayes | – Senior Manager, VIA West, Vancouver |
| K. Chapados | – Specialist, Labour Relations, Montreal |

And on behalf of the Union:

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|------------|-------------------------------------|
| B. Kennedy | – National Representative, Edmonton |
| D. Kissack | – President, Winnipeg |
| L. Hazlitt | – Regional Representative, Winnipeg |
| D. Andru | – Secretary Treasurer, Toronto |
| C. Duval | – Grievor, Winnipeg |

AWARD OF THE ARBITRATOR

The grievor, a Senior Station Attendant whose service date is April, 1996, was called for an investigation for alleged "Failure to follow Company Policy and Procedures for logging and safekeeping of lost and found articles, violation of the Code of Ethics and theft of customer property occurring on December 14-15, 2017". Following the investigation, the grievor was assessed 30 demerits for those offences, and as a

consequence his disciplinary record stood at 65 demerits, which resulted in his discharge in accordance with the system of discipline in effect. The issue is whether or not there was just cause for the imposition of discipline in the circumstances, and if so whether 30 demerits was within the range of reasonable disciplinary responses.

The grievor was in the station office at about midnight on December 14, together with two other employees, one of whom advised the grievor that she was about to go on her break. On the desk in the station office were various items, apparently lost property, which another employee said she had left to be logged by the senior SSA, in this case the grievor. Among the duties of an SSA are “to complete reports and file correspondence related to lost and found, damaged and missing luggage”. It may well be that the employee who left the items on the desk ought to have performed those tasks herself, but this case relates to the grievor’s failure to perform those tasks.

Among the items left on the desk was a green bag, which contained some food, which was decomposing, and a Tim Horton’s mug in its original plastic packaging. One of the employees threw out the food, at the grievor’s direction. The grievor stated at the investigation that he asked the other employees if either of them wanted the mug, and that his understanding was that one of them was going to keep it. That employee apparently denies that she wanted it, but however that may be, the grievor was clearly treating this lost property in an improper way. None of the items was tagged or logged as they should have been. At the end of his shift, the grievor took the mug from the desk and left the office. He did this in clear view of the video cameras mounted in the office.

From the material before me, it has not been shown that the grievor left the property with the mug. Rather, it seems, the grievor placed it in his union locker (the grievor had two lockers, one for personal items and one for use in his capacity as the Union Local Chair). He stated that he thought the other employee was interested in it and had forgotten it; the mug was still in his locker at the time of the investigation.

From all of this I do not conclude that the grievor stole the mug, which was not removed from Company property. It is clear, however, that he did not adhere to the Customer Experience Lost and Found Instructions, with which he agreed he was familiar. He stated that “Those procedures are at best guidelines”, going on to say that they were not something that was strictly followed. There would appear to be some truth in that latter comment as the earlier handling – or mishandling – of the lost items suggests.

While the grievor may not have committed theft in a technical sense, he clearly misappropriated the item in offering it to the other employee and in keeping it, whether or not for her, in his locker. Misappropriation of lost property and failure to follow the correct procedures of which he was aware of are offences for which discipline may be imposed. There was, I conclude, just cause for the imposition of some discipline on the grievor. Given that actual theft has not been established, and that the grievor’s conduct may be considered against a background of a certain laxity (and the material before me indicates more than just the failure to log the items in the previous shift) in the enforcement of the Company’s procedures, and considering also that the imposition of thirty demerits in this case would lead to the discharge of the grievor, it is my view that 30 demerits was beyond

the range of reasonable disciplinary responses to the situation. In assessing the penalty, the Company did not simply consider the misconduct of the evening in question; rather it considered the grievor's entire discipline record, including matters which no longer were included in the 35-demerit disciplinary record the grievor had accrued, one event which the Company considered noteworthy occurring some ten years previously.

Having regard to all of the circumstances, I consider that the assessment of 20 demerits would not have exceeded the limits of appropriate discipline in this case. It is my award that the penalty of 30 demerits be expunged from the grievor's record and that 20 demerits be substituted therefor. It is my further award that the grievor be reinstated in employment without loss of seniority and that, subject to mitigation of loss, he be compensated for loss of regular earnings and benefits, and that his discipline record stand at 55 demerits.

July 23, 2019



J. F. W. WEATHERILL
ARBITRATOR