

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2003

Heard at Montreal, Tuesday, 13 March 1990

Concerning

VIA RAIL CANADA INC.

And

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:

The assessment of sixty demerit marks to Mr. L. Crowe for sexual assault and verbal abuse of a female co-worker in Sarnia, Ontario, June 23-34, 1989, and his subsequent dismissal for accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

The Corporation received a written complaint from a female worker dated June 26, 1989, which stated among other things that she was sexually assaulted and verbally abused by the grievor.

Following a hearing on the matter, July 12, 1989, the Corporation was satisfied that Mr. Crowe did sexually assault and verbally abuse the female employee. As a result, the grievor was notified on July 13, 1989, that his record was assessed with sixty demerit marks and that he was dismissed for accumulation of demerit marks.

The Brotherhood contends that the incident occurred during the employee's off duty hours and the Corporation failed to properly investigate the incident. Further, that the decision to discharge Mr. Crowe was made prior to the hearing of July 12.

The Brotherhood requests immediate reinstatement with full compensation, and the removal of the incident from the grievor's record.

The Corporation disagrees with the Brotherhood's contention and has denied the grievance.

FOR THE BROTHERHOOD:

FOR THE CORPORATION:

(SGD) TOM McGRATH
NATIONAL VICE-PRESIDENT

(SGD) P. J. THIVIERGE
ACTING DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C.O. White - Senior Labour Relations Officer, Montreal
C. Pollock - Senior Labour Relations Officer, Montreal

J. Kish - Senior Advisor, Labour Relations, Montreal
A. Henery - Senior Officer, Human Resources, Montreal
M. Saccary - Witness

And on behalf of the Brotherhood:

M. Pitcher - Representative, Toronto
H. Henry - Local Chairman, Toronto
L. Crowe - Grievor

AWARD OF THE ARBITRATOR

The evidence establishes that on June 23, 1989 the grievor worked in On-Board Service from Toronto to Sarnia, along with two other employees. One of those employees was a relatively new female service attendant, Ms. Michelle Saccary. It is not disputed that late in the evening of the 23rd, after they went off duty in Sarnia, Ms. Saccary and Mr. Crowe went out together to dinner at a restaurant. Afterwards, at her suggestion, they went to a nearby disco club where they spent a considerable period of time drinking and dancing together. While there is some slight difference in their recollections, it does not appear in doubt that they had two to three drinks each, which were paid for by Mr. Crowe. When they returned to their hotel they both went into Mr. Crowe's room. While there is again conflict as to who suggested that arrangement, it is not disputed that Ms. Saccary went to the grievor's room voluntarily.

It is at this point that the material evidence diverges dramatically. Ms. Saccary maintains that during their conversation Mr. Crowe offered to massage her neck, and that when she declined he positioned himself behind her to do so. When she attempted to get up from where she had been sitting on the floor, she states that she fell onto the bed and that he placed himself on top of her, attempting to untie her brassiere and remove her jersey. According to her account, after she told him twice in a raised voice that she did not wish to become physically involved, he released her and she got up and left the room.

The grievor's account is substantially different. He states that Ms. Saccary was in his room for approximately forty-five minutes and that initially it was she who asked him to massage her shoulders. According to his evidence, at first she was sitting on the floor between his legs as he remained seated on the sofa. He states that shortly thereafter she got up, making a comment to the effect that her legs were too uncomfortable in that position. According to his account she then proceeded to lie face down on the bed with her jersey pulled up to her shoulders, and her brassiere unhitched. He states that she continued to stay in that position while he massaged her for a further five minutes. According to Mr. Crowe she finally asked him why he was not making a pass at her and, when he made a joking response, she got up, rearranged her clothing and left the room. It is common ground that she asked the grievor to give her a wake up call the following morning, which he did.

The allegation of verbal abuse arises from the evidence of Ms. Saccary respecting a comment which she maintains was made by the grievor the following day. According to her when the two of them were alone, proceeding from the taxi to the Sarnia train station the following morning, Mr. Crowe made a comment to her to the effect that he had not slept well, "... because of you, bitch." The grievor categorically denies having made any such comment.

It is well settled that sexual harassment, whether verbal or physical, including sexual assault between employees is deserving of the most serious of disciplinary sanctions (see CROA 1791). It is also true, however, that if an employer makes an allegation of a charge as serious as sexual assault, the standard of proof to establish that the infraction incurred must, on the balance of probabilities, be commensurate with the gravity of the accusation. (Indusmin Ltd. (1978) 20 L.A.C. (2d) 87 (M.G. Picher)) In other words, if a serious charge is made there should be correspondingly serious and convincing evidence to sustain it.

On the whole of the evidence before me I find it difficult to fully accept the account of the events on the evening in question given by either Ms. Saccary or the grievor. Taking the female employee's evidence at its highest, she knowingly placed herself in a compromising, if not suggestive, situation. She spent an evening eating, drinking and dancing with Mr. Crowe and afterwards, at a very late hour, went unaccompanied to his room where, it does not appear disputed, she spent some forty-five minutes. By her own account she did that even after the grievor had put his hand on her back as they walked to the hotel, and allegedly made a comment about the attractiveness of her breasts. Even if her evidence is accepted, as the spokesperson for the Brotherhood argues, as a consenting adult she placed herself in a situation in which it is difficult to assess with any precision the intentions or expectations of either of the persons involved.

Even on the basis of Ms. Saccary's view of the incident, it is plausible that in the circumstances the grievor could reasonably have believed that she was encouraging his advances, and that, misreading her intention, he made a pass at her in his room. Without in any way condoning the actions of Mr. Crowe, and with the fullest sensitivity to the right of Ms. Saccary to be free of the sexual advances of a fellow employee, I find it difficult to conclude other than that there was a miscommunication between them, resulting in a physical pass by Mr. Crowe. Moreover, assuming the truth of Ms. Saccary's account, in assessing whether what occurred amounted to sexual assault, in my view some weight must be given to the fact that Mr. Crowe immediately stopped when she expressed her objection. I am not, in these circumstances, prepared to conclude that the Corporation has established, on the balance of probabilities, that Mr. Crowe engaged in conduct that can be characterized as deliberate sexual assault that would justify his discharge.

Nor, absent any corroborating evidence, can I find that the alleged verbal abuse is made out on the evidence before me. The events of the day following the hotel room incident are, if anything, more consistent with the innocence of the grievor. It is not disputed that on the morning of June 24, as requested, Mr. Crowe telephone

the complainant employee in the morning to give her the wake up call that she had requested. They rode together in the back seat of the taxi, with the third crew member seated in front, from the hotel to the train station, while she spoke in a light-hearted way of their prior evening at the disco. It also appears undisputed that during the course of their trip from Sarnia back to Toronto Ms. Saccary socialized to some degree with the grievor, and that on at least one occasion she sought his assistance in filling out a form, rather than that of the other crew member who was working in a location on the train which was closer to her. It appears that she made no complaint to any member of management about the incident at the hotel until some forty-eight hours later, on June 26. On the whole, the conduct of Ms. Saccary on the day following the incident is more consistent with a misunderstanding between two adults in a relatively intimate setting, than with the sense that she had been the victim of a sexual assault or verbal sexual abuse.

For the foregoing reasons the Arbitrator must find that the Corporation has not discharged its burden of proof to establish, on the balance of probabilities, that the grievor knowingly and deliberately engaged in sexual assault, whether physical or verbal, against a fellow employee, as alleged, on June 23 - 24, 1989. For these reasons the grievance must be allowed. Mr. Crowe shall be reinstated into his employment forthwith, with full compensation for all wages and benefits lost, and without loss of seniority.

March 16, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR