CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2920

Heard in Montreal, Wednesday, 10 December 1997

concerning

VIA Rail Canada Inc.

and

Brotherhood of Locomotive Engineers

EX PARTE

DISPUTE:

Dismissal of R.A. Buckley.

EX PARTE STATEMENT OF ISSUE:

On June 12, 1997, the grievor arrived in Ottawa on Train #40 and because of the lateness of his train he booked rest in accordance with the collective agreement when he registered off duty. Once the grievor booked off on rest, the Corporation immediately called a replacement conductor for the return trip to Toronto. The grievor was also informed by the CMC that he was on his own (no accommodations) in Ottawa meaning that if desired a hotel room he would have to pay for it himself. The grievor chose to return to Toronto on train #47 while under rest. At approximately 2000 hours the CMC called the grievor on the train and ordered him to break his rest and work the rest of the way to Toronto because one of the engineers was now under mandatory rest and could not proceed any further. The grievor refused to work until his personal rest was up. As a result the train was delayed until another employee could be called and transported to the train.

Following this incident the Corporation held a formal investigation on July 2, 1997. On July 30, 1997 Mr. Buckley was discharged from the Corporation for:

> Failure to comply with a directive from the Operations control centre while assigned to Train No.'s 40-47 on June 12, 1997; interfering with the Corporation's business resulting in undue and unnecessary delays to Train No.'s 47 and 49 on June 12, 1997 which significantly impacted the quality of service to two hundred and fifty-seven passengers, as well as failure to comply with a directive from a manager, customer services, while returning to Toronto from Ottawa on Train #47, June 12, 1997.

The Union appealed the discharge of Mr. Buckley on the grounds that Mr. Buckley's discharge was unwarranted, discipline was excessive if not entirely unwarranted and that Mr. Buckley did not receive a fair and impartial investigation in accordance with the collective agreement.

The Corporation has failed to address or respond to the Union's appeal

FOR THE Brotherhood:

(SGD.) M. P. Gregotski

GENERAL CHAIRMAN, UTU

There appeared on behalf of the Corporation:

E. J. Houlihan – Senior Manager, Labour Relations, Montreal

D. Trubiano – Senior Officer, Labour Relations, Montreal

And on behalf of the Brotherhood:

M. Church – Counsel, Toronto

J. Tofflemire – General Chairman, Toronto, BLE

R. Skilton – Local Chairman, Toronto, BLE

L. Lisle – Witness

M. P. Gregotski – General Chairman, UTU, Fort Erie

G. J. Binsfeld – Vice-General Chairperson, UTU, Fort Erie

G. Anderson – Secretary, GCA, UTU, Fort Erie

R. A. Buckley – Grievor

AWARD OF THE ARBITRATOR

The facts in respect of this grievance are not in dispute. Unfortunately, they reveal the willingness of both an employee and his supervisor to leave a trainful of passengers stranded only minutes from their destination of Toronto. The grievor, Mr. R.A. Buckley, was assigned to work as a conductor on VIA trains 40/47 from Toronto to Ottawa and return on June 12, 1997. Upon arrival at Ottawa the grievor chose to book six hours' rest. He did so, it appears, as in his judgement he would not have been able to complete the tour of duty back into Toronto without violating the mandatory rest provisions, whereby he could not be on continuous duty for more than twelve hours. Nor does it appear that the grievor was willing to lend himself to the strategy proposed to him by the Corporation's control centre, which was to take a twenty minute break, so that he could technically avoid the twelve hour limitation, by rendering his service non-continuous. In the result, the grievor was advised that he was on his own for the purposes of obtaining accommodation and returning to his home terminal of Toronto.

Mr. Buckley then chose to return to Toronto on train 47, the train which, but for his booking rest, he would have operated. Another conductor, Mr. Ed Veloso, was assigned to train 47. Train 47 was operated by two locomotive engineers, one of whom, Locomotive Engineer Selby, had gone on duty earlier that day at Toronto at the same time as Mr. Buckley. When train 47 reached Oshawa, some fifty-one miles east of Toronto, Locomotive Engineer Selby was compelled to take mandatory rest, at approximately 20:25. The train could not lawfully proceed with only one locomotive engineer on duty in the cab of the locomotive. The Corporation's control centre had been aware of the developing situation, having been advised of the time limits confronting Locomotive Engineer Selby at or about 17:07. It appears that a tentative arrangement had been made with Conductor Veloso to have him ride in the head end of train 47 as a "second pair of eyes" for the duration of the forty minute run into Toronto. However, notwithstanding his initial indication that he would do so, Mr. Veloso subsequently declined, explaining that he had conferred with a legislative representative of his union, and felt that it was unsafe for him to leave the body of the train and his passengers. It does not appear substantially disputed that the legislative representative consulted by Mr. Veloso was Mr. Buckley, who was then a passenger on the train, and that contact was also made with Mr. Veloso's local union chairman, Mr. Rick Skilton, by way of a telephone call to his home.

In the result, the train was stopped at Oshawa, with Mr. Veloso declining to leave the body of train. Upon becoming aware of the presence of Mr. Buckley on board train 47, the control centre spoke with him about the possibility of becoming the second person in the locomotive cab. A transcript of a radio or telephone communication between Mr. Buckley and Control Operations Supervisor Brian Abbott discloses that Mr. Abbott communicated the request to Mr. Buckley, and eventually upgraded it into an order, whereby he was instructed to go on duty in the locomotive at the expiry of his rest, at 21:04. Mr. Buckley responded that he could not be forced to accept a call to work, and that he would do so only on his own conditions. He explained that that included being paid "over and above", a formula which would have resulted in Mr. Buckley receiving twelve hours' pay for the assignment, which was estimated to require less than an hour. Mr. Abbott responded that Mr. Buckley would be paid four hours' wages, which he asserted was in accordance with Mr. Buckley's rights under the collective agreement, which calls for the payment of a minimum day of four hours. Mr. Buckley retorted that he was under no obligation to accept a call, and that he would accept the call only if it was under his own conditions. The stand-off continued, until Mr. Abbott instructed Mr. Buckley that he was out of service pending investigation, and that he was to leave the train, presumably on the basis that his pass was no longer valid. It appears that the grievor then purchased a ticket from Conductor Veloso for the balance of the trip into Toronto.

The record discloses that train 47 was delayed some one hour and fifty minutes at Oshawa. The problem was eventually solved by coupling it to train 49, operating both trains to Toronto, arriving at approximately 22:54. As train 47 was already late because of other conditions unrelated to this incident, it was in fact approximately three hours late in its arrival, causing potential financial loss to the Corporation under its policy of providing a 50% credit on a passenger's next ticket in the event of a train arriving more than one hour late.

The Brotherhood alleges that Mr. Buckley, an employee of some thirty-one years' service with little or no prior discipline, was the victim of a deliberate attempt on the part of the Corporation's officers to "get him". It asserts that his discharge was without just cause, in bad faith, and was achieved in disregard of his right to a fair and impartial investigation prior to the assessment of discipline. Its counsel also stresses that the circumstance created on June 12 is of the Corporation's own making. He notes that Mr. Buckley is known as a conductor who operates safely, and argues that the Corporation comes to this matter with less than clean hands. In particular Counsel notes what he characterizes as the "sham" of the twenty minute break at Ottawa which the Corporation would invoke as a basis as asserting that the grievor was not on twelve hours' continuous duty, a practice which he submits is questionable from the standpoint of both safety and legality. Counsel further stresses that the grievor would not, in fact, have received any real time off at Ottawa, as he was occupied in turning his train at that location, doing paper work and that he would, in any event, have been put under pressure from the Ottawa station staff to immediately board the Toronto bound passengers. On the other hand, Counsel for the Corporation suggests that the time which the grievor used to turn his train and perform his paper work at Ottawa was excessive, and contributed to setting up the circumstance in which he would later attempt to claim payment on the "over and above" basis, effectively holding the Corporation to ransom. In rebuttal, Counsel for the Brotherhood stresses that it is not uncommon for conductors to negotiate the terms of extraordinary service with the Corporation, and that the "over and above" formula is itself regularly employed. Indeed, the record discloses that the grievor previously made such an arrangement, with the agreement of the Corporation, on at least one occasion in the past.

The facts disclose an obvious stress operating on both parties. The Corporation, on the one hand, is constrained by mandatory work limits placed upon its employees in turnaround service, and tries, to the best of its ability, to manage its trains so as to avoid the need to relieve crew members enroute, an option which obviously occasions considerable cost. On the other hand, the Brotherhood and grievor express concern as to the limits employees may be pushed to get around the mandatory rest rules and to operate their trains in such a way as to avoid the need for relief crews.

The Arbitrator considers firstly the issue of the disciplinary investigation. The thrust of the Brotherhood's argument is that the officer conducting the investigation refused to call as witnesses persons the Brotherhood feels should have been called, so as to make them available for cross-examination by the Brotherhood's representative. The Brotherhood maintains that there was a violation of article 73.2 of the collective agreement which reads as follows:

> **73.2** Employees may select a fellow employee or accredited representative to appear with them at investigations, will have the right to hear all of the evidence submitted and will be given an opportunity

through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee and his fellow employee or accredited representative will be furnished with a copy of the statement taken at the investigation.

Its Counsel refers the Arbitrator to the following cases: **CROA 1475, 1597, 1720, 1886** and **2041**.

Counsel for the Brotherhood asserts that the officer conducting the disciplinary investigation violated the standards of a fair and impartial investigation, and the obligation to give the Brotherhood an opportunity to ask questions of witnesses, by refusing to call as witnesses certain persons named by the Brotherhood. The Arbitrator cannot agree that the circumstances disclose a violation of article 73.2. The cases relied upon by the Brotherhood, and the interpretation of article 73.2 and similar provisions in other collective agreements rendered by this Office, do not endorse the view that the Brotherhood is free to name persons it chooses as witnesses, and thereby gain the opportunity to ask questions of them in the sense contemplated within the article. Rather, the spirit and letter of the article is that when witnesses are called by the Corporation, to the extent that such persons may give evidence which has a bearing on the employee's responsibility, the Brotherhood is to have a fair opportunity to ask questions. It is of course open to the Brotherhood to suggest witnesses, and it may be that refusal to call a particular witness will be at the Corporation's peril. But that choice remains the Corporation's. The Brotherhood is also entitled to receive copies of all documents in the possession of the investigating officer which bear on the investigation, and to have the opportunity to ask questions of witnesses who are examined. Those rights were observed in the case at hand, and no violation of article 73.2 of the collective agreement is disclosed.

The fundamental issue is whether the Corporation had just cause to discharge Mr. Buckley. The Arbitrator has great difficulty sustaining the employer's position in that regard. Firstly, it is less than clear that Mr. Buckley alone can be faulted for the delay of train 47. As Counsel for the Brotherhood stresses, the Corporation knew, or reasonably should have known, well in advance of the incident at Oshawa that it would be facing a crisis with respect to the staffing of train 47 past the time at which Locomotive Engineer Selby could no longer lawfully continue to work. It is understandable, of course, that the Corporation might to seek to minimize its labour costs. However in the case at hand, if causation is an element to be examined, the delay to the passengers occasioned by the events at Oshawa could equally have been avoided through alternate planning by the Corporation, or its willingness to incur some expenditures. It was obviously open to Mr. Abbott to accept the grievor's offer to do the work for payment "over and above", however unpalatable, if only to avoid delay to the passengers, and to deal with Mr. Buckley afterwards by way of discipline, if justified. For reasons he best appreciates, Mr. Abbott chose to let the train, and its passengers, await another conductor, apparently dispatched from Toronto.

In dealing with the grievor's conduct, the first question to be determined as an element of insubordination is whether Mr. Buckley was under an obligation to work when he was directed to do so by Mr. Abbott. There is, very simply, nothing in the collective agreement which the Arbitrator can find to sustain the suggestion of Counsel for the Corporation that the grievor was under any such obligation. Firstly, as a senior employee holding a regularly scheduled assignment, Mr. Buckley is not subject to being called, in any circumstance. He can, in other words, decline to work when asked to do so, other than in relation to his own assignment, or in *bona fide* emergencies. There is no suggestion before me that the time-on-duty disqualification of a crew member, a regular occurrence, is an emergency.

As an alternative argument, the Corporation suggests that the grievor was subject to article 13.2 of the collective agreement which states, in part "regularly assigned employees will make their regular assigned shift or run when they are available therefor...". Counsel for the Corporation seeks to characterize train 47 as being Mr. Buckley's assignment, arguing that he was therefore under an obligation to work as instructed. The Arbitrator can see no validity to that argument. At all material times Mr. Buckley had booked rest, and the train was properly assigned to Conductor Veloso. Article 13.2 of the collective agreement, which deals with the obligation of conductors to undertake their work "notwithstanding that trains may be late or running ahead of time" simply has no application in this circumstance. I am satisfied, on a review of the materials before me, that Mr. Buckley was under no obligation to accept a call to work. Moreover, he expressly explained that fact to Mr. Abbott, as is clearly reflected in the transcript of the conversation tendered in evidence.

I have some difficulty finding that the exchange between Mr. Buckley and Mr. Abbott, and the grievor's ultimate decision that he would only perform the work on the basis of an "over and above" payment, as he had done in the past, can fairly be characterized as insubordination. The employer clearly had no contractual right to call or order Mr. Buckley to perform the work in question. He, in turn, having been denied hotel accommodation or any transportation arrangement when he booked rest in Ottawa, as was his right, was obviously in no mood to be helpful. He was, however, at all times civil in his verbal exchange with Mr. Abbott. A review of the entirety of the material before me also suggests that there was a degree of prior tension between Mr. Buckley and Mr. Abbott, as well as other supervisors, occasioned in part by the grievor's established tendency to hold to the strict line of safety and staffing rules. There is little other explanation for the fact that, in the face of his ultimate refusal, Mr. Abbott ordered Mr. Buckley put off the train, notwithstanding that there was no suggestion that he was a disorderly passenger, or that he was on board other than in a lawful capacity, as a pass holder.

None of the foregoing comments should be construed as condoning or excusing the course of action ultimately taken by Mr. Buckley. From his perspective, putting it at its highest, he may have wanted to put the Corporation to prohibitive cost in an effort to prompt better planning in respect of the assignment and relief of crews. However, there can be little doubt that the niceties of that strategy would be lost on the delayed passengers. Unfortunately, the course which Mr. Buckley followed is of the sort which gives credence to those only too willing to condemn what they perceive as the excesses of some employees who are protected by a collective agreement. It is also difficult to reject out of hand the suggestion of Counsel for the Corporation that the grievor appeared to be more motivated by the opportunity for personal gain, rejecting the Corporation's offer of four hours' pay for some forty minutes' work, and insisting on a full twelve hours' pay for the same work. However, in the end the Arbitrator is compelled to determine, in a scenario which brings credit to neither Mr. Abbott nor Mr. Buckley, whether the grievor was in fact insubordinate, and therefore deserving of discharge.

On balance, I cannot conclude that he was insubordinate. As noted above, Mr. Buckley was not offensive or discourteous toward his supervisor. It does not appear disputed that if Mr. Buckley had been called at his home to perform relief work in the same circumstance, he would not have been liable to discipline for his refusal to do so. While the facts are obviously different, to the extent that Mr. Buckley was a passenger on the train, his right to refuse the work was no less real. While management's frustration at his response may be understandable, an arbitrator cannot convert it into a justification for discharge, much less the discharge of an employee of thirty-one years' service, with virtually no discipline against his record in the last twenty years.

In the alternative, even if I were to conclude that the grievor did act in a manner that was insubordinate, which I do not, I could not sustain the Corporation's decision to terminate his services. Given the length and exemplary quality of Mr. Buckley's service to the Corporation, as well as to CN previously, over a span of more than three decades, the Corporation's officers responsible for the decision to terminate him in this matter knew, or reasonably should have known, that discharge in a first instance of this kind would be grossly disproportionate to the infraction. As Counsel for the Brotherhood notes by way of analogy, in other cases running trades employees responsible for delays in passenger service by their illegal strike action have generally been dealt with by the assessment of demerits, short of discharge.

Even if it could be shown that under the collective agreement the Corporation had a right to order Mr. Buckley to work, a number of mitigating factors would suggest that discharge would not be an appropriate response. Apart from the grievor's own exemplary service of some thirty years, mitigating factors which a board of arbitration would examine would include the Corporation's own actions in allowing the situation to develop as it did at Oshawa on the evening of June 12, 1997. Moreover, the undenied fact that both the grievor and other conductors have, in similar circumstances, negotiated "over and above" payments would be a further factor to be considered in mitigation of the grievor's conduct. However, for the reasons related above, with the fullest reservations as to the poor judgement shown by the grievor and his supervisor, I am compelled to find that there was in fact no insubordination, and no cause for any discipline in the circumstances. While Mr. Buckley's actions might be characterized by some as disgraceful, they did not constitute insubordination or the violation of his contractual obligation to his employer.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost. It is to be

hoped that, in light of this unfortunate incident, the parties will work together to deal with the practical realities of observing mandatory rest regulations in ways most conducive to both safety and productivity.

December 15, 1997 **(signed) MICHEL G. PICHER**

ARBITRATOR