

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3010

Heard in Montreal, Wednesday, 9 December 1998

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Appeal the discipline (45 demerit marks) assessed A. O'Brien.

EX PARTE STATEMENT OF ISSUE:

On October 5, 1995 the grievor was the conductor on train 89 operating between Toronto and Sarnia. Approaching London during a period when the grievor was engaged in operational duties, the OTS attendant approached him with what was described as a minor problem. Following the aforementioned trip an investigation was held and Mr. O'Brien was assessed 45 demerit marks for failing to satisfactorily secure the safety of passengers travelling in car 03.

The Union appealed the discipline citing that the evidence did not substantiate discipline.

The Corporation has not approved the appeal without explanation.

FOR THE BROTHERHOOD: (SGD.) J. R. TOFFLEMIRE GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan - Senior Manager, Labour Relations, Montreal
B. E. Woods - Director, Human Resources and Labour Relations,
Montreal
J. C. Grenier - Consultant
J. N. Morello - Legal Counsel, Montreal

And on behalf of the Brotherhood:

J. R. Tofflemire - General Chairman, Oakville
A. O'Brien - Grievor

AWARD OF THE ARBITRATOR

The record reveals that the grievor, Mr. Arthur O'Brien, was the conductor on VIA train 89, operating from

Toronto to Sarnia on October 5, 1995. The train consisted of three passenger cars, and Mr. O'Brien had the services of an assistant conductor. It appears that the arrangement between them was that Mr. O'Brien would be responsible for the rear-most of the three cars, and the back half of the middle car while the assistant conductor, Mr. Rick David, was responsible for the car nearest the head end as well as the forward half of the second car.

It is not disputed that the passengers in the lead car were subject to an unfortunate display of rudeness by a drunken male passenger. It appears that between Toronto and London the individual in question, who was accompanied by two females and a young child, was physically abusive towards the child, abusive towards his female companion, on whom he spat a quantity of a beverage which he was drinking, and was verbally insulting to passengers in the immediate vicinity. It does not appear disputed that on one occasion he threw peanuts at a female passenger who objected to his conduct, calling her an "ignorant bitch". He also made sexually offensive comments to several female students seated nearby.

The record indicates that the on-board service person responsible for serving drinks in the car may have served a questionable amount to the individual in question. It would appear, however, that the OTS attendant did nothing to deal with the developing problem until one of the passengers demanded he go and get the conductor. The grievor's account, which is not disputed, is that he was approached by the attendant when the train reached London. He was then occupied with finalizing clearances for his train's movement, and asked the individual how he judged the severity of the conduct in question, to which the attendant replied that it would have been a two on a scale of one to ten. Based on that information Mr. O'Brien did not immediately proceed to the lead car, but continued to finish the work in which he was engaged.

When the train reached London, however, Mr. O'Brien did deal with the matter. It seems that as he was standing on the platform the drunken patron approached him, demanding that he be provided his own private rail car, indicating that he was willing to pay for it. There appears to be little doubt that from that point onwards Mr. O'Brien dealt with the matter with some expedition, and in a manner with which the Corporation does not question. He immediately removed the offending passenger and his party, placing them in an isolated location at the extremity of another car, where they were kept under supervision until the train reached Sarnia. Further, he telephoned the Sarnia police from Strathroy, arranging for them to meet the train and take the offending individual into custody. He

also dealt with what he estimated to be approximately twenty extremely disturbed passengers, asking them to write written reports of what they had observed, which a number of them did.

A careful review of the reports of complaint written by the passengers, and in particular separate letters sent to the Corporation by two of them, indicates that the quality of patrolling of the train failed to detect any problem in the car in question over a substantial period of time, being approximately three hours while the train travelled from Toronto to London. It also appears from the evidence that at London a company supervisor took over from one of the locomotive engineers, to operate the train from London to Sarnia. When that individual, Via Manager Train Services Don Patterson, was approached by the grievor at London for advice as to how to handle the problem of the obnoxious passenger Mr. Patterson declined to get involved, stating simply that he was there to operate the locomotive.

When the entire sequence of events is reviewed carefully, the Arbitrator is not persuaded that the failings of Mr. O'Brien are sufficient to justify the assessment of forty-five demerits, although I am satisfied that some measure of discipline was deserved. Firstly, I can find no substance to the suggestion that Mr. O'Brien was himself rude to the passengers when he went to the car to attempt to resolve the problem. While he may have made an unfortunate comment to the effect that he had been doing paper work, or that involvement with the police would involve further paper work, his actions in respect of the offending passenger clearly responded to the complaints which he had received and, it is agreed, put an end to the problem. Mitigating factors also include the fact that he was not advised of a plainly deteriorating situation by the OTS attendant who was at all time present in the car in question. The attendant's willingness to provide drinks to the passenger for tips is called into question in a letter from at least one of the complaining customers.

The fact remains, however, that Mr. O'Brien was responsible for ensuring that order was maintained in all three cars which were under his responsibility. I must agree with the Corporation that the failure on his part to detect a 100% problem of such severe proportions over the course of a period of some three hours does call into question the level of vigilance which he applied in patrolling the cars of his train during its operation between Toronto and London. I cannot agree with the Corporation, however, with respect to the suggestion that he was himself disrespectful to passengers, or acted other than in a fully responsible manner from the time that he became aware of the true nature of the problem.

In considering the appropriate measure of discipline in the case at hand, regard must also be had to the grievor's prior record. It is not disputed that his prior service with the Corporation has been without any discipline whatsoever. In addition, prior to his being hired by the Corporation in 1990, he served for some five years as an employee of CP Rail where he was also without any discipline. When all of the factors are taken into account, including the apparent failure of a responsible company officer to provide any counselling or assistance to the grievor in the face of the difficult situation he faced, I am compelled to the conclusion that the assessment of fortyfive demerits is excessive. In my view fifteen demerits would have been an appropriate measure of discipline to bring home to the grievor the importance of being more vigilant in patrolling his train during a three hour period of operation.

The grievance is therefore allowed, in part. The Arbitrator directs that fifteen demerits be assessed against the grievor for the incident of October 5, 1995. It is also the Arbitrator's recommendation that, in light of the grievor's prior good service, the incident in question should be given minimal weight in considering his entitlement to gain access to further service with the Corporation in the capacity of a locomotive engineer, a position for which he is already qualified.

December 14, 1998

MICHEL G. PICHER