

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3421**

Heard in Montreal, Thursday, 16 April 2004

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)
EX PARTE**

DISPUTE - UNION:

Concerning a written reprimand and twenty-five demerits assessed to Mr. Kevin Toal

UNION'S STATEMENT OF ISSUE:

On August 16, 2002, Mr. Toal attended an investigation for his alleged "failure to attend an investigation on Friday, August 2nd, 2002". During the course of the investigation he was asked at question 9: "Q9. Given the evidence presented please explain why you failed to attend the investigation scheduled for Friday, August 2, 2002?" His answer was, in part: A9 "'Cause I had to bring my children home. I advised Tony that I wouldn't be back until 3:10 P.M. 'cause the Senneterre train leaves 3 times a week ...".

Some five months later, on January 9th, 2003, Mr. Toal was served a notice to appear for an investigative statement for alleged "failure to comply with Company rules and regulations relating to children travelling alone policy on August 2nd, 2002." He subsequently received a written reprimand for an alleged violation of the said policy. It is the Union's position that the investigation in question was not in compliance with article 24.2 in that "investigations in connection with alleged irregularities will be held as quickly as possible." Furthermore, Mr. Toal made every effort possible to comply with the said policy but the physical circumstances made complete compliance impossible.

When served with the aforementioned notice to appear on January 9th, 2003 Mr. Toal reacted with great emotion. He went to Ms. Carol Barbosa (Team Leader) and expressed his dismay using

colloquial terms. For this he was served a second notice to appear for alleged "conduct unbecoming a VIA Rail employee".

It is the Union's position that when Mr. Toal's history, over the previous eight months is taken into account, his reaction on January 9th, is totally understandable. Virtually all of the discipline he received from August of 2002 onward is related to the date of August 2, 2002, when he was investigated for alleged "unauthorized leave of absence". That one single event led to continued investigations, which we claim were as a result of a personal vendetta by his supervisor Ms. Leslie Cowan.

Accordingly, we are asking that the aforementioned discipline be expunged from his record, that he be reinstated to his employment forthwith, and that he be compensated for all lost wages and benefits.

DISPUTE - CORPORATION:

A Concerning a written reprimand assessed to Mr. Kevin Toal for failure to comply with the Company's rules and regulations relating to "Children Travelling Alone" (CHTA) policy.

B Concerning the discipline of 25 demerits assessed to Mr. Toal for conduct unbecoming a VIA Rail employee which led to his dismissal due to the accumulation of 80 demerits.

CORPORATION'S STATEMENT OF ISSUE:

A On August 1st, 2002, Mr. Toal made travelling reservations for his two daughters and himself to go to Montreal from Toronto. On arrival, Mr. Toal proceeded to send his children alone on to train #603 leaving for Senneterre. As a Telephone Sales Agent since June 1997, Mr. Toal was aware of VIA's Children Travelling Along policy with which he failed to comply.

The Union's position is that unexpected circumstances and numerous inconveniences encountered by Mr. Toal on his arrival in Montreal made it impossible for him to comply with the CHTA policy.

The Corporation has declined the grievance and maintains the written reprimand assessed was appropriate discipline in the circumstances.

B On January 9th, 2003, Ms. Leslie Cowan, Manager of the Telephone Sales Office (TSO) served Mr. Toal a notice to appear for an investigation. After reviewing the notice Mr. Toal stormed towards Ms. Barbosa, Team Leader with the TSO with

extreme anger and began shouting derogatory remarks at her about Ms. Cowan. Mr. Toal used profane and threatening language with Ms. Barbosa to demonstrate his discontent about the investigation notice. His behaviour within the public working place was confrontational, intimidating and offensive towards Ms. Barbosa and the Corporation. His comments were uncalled for and he publicly belittled his superiors.

The Union's position is that Mr. Toal's allegations stem from his reaction to being served a notice to appear for an investigation. They do not deny the behaviour and acknowledge that Mr. Toal's mannerism and tone of voice were abstract and that he was simply "just venting". Moreover, not denying the wording used the Union finds it neither offensive nor threatening.

The Corporation has declined the grievance and maintains the discipline of 25 demerits assessed was appropriate discipline in the circumstances.

FOR THE UNION: FOR THE CORPORATION:

(SGD.) D. OLSHEWSKI (SGD.) L. LAPLANTE

NATIONAL REPRESENTATIVE FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

A. Iacono - Sr. Officer, Labour Relations, Montreal
 E. J. Houlihan - Sr. Manager, Labour Relations, Montreal
 L. Laplante - Sr. Officer, Labour Relations, Montreal
 L. Cowan - Manager, Telephone Sales Office, Toronto
 C. Barbosa - Team Leader, Telephone Sales Office, Toronto

And on behalf of the Union:

D. Olszewski - National Representative, Winnipeg
 K. Toal - Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns two heads of discipline against employee Kevin Toal. The first is the assessment of the reprimand for his alleged violation of the Corporation's travelling alone policy on August 2, 2002. The second is the assessment of twenty-five demerits for conduct unbecoming an employee by reason of intemperate and abusive language addressed to a member of management.

The Arbitrator is satisfied that the reprimand must stand. The facts in relation to that discipline are not contested. On

August 2, 2002, the grievor was involved making travel arrangements for his children, initially from Toronto to Montreal in his company, and then onward from Montreal to Senneterre, when his two daughters, aged 11 and 13, would travel alone. The evidence is clear that Mr. Toal did not take sufficient steps to have his children duly processed under the Corporation's policy, thereby failing to ensure that they would be properly supervised by a Service Manager during the course of their travel from Montreal to Senneterre. That aspect of the discipline must therefore be sustained. Given the grievor's lengthy absence from the workplace, the Arbitrator cannot sustain the objection of the Union as to the timing of the investigation. Nor does the record disclose any violation of article 24 of the collective agreement with respect to the conducting of a fair and impartial investigation.

The second head of discipline concerns the assessment of twenty-five demerits for a verbal outburst on the part of Mr. Toal. The evidence establishes that on January 9, 2003 the grievor was presented with a notice to attend a disciplinary investigation relating to his alleged failure to observe the Corporation's policy with respect to children travelling alone, arising out of the incident of August 2, 2002. Because the grievor believed that the person who gave him the notice, Ms. Leslie Cowan, was "out to get him" the receipt of that notice prompted an angry reaction on his part. It is not disputed that he proceeded to the Guest Service area lounge in Union Station in Toronto where he met Team Leader Carol Barbosa, a member of senior management. He then used loud and profane language, including "four letter" words, to describe Ms. Cowan and express his intention to "get her" because of the disciplinary investigation notice which she had given to him. It appears that shortly thereafter he repeated similar words to two red caps, also within earshot of other people in the area.

The issue is whether the assessment of twenty-five demerits was appropriate in the circumstances. A related question is whether it is appropriate in the circumstances for the Arbitrator to exercise his discretion to direct a reduction of penalty.

I am satisfied that the conduct of the grievor was clearly unacceptable and deserving of discipline. In normal circumstances I would find that the assessment of twenty-five demerits was well within the appropriate range of penalty response.

There are, however, mitigating factors to be considered. It appears to the Arbitrator that a substantial part of the grievor's disciplinary record which was then outstanding flowed from events following a car accident in which he was involved, which prompted an extensive leave of absence over the summer and early fall of 2002. He received a substantial number of demerits relating to the consequences of that single incident. While his prior record would have placed Mr. Toal at sixty-five demerits, after the assessment of twenty-five demerits, there is reason to consider that a suspension, as a last chance measure, would be appropriate in the circumstances. In mitigation it is also apparent that the grievor did express regret for his words to Ms. Barbosa at the disciplinary investigation.

I am therefore satisfied that this is an appropriate case for an substitution of penalty, albeit not one for an order of compensation. The Arbitrator directs that the twenty-five demerits assessed against the grievor be struck from his record, and that the period from the termination of his employment to his reinstatement be recorded as a suspension for conduct unbecoming, and that he be returned to work without loss of seniority and without compensation, with his disciplinary record to stand at forty demerits.

April 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR