CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1481

Heard at Montreal, Tuesday, March 11, 1986

Concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

Appeals submitted on behalf of N. Leger and J. Leblanc, On-Board Services probationary employees of VIA Rail Canada Inc., claiming they were unjustly discharged for certain off-duty irregularities. VIA Rail Canada Inc., claims the matter is not arbitrable.

BROTHERHOOD'S STATEMENT OF ISSUE:

Both N. Leger and J. Leblanc were probationary employees when they were dismissed for alleged irregularities outside of their regular tour of duty.

Throughout the grievance procedure the Corporation claimed that the matter was a "closed issue" on the basis that article 11.3 of the VIA Agreement No. 2 does not entitle probationary employees found unsuitable to grieve discharge.

The Brotherhood submitted grievance appeals claiming that their off-duty behaviour did not warrant dismissal and further claimed that the collective agreement articles 24.21 and 25 and the Canada Labour Code Part V, section 155 (1) contains the provision "… for final and binding settlement without stoppage of work by Arbitration or otherwise, of all differences between the parties …".

The Brotherhood requests that the Arbitrator consider this matter arbitrable and hear the issue at a later date.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
FOR: NATIONAL VICE-PRESIDENT

There appeared on behalf of the Corporation:

M. St-Jules	– Manager Labour Relations, Montreal
J. Kish	– Personnel and Labour Relations Officer, Montreal
C. O. White	– Officer Labour Relations, Montreal

And on behalf of the Brotherhood:

G. T. Murray	– Representative, Moncton

PRELIMINARY AWARD OF THE ARBITRATOR

The Employer has challenged the arbitrability of the discharge grievances referred to CROA on behalf of Ms. N. Leger and Ms. J. Leblanc. It alleges that the grievors were terminated because it was concluded that they were unsuitable for the positions they were hired to perform. And, because their terminations occurred during the course of their probationary periods it was argued, pursuant to 11.3 of VIA Agreement No. 2, that their grievances were not arbitrable.

The Trade Union does not deny the fact that the grievors were released from employment during their probationary periods.

Article 11.3 of agreement no. 2 reads as follows:

> 11.3 Employees will be considered as on probation until they have completed 60 days of actual work in a position covered by this Agreement. **Employees found unsuitable shall not be entitled to grieve with respect to discharge**, but with this exception they shall have access to the Grievance Procedure. (emphasis added)

At issue in this case is the question of whether article 11. of agreement no. 2 is in conflict with the requirements to extend to all employees the benefits of "arbitration or otherwise" as statutorily mandated by section 155(1) of the **Canada Labour Code** Part V:

> Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation

Several decisions of the Provincial Superior Courts have ruled provisions contained in collective agreements denying probationary employees access to the grievance and arbitration procedures are contrary to the public policy considerations that are contemplated by like provision to section 155(1) of the **Canada Labour Code**. That is to say, parties to the collective agreement have been prohibited from eliminating any differences involving probationary employees from the dispute settling mechanism provided in the grievance procedure and ultimately arbitration. As a result such provisions restricting access to the grievance and arbitration procedure have been declared null and void.

The case of **International Association of Firefighters, Local 268 and City of Halifax** (1982) 50 N.S.R. (2d) 299 was relied upon by the Trade Union and is particularly appropriate because the governing labour legislation as reflected in section 40 of the **Trade Union Act** (NS) reads exactly the same as S155(1) of the **Canada Labour Code**. In that decision the Nova Scotia Supreme Court followed a like decision by the Divisional Court in **Re Toronto Hydro Electric and CPE** 1980 29 OR (2nd) 18. In that decision the court ruled that probationary employees held like entitlements to adjudication of their differences at arbitration as is the case with regular or permanent employees. In relying on the Hydro decision the court concluded:

> In my opinion, any provision in a collective agreement which, like the exclusion clause in article 16.02 of the agreement before us, purports to exclude any class of employees from their statutory right to arbitration of all "differences" is repugnant to the principle of mandatory arbitration proclaimed by s. 40 and is therefore void. The parties have no power to evade or qualify the statutory command. They thus cannot exclude probationary employees from "the right to grieve dismissal".

It is also important to note that the court distinguished the decision of the S.C.C. in **Re Leeming** (1981) S.C.R. 124 on the basis of the different wording of the governing **Labour Relations Statute**. I mention this only because the Leeming decision was referred to by the Company in its written brief in support of the validity of article 11.3 of agreement no. 2.

It suffices to say that I am bound by the decision of Superior Courts rendering null and void provisions of collective agreements that offend the public policy considerations contained in the governing Labour Relations Legislation. In this particular case the parties in their denying access to probationary employees to the grievance and arbitration procedures have indeed offended section 155(1) of the **Canada Labour Code** Part V. Accordingly I am obliged to declare article 11.3 and other related provision of agreement no. 2 null and void.

As a result, the grievors' grievances are arbitrable.

(signed) DAVID H. KATES
ARBITRATOR

On Wednesday, July 9, 1985 there appeared on behalf of the Company:

C. O. White	– Labour Relations Officer, Montreal
D. J. Matthews	– Manager Human Resources, Moncton
R. E. Belliveau	– Assistant Supervisor Employee Service Center, Moncton

And on behalf of the Brotherhood:

G. T. Murray	– Representative, Moncton
E. A. Powell	– Representative, Halifax
N. Leger	– Grievor
J. Leblanc	– Grievor

AWARD OF THE ARBITRATOR

The grievors were hired on June 1, 1985 as waitresses on VIA's Moncton, N.B. – Montreal, P.Q. passenger run. During their probationary period they were involved in an incident on July 19, 1985 that resulted in their terminations.

It is common ground that on that day they entered a VIA Passenger Train Moncton – Montreal (return) while off duty and did not purchase train tickets. During the course of the trip they allegedly partook of certain meal and sleeping services without paying for the same.

It is clear that the Employer is not charging the grievors with theft. Nonetheless, the Company has alleged that the grievors were in violation of a Company directive requiring them to pay, while on their own time, for train tickets and other train services that are normally provided to the travelling public.

The grievors' excuse indicated that because they were new employees they were not aware of the Company's travelling directive.

The uncontradicated evidence established, however, that the grievors were provided with a copy of the Company's travelling directives as part of the induction procedures given them as new employees. The grievors obviously did not read these directives thereby precipitating the misconduct that resulted in their terminations.

The scope of arbitral review in cases involving the termination of probationary employees is succinctly set out in **Re Pacific Airlines Ltd. and Canadian Air Line Flight Attendants Association** (1981) 30 L.A.C. (2d) 68 (Sychuk) at page 76:

> … My review of arbitral decisions leads me to the conclusion that the following principles and standards are applicable when the parties have not expressly set out in the collective agreement the standard of review for the termination of a probationary employee, namely:
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> 1. Where a collective agreement expressly provides for a probationary period but does not contain an express provision setting the standard of review for the termination of a probationary employee, the decision of the Employer to terminate the probationary employee shall not be set aside unless the said decision is arbitrary, discriminatory or in bad faith.
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> 2. The onus is on the Employer to establish a *prima facie* case that the Employer had grounds to terminate the probationary employee and that said decision was made *bona fide*, and if the Employer does so, the onus then shifts to the employee to prove that the said decision was arbitrary, discriminatory or in bad faith, and if the employee is unable to do so, the decision to terminate the probationary employee shall not be set aside even if the arbitrator would, on the particular facts of the case, have come to a contrary conclusion.

In having regard to the above I am satisfied that the Company has satisfied the onus of providing a *prima facie* case with respect to the grievors' misconduct. The onus of establishing that the Company acted in an arbitrary, discriminatory or bad faith manner in securing the grievor's discharges therefore shifted to the Trade Union.

And, as the **Re Pacific Airlines Ltd**. case (*supra*) suggests although an Arbitrator may disagree with the Company's decision, I must be satisfied that the discharges were affected for allegedly improper purposes Since the Trade Union could not demonstrate any bad faith on the Company's part in its decision to discharge, I am duty bound to dismiss these grievances.

(signed) DAVID H. KATES
ARBITRATOR