CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1833

Heard at Montreal, Wednesday, 12 October 1988

Concerning

VIA RAIL CANADA INC.

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The assessment of fifteen demerit marks to the record of Mr. R. Albert for undue familiarity with guests while on duty aboard VIA Train 2, August 2-4, 1987.

JOINT STATEMENT OF ISSUE:

While employed as a Senior Service Attendant, Mr. Albert was observed serving guests in the Dome area of the Park Car after hours.

Mr. Albert was asked to provide a written statement of his recollection of the incident. He was subsequently assessed 15 demerit marks for undue familiarity with guests.

The Brotherhood contends that the Corporation has violated Articles 24.5, 24.7 and 24.8 of Agreement #2, by not giving Mr. Albert a hearing, that the Corporation is inconsistent in its application of discipline for the same offense, that the investigator's report is unacceptable due to certain irregularities, that Mr. Albert was not on duty at the time in question and therefore was not subject to abide by the rules.

The Brotherhood requests that the 15 demerit marks be removed from his file.

The Corporation disagrees with the Brotherhood's assertions and has denied the request.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) TOM MCGRATH	(SGD.) A. D. ANDREW
NATIONAL VICE-PRESIDENT	DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. O. White	– Labour Relations Officer, Montreal
C. Pollock	– Labour Relations Officer, Montreal
J. R. Kish	– Personnel & Labour Relations Officer Customer Services, Montreal
D. Fisher	– Observer

And on behalf of the Brotherhood:

T. N. Stol	– Regional Vice-President, Toronto
R. Albert	– Grievor

AWARD OF THE ARBITRATOR

In August of 1987, the Corporation was in possession of a report by a private investigator which, if true, would disclose that during the trip of Trains 2/10 Mr. Albert did, on one occasion, engage in a form of socializing with passengers that would fairly be characterized as "undue familiarity with guests." For reasons that are not fully explained, however, the incident in question, including the fact that the grievor's conduct was not acceptable to the Corporation, was not drawn to his attention for a period of nearly three months. It was only on October 30, 1987 that the grievor was advised that he was being assessed fifteen demerits for the incident in question.

It is, in my view, prima facie inconsistent with the exercise of an employer's authority to impose discipline to delay any communication whatever respecting the incident giving rise to the discipline to the employee concerned for a period of close to three months. From a practical standpoint the employee is put at a severe disadvantage, as he or she may have no recall of an event to which the employee attached no particular significance at the time but for which the Corporation has retained a documented negative report from the outset. In the circumstances of this case I find it difficult to conclude other than that the Corporation effectively acquiesced in the grievor's conduct on the occasion in question by failing to bring the matter to his attention for the period of time disclosed.

Assuming, without finding, that the reason for the Corporation's non-disclosure was to allow it to await a second and more serious incident without "tipping off" the employee that he was under scrutiny, I would find it equally difficult to square that approach with the fair administration of an enlightened system of progressive discipline. If the Corporation had communicated to Mr. Albert that it was aware of the incident of August, 1987 and was imposing discipline upon him for that event, there might well never have been a second incident, which has become the subject of his discharge and a separate grievance (*see* ***CROA 1834***). It is plainly inconsistent with sound principles of labour relations for an employer to "lie in the bushes" with respect to an incident for which it knows it can discipline an employee, knowingly doing nothing to correct his conduct, and subsequently resurrecting the incident and imposing discipline for it only when it believes it has evidence to prove a second and more serious incident of misconduct.

Putting it at its highest, in the instant case the Corporation unilaterally followed a course of conduct consistent with acceptance on its part of the actions attributed to the grievor in the investigator's report. In these circumstances the grievance must be allowed. The demerits assessed against the grievor shall be removed from his record forthwith. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

OCTOBER 14, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR