CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2885

Heard in Montreal, Thursday, 11 September 1997

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Suspension (90 days) and indefinite restriction assessed P. Ethier.

EX PARTE STATEMENT OF ISSUE:

On July 27, 1995, Conductor P. Ethier was assessed a ninety (90) day suspension and a restriction from occupying the position of Conductor and Assistant Conductor on VIA trains for allegedly engaging in unacceptable language and conduct toward passengers, co-workers and superiors.

The Corporation investigated the foregoing alleged occurrences separately on June 8, June 30 and July 4, 1995. The discipline was issued in an untimely manner on July 27, 1995.

The Union submits that, in view of all of the circumstances, Mr. Ethier's behaviour did not warrant the measure of discipline issued. In the first instance, Mr. Ethier encountered numerous deficiencies and anomalies that are solely attributable to decisions taken by the Corporation. Second, Mr. Ethier was suffering from severe stress and depression, which condition was brought to the attention of the Corporation during the investigation process.

The Union requests that the suspension and restriction be reduced. The Corporation has declined the Union's appeal.

FOR THE UNION:

(SGD.) N. MATHEWSON
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Officer, Labour Contracts, Montreal
J. P. Grenier	– Witness

And on behalf of the Union:

G. J. Binsfeld	– Vice-General Chairman, Fort Erie
G. Bird	– Vice-General Chairman, Montreal
M. P. Gregotski	– General Chairman, Fort Erie
P. Ethier	– Grievor

AWARD OF THE ARBITRATOR

The material establishes, to the satisfaction of the Arbitrator, that a number of incidents which occurred between May 9 and May 28, 1995 reflect a certain degree of irregular conduct on the part of Conductor Ethier, the sum total of which justified the assessment of a significant degree of discipline. While it is unnecessary to deal with the details of the various incidents, they include overly familiar conduct with passengers, improper practical jokes directed at other employees, the undue expression of criticism of the Corporation in front of passengers and, in one instance, the putting of a supervisor off a train, albeit the grievor was unaware of the individual's rank.

The real issue before the Arbitrator is the appropriate measure of discipline. Following disciplinary investigations, the grievor was suspended for ninety days and subjected to an indefinite demotion to yard duty. In the end, that demotion lasted one year, causing a significant reduction in the grievor's earnings.

In a recent award, this Office had occasion to consider the appropriateness of combining penalties, including the assessment of demerits in conjunction with a demotion. In **CROA 2876**, the Arbitrator found that the simultaneous assessment of demerits and the imposition of an indefinite demotion was out of keeping with industry standards and beyond what was necessary for the purposes of rehabilitative discipline. In that case, which involved CROR rules infractions, the Arbitrator commented, in part, as follows:

> The Arbitrator deals firstly with the issue of demotion. Based on the material filed, and in particular the grievor's prior record of apparent inattention or indifference to operating rules which are safety sensitive, the grievor's demotion from the position of B&B foreman is amply justified. While the demotion is said to be permanent, the Arbitrator is satisfied that the comments made in **CROA 1697** and **CROA 2877** with respect to the ongoing discretion of the Company to return the grievor to a foreman's position, should he demonstrate in the future that he has the attributes to safely discharge that function, apply in this case. On the whole, the Arbitrator cannot disagree that the Company was justified in removing the grievor from the duties and responsibilities of a B&B foreman.
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> The next issue becomes whether the simultaneous assessment of thirty demerits is justified in the circumstances. As acknowledged in Canadian arbitral jurisprudence, demotion is an extraordinary form of discipline, tending as it does to abridge seniority rights and permanently impact an employee's earning capacity (s*ee, e.g.,* **Re Toronto Electric Commissioners and Canadian Union of Public Employees, Local 1** *(1990), 19 L.A.C. (4th) 105 (Springate)*). The Company has drawn to the Arbitrator's attention three prior awards of this Office in which violations of Rule 42 resulted in the assessment of demerits or, alternatively, a demotion from the rank of foreman (*see* **CROA 1236, 1622**, *and* **1735**). Significantly, however, no case is drawn to the Arbitrator's attention in which an employee has suffered both the serious consequence of a permanent demotion and the simultaneous assessment of a substantial measure of demerits for the same infraction. A review of the decisions of this Office indicates that over many years the general industry practice has been that demotion stands alone as discipline, and is not augmented by demerits (*see, e.g.,* **CROA 558, 715, 1038, 1321, 1664, 1698,** *and* **1779**).
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> The purpose of industrial relations discipline is not to punish or inflict hardship for its own sake. Discipline is to be fashioned so as to protect the legitimate interests of the employer and to rehabilitate the employee by bringing to his or her attention the need to take corrective action by avoiding the conduct or errors of judgement which prompted the discipline. In the case at hand, the permanent demotion of Mr. Byrne from the position of B&B foreman has substantial financial consequences for his future earnings. I have little doubt that the imposition of that demotion will, of itself, serve to communicate to him in clear terms the need to exercise greater care in all aspects of his work within the track maintenance forces of the Company while also protecting the Company against any similar incidents. I must agree with the Brotherhood that in the circumstances of this case the apparently unprecedented assessment of demerits superimposed upon the permanent demotion of the grievor is excessive. The interests of the Company are sufficiently served by the removal of the grievor from a position in which he might again cause a risk to persons or equipment. As noted above, the rehabilitative message to Mr. Byrne is amply

> communicated in the ongoing reduction of his earning and earning capacity by reason of his demotion. For these reasons I am satisfied that the further assessment of thirty demerits is not warranted in the circumstances, and that the demerits in question should be removed from the grievor's record.

At a minimum, the above analysis would suggest that an employer seeking to rely on the double punishment of suspension and demotion bears an onus of demonstrating that such a two-pronged penalty is appropriate, if not necessary, for the purposes of rehabilitation. I am not persuaded that that is demonstrated in the case at hand. Firstly, there are a number of mitigating factors of significant weight to be taken into account as regards Conductor Ethier. He is a long service employee in the railway industry, having commenced his employment with Canadian National in 1973, transferring to the service of the Corporation in 1993. Mr. Ethier has had a generally positive discipline record over the years and, as evidenced in the material filed before the Arbitrator, has been the subject of a number of letters of compliment and commendation during the course of his service with VIA Rail. As the record discloses, the aberrant conduct of Mr. Ethier during a brief period in May of 1995 is apparently related to the suffering of a degree of personal stress, for which he eventually obtained medical assistance through the Corporation's EAP service. On the material before the Arbitrator, there is no question of the quality of the grievor's service and his dedication to the advancement of the Corporation's business. Indeed, as noted in a Corporation document, his exemplary work in yard service, which resulted in a further commendation, prompted the Corporation to return Mr. Ethier to road service after a one year period of demotion.

All things considered, I am satisfied that the assessment of a three month suspension, layered on top of a one year demotion, with all of the reduction in earnings and positive work opportunities which that implies, is an excessive burden of discipline in the case at hand, and is beyond what the Corporation should have seen as reasonably necessary to convey the appropriate rehabilitative message to the grievor. In my view the assessment of the demotion would, of itself, have amply satisfied the Corporation's legitimate needs.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the ninety day suspension be struck from the grievor's record, and that he be compensated for that period for his wages and benefits lost, calculated at the rate of earnings which he would have had in yard service.

September 15, 1997

(signed) MICHEL G. PICHER
ARBITRATOR