CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4692

Heard in Montreal, July 9, 2019

Concerning

VIA RAIL CANADA INC.

And

UNIFOR NATIONAL COUNCIL 4000

DISPUTE:

The assessment of 60 demerits and the subsequent discharge of Senior Station Attendant, C. Duval on January 26, 2018, regarding his accessing and disclosing the personal information of an employee to other employees on November 20, 2017.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Union submits that the grievor was acting within the parameters of a Union officer dealing with the subject of estimated earnings for a part-time employee whom worked overtime hours in comparison to the earnings of other employees. This part-time employee – the complainant – learned of the grievor drawing these comparisons and filed a complaint to the Corporation contending a breach of her privacy.

The Union contends that the rates of pay are not a secret. Rates are captured in the collective agreement of which copies are posted online for all to see. Lastly, the Union contends that the Corporation did not conduct their investigation in a timely manner as the collective agreement provides.

Given the mitigating circumstances, the Union contends that the assessment of 60 demerits that caused the grievor to be discharged is excessive. The Union requests that these demerits be expunged and that the grievor be reinstated to service with the Corporation forthwith.

The Corporation contends that the level of discipline is appropriate and has therefore declined the Union's contentions and grievances

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

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The Corporation contends that the decision to terminate the grievor's employment was appropriate given that its investigation revealed that on the balance of probabilities the grievor intentionally accessed another employee's (complainant's) personal financial information, and disclosed that information to other employees without the Complainant's consent.

Although the Corporation takes note of the Union's contention that Mr. Duval was intervening on a union matter at the time of his privacy breach, it considers the inappropriate access to, and use of, the Complainant's personal information during that process to be a separate and distinct issue that represents a serious violation of the Corporation's policies and the law.

In considering what if any aggravating factors may have existed in the grievor's case, the Corporation considered the grievor's complete disciplinary history and other complaints that had been made against the grievor, including to the Ombudsman. Additionally, the Corporation considered as aggravating factors the fact that the grievor showed no remorse, accepted no responsibility for wrong-doing and was not honest and forthright during the investigation.

As regards the investigation, the Corporation contends that it acted in a diligent and reasonable manner in the circumstances, some of which were particularly difficult given the grievor's allegations directed at managers and other colleagues.

The Corporation contends that the level of discipline is appropriate and has therefore declined the Union's contentions and grievances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. W. Kennedy	**(SGD.) K. Chapados**
National Representative	Specialist Advisor, Employee Relations

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Norton Rose, Montreal
L. Mayes	– Senior Manager, VIA West, Vancouver
K. Chapados	– Specialist, Labour Relations, Montreal

And on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
D. Kissack	– President, Winnipeg
L. Hazlitt	– Regional Representative, Winnipeg
D. Andru	– Secretary Treasurer, Toronto
C. Duval	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

The grievor, a Senior Station Agent whose service date is April, 1996, was discharged as a consequence of the imposition of 60 demerits for "Violation of the Code of Ethics and Company Policy in disclosing personal and confidential employee

information on November 20, 2017". The substantial questions to be determined are whether or not there was just cause for the imposition of discipline in the circumstances, and if so, whether the penalty imposed was within the range of reasonable disciplinary responses to the situation.

The Union raised a preliminary objection to the timeliness of the investigation and subsequent imposition of discipline. The event for which the grievor was disciplined occurred on November 20, 2017, and was brought to the Company's attention the following day. The investigation was held on January 10, 2018. The delay was thus slightly over seven weeks.

Article 24.2 of the collective agreement provides in part that:

> *Investigation in connection with alleged irregularities will be held as quickly as possible.*

The Company had no particular explanation for this delay, except to say they were bound to be disruptions in schedules and staff over the holiday period. That might be considered a reasonable excuse for, say, the two-week period over Christmas and New Year's but is not sufficient for the delay which occurred. More convincingly, the Company argued that there was no substantial prejudice to the grievor, since this was not a case in which memories of events were important, as the matter depends essentially on a written communication. While I consider that the delay between the events in question and the holding of the investigation was excessive, it is not necessary to decide the matter on this ground. The matter was fully heard on the merits, to which I now turn.

On November 21, 2017 a fellow employee, herself a Union Officer, complained to the Company that the grievor, Local Chair of the Union, alleging that the grievor

> "*Violated my privacy by disclosing my private financial information to other employees and union officials".*

The alleged violation of privacy is contained in an e-mail sent by the grievor to the complainant, with copies to two others, apparently union members, on November 20th. This e-mail was a response to an e-mail sent to the grievor by the complainant with copies to two other union members on the same day. The subject of this correspondence was the calling agreement, a local agreement as contemplated by the collective agreement. It appears that the local calling agreement, which had been in effect for many years, had been the subject of complaint by some employees, who felt that it did not appropriately balance the respective interests of full-time and part-time employees. The local union and the local management had had negotiations over this, and the grievor, as it appears he was entitled to do, invoked the provision of the collective agreement allowing either party to give 30-day notice of revocation of the local agreement, the result being that the provisions of the collective agreement would then govern the calling procedure.

The complainant, a part-time employee, wrote to the grievor as noted, urging the retention of the current local calling agreement and calling for a vote of the members. The grievor's reply included the following:

> *And let's be frank here since you are so vocal about this. You are the one most impacted by this agreement being possibly cancelled. Of course this local calling agreement has worked great for you under the conditions and if I was you I would not want to see any changes made. After all, where else do you find a part-time employee making over*

> *$75,000 a year and already over 15K of overtime being the second highest earner in Winnipeg #1 one agreement? Brigitte, you make more than full-time employees that have been here more than 20 years and you don't even have four years of CCS. If you don't see an issue with that I would be seriously concerned. And to make matters wors[e], you are a union officer. This union, like most, is not in the business of promoting OT and certainly not favoring a very junior employee over long-standing brothers and sisters. I am all in favor of trying to get as many people as possible to 40 hours but will certainly not entertain junior employees making more than full-time employees because of loopholes in the locally arranged calling agreement.*

It was the Company's contention that its investigation "*revealed that on the balance of probabilities the grievor intentionally accessed another employee's (Complainant's) personal financial information, and disclosed that information to other employees without the Complainant's consent"*. The Company asserts that the grievor had "inappropriate access to, and use of" the complainant's personal information.

There can be no doubt that the grievor's e-mail to the complainant was union business. That fact, however, would not justify his having improper access to private information, and then to divulge it to others, union members or not. The onus is of course on the Company to establish its allegations, and the material before me does not, in my view, support the conclusion that the grievor "on the balance of probabilities", had improper access to the complainant's personal information and communicated it to others.

The Company argued that the grievor would have had to make complicated calculations of regular time, overtime, shift premiums, authorized personal leave and other matters including position numbers and classifications in which the complainant

may have worked in order to arrive at the figures he did in calculating the complainant's income from employment with the company. It is on that basis that the Company concluded that the grievor must have had improper access to the company pay records for the complainant. There is no factual evidence to indicate that the grievor did in fact hack into or improperly search out and look at any company records in this regard. The obvious basic source for the grievor's calculation of the complainant's earnings would be the collective agreement, a document available to all employees and which sets out the wage rates for all positions, and the rules governing the application of all the factors referred to by the company. As well, of course, there is the grievor's general knowledge of working conditions and of employee concerns – especially those relating to calls, assignments and overtime – often the subjects of grievances of which the grievor, in his capacity as Local Chair must be aware. One would expect employees generally to be alert to positions available and to overtime opportunities, and to be aware of competition from others. The figures stated in the e-mail are not precise figures (which it might indeed require access to the company's pay records to acquire) but are set out in round numbers and, in my view, are figures which an informed Local Chair, or indeed any concerned employee, might arrive at. As the grievor put it at the investigation, "*We have very few employees working either full time, or working a substantial number of hours so it's not very complicated to figure it out*".

The grievor's e-mail, while strongly put, was not an inappropriate response to a fellow employee's concerns. The reference to the complainant's approximate earnings was appropriate to the question at issue. It has certainly not been established as probable

that the approximate figures were discovered by prying into private records pertaining to the complainant.

In her complaint, the complainant asserted that she had voiced her concerns to the grievor in person, and that he began yelling at her. There is no other material before me with respect to that, and it is not a ground on which discipline was imposed.

Having regard to all of the material before me, and for the reasons set out above, it is my conclusion that just cause for the imposition of discipline has not been established. Accordingly it is my award that the 60 demerits imposed on the grievor be expunged from his record.

July 23, 2019

J. F. W. WEATHERILL
ARBITRATOR