

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4617

Heard in Edmonton, March 13, 2018

Concerning

VIA RAIL INC.

And

UNIFOR

DISPUTE:

The assessment of 60 demerit marks and the subsequent discharge of Counter Sales Agent Eva Caissie on June 3, 2016, following a Last Chance Agreement (LCA) signed October 15, 2015.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Corporation conducted an investigation of the grievor for her; *“failing to fulfill your obligations of the ‘Last Chance Agreement’ dated October 15, 2015, and failing to comply with VIA Rail financial policies and procedures as a ticket agent.”* The Union contends that the Corporation’s investigation was unfair and not in keeping with its obligations to conduct a fair and impartial investigation pursuant to Article 24.1 of Collective Agreement No. 1, and had not met the burden of proof to justify the imposition of such excessive discipline. The Union further contends that the Corporation violated the terms of the LCA by terminating the employment of the grievor without just cause.

The Union requests that the instant discipline in this case be expunged, that the grievor be reinstated without the loss of wages, benefits and seniority, and that she is made whole.

The Corporation denies the Union’s contentions and has declined the grievance to date.

THE CORPORATION'S EXPARTE STATEMENT:

Ms. Caissie began her employment with the Corporation on May 2, 2011. At the time of her termination, she held the position of Senior Counter Sales Agent.

On or around October 15, 2015, Ms. Caissie entered into a Last Chance Agreement with the Corporation and the Union as a result of discussions relating to her potential discharge following an investigation which revealed that money was missing from the Miramichi Station petty cash where she worked.

The Last Chance Agreement provided that Ms. Caissie’s disciplinary record would stand at 55 demerit marks for two years. Furthermore, she committed to following all provisions of the Code of Ethics and as such was required to report and provide without fail an explanation for all

missing monies or discrepancies in the balance of her floats to her manager immediately, failing which she would be immediately terminated.

On or around April 29, 2016, VIA received a customer complaint regarding the purchase and refund of two tickets that had been issued and refunded by Ms. Caissie. An investigation was held by the Corporation, during which Ms. Caissie was met with to obtain her version of the facts on May 12, 2016. A Supplemental investigation was held on May 27, 2016 following further investigation into statements made by Ms. Caissie during the first investigation.

The Corporation concluded that Ms. Caissie failed to comply with its financial policies and procedures and failed to fulfill her obligations pursuant to her Last Chance Agreement dated October 15, 2015. The Corporation therefore imposed 60 demerit marks, which resulted in her termination of employment with VIA.

The Corporation contends that its investigation was fair and impartial pursuant to Article 24.1 of the Collective Agreement No.1 and that it did meet the burden of proof to justify the imposition of the demerit marks. Finally, the Corporation contends that at all times the terms of the last-chance agreement were respected by the Corporation. Therefore, the grievance should be dismissed.

FOR THE UNION:
(SGD.) B. Kennedy
Regional Representative

FOR THE COMPANY:
(SGD.) E. Houlihan
Director, Labour Relations

There appeared on behalf of the Company:

E. Houlihan	– Director, Labour Relations, Montreal
B. Blair	– Human Resources, Business Partner, Montreal

There appeared on behalf of the Union:

B. Kennedy	– Regional Representative, Edmonton
J. Murray	– Regional Representative, Moncton
D. Kissack	– President, Winnipeg
E. Caissie	– Grievor, Moncton

AWARD OF THE ARBITRATOR

The events giving rise to the grievor's termination arose in April and May 2016. At the time the grievor was working under a strict "last chance agreement" freely signed by her and the Union in October 2015.

The relevant terms are:

2. Mrs. Caissie-Geikie commits to follow all provisions of the Code of Ethics. As such, Mrs. Caissie-Geikie will need to report and provide, without fail, an explanation for all missing monies or discrepancy in the balance of her floats to her manager immediately. Should the employee fail to report the said missing amount or discrepancy, she will be immediately terminated;

3. Should her manager be unavailable or absent, Mrs. Caissie-Geikie will need to report and provide an explanation to the local duty officer;
4. Should the explanation for the missing monies or discrepancy prove insufficient, the incident will be considered as a breach of conditions as set forth herein;

The customer complaint of April 29, 2016 justified the Employer's decision to investigate what had happened. The story, as it emerged, was that a young couple bought two tickets to attend a wedding in Halifax, at a sale price of \$108.50 each. They broke up before the trip and wished a refund. Refunds for discounted tickets are subject to a service charge of 50% of the ticket cost. The young man came in with his ticket to get his refund. The grievor had no cash in her cash drawer, so she said she would call him back once cash became available, which she did. He came back, turned in his unused ticket, and received \$54.25 in cash. The young man did not want to collect his ex-girlfriend's refund; indeed he did not have her ticket. The grievor asked him to tell her she should come by the station with her ticket and she would provide her with a refund.

The Company's investigation into its records following the initial complaint showed that the two tickets were sold on April 16th. Both were later processed in the system as refunded. There were two separate refund transactions on April 18th, within seconds of each other, for \$108.48 each.

Jumping ahead, on May 12th, after Via received the complaint and after the investigation had begun, the grievor's manager attended the workplace and opened up a locked drawer in the grievor's desk and located two envelopes, marked with the names

of the two purchasers, with \$108.50 cash in one and \$54.25 cash in the other. An envelope containing \$1,200 for petty cash was also found in the drawer rather than in the vault where it should have been.

The Union advances what amounts to an “all’s well that ends well” defense. No money, it asserts, was missing, although it was placed in a drawer rather than in the vault where it belonged. There has been, it argues, no breach of the last chance agreement, and thus termination is inappropriate or, alternatively, too harsh.

The circumstances of the customer complaint the Employer argues, raised cause for suspicion. The young woman’s aunt called indicating her niece had received no refund while the young man had received \$54. A check of Via’s computer records showed both tickets had been fully refunded for \$108.50 each. This record, showing a \$217.00 refund contrasted with the customer’s account that only \$54.25 had been received, naturally caused suspicion. Further inquiry showed the grievor’s cash balances were not over by the difference. No tickets were included in her sales report as they should be for refunds. Via’s policy is that, if there is to be a cash refund (as for a debit purchase) and there is insufficient cash, the agent must issue a “refund request”, which was not done. The records showed that, in processing the refunds, the grievor used a waiver code “WADPR” which allowed a full rather than 50% refund. If a third party claims a refund on behalf of another ticket holder, that third party needs to fill in an application, which was not done (although the young man expressly did not ask for her refund).

With this information in hand, the Company met with the grievor on March 12, 2016. Her explanation, in brief, as to what happened is that the young man came in asking for a refund and explained the situation. She lacked cash at the moment, but called him back and he returned his ticket and received his \$54.25 refund. She says she told him to tell the young woman to come in for her refund. She then processed both refund transactions, each for the full \$108.50. She says she processed a refund for the full amount for the young woman because she felt sorry for her as he had caused the breakup. She maintained she posted a full refund for the young man in error which she then realized put her cash balance out by \$54.25, so she posted it as a full refund. She took the cash for each and put them in envelopes which she said she put in the vault, although this proved to be untrue; the envelopes were in her drawer. This explanation indicates several breaches of the proper procedures.

- The young lady's refund should not have been posted at all since she had not brought in her ticket. There was no justification for processing it "while she had cash on hand" and calling in the expectation she would come in with the ticket.
- Having decided to properly refund the young man the half price ticket, with the other half for a service charge, the grievor then decided due to her own error to reverse the service charge and create a "refund" for him which she placed in an envelope. No evidence beyond the grievor's statement suggests the young man was told of this.
- Processed refunds must be shown on the daily cash report, with the returned ticket attached. They were not.
- Cash (the refunds plus the petty cash) was left in a drawer not in the vault.
- No explanations for waiving the service fees were recorded anywhere.

The Company doubts that the young lady was called, since their inquiries suggested no call was received. Having worked since 2011, the grievor should be aware of Via's policies. In my view, if she was not so aware in 2015, the last chance agreement should have made her extra sensitive to the need to know and apply these policies.

The grievor works in an unsupervised setting and has help available by phone. The various policies are designed to provide checks and balances to protect against both fraud and false allegations. The way the grievor processed these transactions left two "refunds" appropriately paid out (although without one of the tickets); a balanced cash drawer, and money that, if not further claimed, could be misappropriated with no obvious record. This adds to the Employer's concern, since there is nothing concrete beyond the grievor's statement to confirm that either customer was in fact contacted.

Arbitrators are reluctant to avoid the consequences of breaching a last chance agreement, for the reasons given in the cases referred to in SHP 648 (Picher):

The same sentiment was reflected in **CROA 3198** in the following terms, quoting Arbitrator M. Lynk in **Re Canadian Waste Services Inc. and Christian Labour Association of Canada** (2000), 91 L.A.C. (4th) 320:

Accordingly, arbitrators are understandably reluctant to interfere with the terms of a last chance agreement. These LCAs, including the one before me, are usually clearly drafted, and the expectations are well understood by the parties. If they can be easily undone by a grievor's claim that her or his unexpected or unintended relapse cause the attendance or performance breach of the LCA, the employers would have little incentive to enter into these agreements

in the future. As Arbitrator Davie stated in *Re Standard Products (Canada) Ltd.*, at p. 96:

If arbitrators do not uphold or enforce “last chance” agreements, parties would be discouraged from resolving matters and agreeing upon conditions which generally reflect prevailing arbitral jurisprudence and the specific circumstances of an individual case.

The Employer has established that the grievor was responsible for a discrepancy in her float balance. It lies in the fact that she processed these “it’s in an envelope” refunds in a way that disguised the fact that she had improperly processed the two transactions, showing her float as balanced when, following correct procedures, she knew it would not have been. This is particularly so in deciding, after the fact, to give the young man a rebate of the service fee he should have paid, and in processing the young woman’s refund without an application or a ticket. She could have reported this and offered her explanations at the time, but chose not to. I agree with the Union that the Employer has not established theft or an intention to steal, but that does not mean discipline is inappropriate; see **CROA 763**. The Employer has established suspicious circumstances and inadequate explanations. I find the grievor’s unorthodox handling of these matters without reporting as required amounted to a proven breach of the last chance agreement.

In arriving at this result I have not had to consider the inappropriate storage of the float monies. I have not had to consider the lack of balance in the May 12 cash drawer audit, and therefore do not need to address the fact that someone other than the grievor may have had access to the drawer. I do find the audit was fully authorized by the last chance agreement.

The Union's objection that the investigation was unfair or less than impartial based on "changing grounds" are not substantiated by the evidence. This is not a case where it is appropriate to relieve against the consequences of a breach of the last chance agreement. The grievance is therefore dismissed.

March 29, 2018



ANDREW C.L. SIMS, Q.C.
ARBITRATOR