CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2245

Heard at Montreal, Thursday, 12 March 1992

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claim of Telephone Sales Agent, Robert Massé, that he was disciplined without an investigation.

JOINT STATEMENT OF ISSUE:

On May 23, 1991, R. Jutras, Assistant Manager of the VIA Quebec Telephone Sales Office, met with the grievor to discuss his absences and lateness for the preceding month of April. This meeting was later confirmed in writing to the grievor, with a copy to his employee file.

On June 6, 1991, the Brotherhood filed a grievance alleging that the Corporation had arbitrarily placed a written reprimand on the grievor's file, without the benefits of an investigation.

The Brotherhood contends that the placement of such a letter on an employee's file outlining an "irregularity", without the benefit of the provisions of Article 24.2, is considered discipline and, therefore, contrary to Article 24.2.

In support of its request for removal of the letter, the Brotherhood has referred the Corporation to CROA 1349, 1486 and 1487.

The Corporation maintains that contrary to the case at hand, the above cases dealt with "corrective interviews" and the recording of these interviews which were placed on the respective employee's disciplinary record.

The Corporation has declined the Brotherhood's request and maintains that the letter addressed to Mr. Massé was only intended as a summary of the meeting that took place with his supervisor, and that this letter is in no way threatening nor does it have a disciplinary connotation. The letter does not form part of the grievor's discipline record nor will it be used to support any future assessment of discipline.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) T. N. STOL	**(SGD.) C. C. MUGGERIDGE**
NATIONAL VICE-PRESIDENT	**DEPARTMENT DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

C. Pollock	Senior Officer, Labour Relations, Montreal
M. St-Jules	Senior Negotiator & Advisor, Labour Relations, Montreal
D. Fisher	Senior Officer, Labour Relations, Montreal
J. Kish	Senior Advisor, Customer Services, Montreal
R. Jutras	Assistant Manager, Telephone Sales Office, Montreal

And on behalf of the Brotherhood:

T. N. Stol	National Vice-President, Ottawa
F. Bison	Local Chairman, Montreal
R. Massé	Grievor

AWARD OF THE ARBITRATOR

The Canadian law of arbitration has long recognized that an employer is entitled to treat absenteeism and lateness in either a disciplinary or non-disciplinary fashion. If it is of the view that an employee's absenteeism is occasioned by his or her failure to act responsibly in matters which are within the employee's control, a disciplinary response may be appropriate. Where, on the other hand, the employee's timekeeping deficiencies are viewed by the employer as non-culpable, as for example in the case of a chronic medical disability or recurring family circumstances beyond the employee's control, it may be appropriate to conclude, for non-culpable reasons, that the viability of the employment relationship is in jeopardy, or is at an end, where there is no basis to expect any substantial change of pattern in the future.

An issue which sometimes arises in cases of non-culpable absenteeism is whether, given a better appreciation of the employer's concern, the employee has a better opportunity to take some steps to improve the chances of better attendance in the future. Arbitrators have commented that in cases of non-culpable absences bringing an employee's attendance problems to his or her attention is fair in that it affords some latitude to improve the situation, giving employees the opportunity to think about whether improvements in diet, personal hygiene, medical attention and, on occasion, tolerating minor illness or ailments without staying away from work or perhaps relocating their residence, might improve their on-going prospect of job security. Boards of arbitration have confirmed that that kind of notice is not disciplinary action. It is not inappropriate for an employer to remind employees that their non-culpable absences are unacceptable, if only to given them the opportunity to consider such things (**the Crown in Right of Ontario (Ministry of Health)** 1985, 21 L.A.C. (3d) 432 [Crown Employees Grievance Settlement Board, Verity]; **Government Employee Relations Bureau** (1984), 15 L.A.C. (3d) 177 [Larson]; **City of Vancouver** (1983) 11 L.A.C. (3d) 121 [Hope]; **General Tire of Canada Ltd.** (1982), 7 L.A.C. (3d) 238 [Kennedy]; **Aliments Steinberg Ltée** (1981) 29 L.A.C. (2d) 297 [Frumkin]; **St. Joseph's Hospital** (1985) 19 L.A.C. (3d) 165 [M.G. Picher]; **Maritime Telegraph & Telephone Co. Ltd.** (1984) 16 L.A.C. (3d) 318 [Cotter]).

The material in the instant case discloses that the absenteeism and lateness registered by the grievor was treated by the Corporation in a non-culpable fashion. His absences were noted on his file and on May 12, 1991 he was provided with the following letter:

> **Subject: Late Arrivals and Absences**
>
> This is to confirm our meeting of May 12, 1991 concerning your 6 entries for the month of April, that is, three (3) absences and three (3) late arrivals.
>
> It is important to be able to rely on your punctuality and presence at work so as to provide our customers with excellent service at all times.
>
> As you have confirmed that you fully understand the point above, I am counting on your cooperation to meet our objective of providing top notch service.
>
> [translation]

The Arbitrator accepts the submission of the Corporation that the foregoing communication was not intended to have a disciplinary impact, and notes the Corporation's acknowledgment that it must be estopped should it attempt to use the letter against the grievor in any future disciplinary proceeding. In the circumstances I cannot accept the submission of the Brotherhood that the letter amounts to discipline within the meaning of article 24 of the collective agreement. The Corporation has a legitimate interest in recording an employee's attendance record and, even if it chooses to treat it as non-culpable, of ensuring that the employee is aware of his or her record in that regard. That approach serves the proper business purpose of the Corporation in ensuring, insofar as possible, that the fundamental obligations of an individual's contract of employment will be fulfilled while, on the other hand, protecting the interests of the employee, who might otherwise be left unaware of the jeopardy which recurring innocent absenteeism and lateness might occasion for his or her ongoing employment relationship.

In the circumstances no violation of the collective agreement is disclosed, and the grievance must be dismissed.

March 13, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR