CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2663

Heard in Montreal, Wednesday, 11 October 1995

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

The termination of the conditional reinstatement of Mr. J. Mills.

JOINT STATEMENT OF ISSUE:

On July 16, 1993, Mr. J. Mills was granted a conditional reinstatement pursuant to CROA 2363. On August 1, 1994, Mr. Mills booked sick. Mr. Mills remained absent continuously after that date. On October 6, 1994, the Corporation wrote to Mr. Mills informing him that, effective October 7, 1994, his "*conditional reinstatement was terminated and his services "dispensed with"*." It is common ground that Mr. Mills' absence was in excess of the average for Chefs in VIA Atlantic.

The Union alleges that the Corporation violated the just cause standard contained in the provisions of article 24.21 of Collective Agreement No. 2, and the Canadian Human Rights Act. It is the Union's position that the Corporation was not within its rights to sever Mr. Mills' employment. The Union further argues that to discharge an employee when he is receiving benefits is a violation of article 34.1 and Appendix 20 of Collective Agreement No. 2. The Union also alleges a violation of article 24.6 due to the fact that the Corporation "did not conduct an investigation prior to discharging Mr. Mills". Lastly, the Union alleges that the Corporation violated Appendix 7.

The Union requests that Mr. Mills be reinstated with full wages and benefits.

The Corporation does not believe that this grievance was progressed in a timely fashion by the Union and, therefore, it is not arbitrable.

FOR THE UNION:	FOR THE CORPORATION:
(SGD.) A. S. WEPRUK	**(SGD.) D. S. FISHER**
NATIONAL COORDINATOR	**FOR: DEPARTMENT DIRECTOR, LABOUR RELATIONS & HUMAN RESOURCES SERVICES**

There appeared on behalf of the Corporation:

D. S. Fisher	– Senior Advisor & Negotiator, Labour Relations, Montreal
C. Pollock	– Senior Labour Relations Officer, Montreal

And on behalf of the Union:

T. Barron	– Representative, Moncton
J. Beed	– Local Chairman, Halifax

PRELIMINARY AWARD OF THE ARBITRATOR

The only issue to be resolved in this preliminary award is whether the grievance is untimely. The substance of the dispute concerns the failure of the Union to progress the grievance to Step 3 of the grievance procedure prior to January 31, 1995. It is common ground that that was the date to which the Corporation's Director of Labour Relations agreed to extend the time limits, in response to a request from the Union's National Coordinator, as reflected in a letter from the Corporation's Director of Labour Relations, dated January 9, 1995.

The first submission of the Union's representative is that the time limits found in article 24.23 of the collective agreement are not mandatory. The Arbitrator has considerable difficulty with that submission. Article 24 provides, in part, as follows:

> **24.23** Where any grievance is not progressed by the Brotherhood within the prescribed time limits, the grievance will be considered to have been dropped. When the appropriate officer of the Corporation fails to render a decision with respect to a claim for unpaid wages within the prescribed time limits, the claim will be paid, but this will not constitute an interpretation of the collective agreement. Where a decision with respect to a grievance other than one based on a claim for unpaid wages is not rendered by the appropriate officer of the Corporation within the prescribed time limits, it will be processed to the next step of the Grievance Procedure.
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> **24.24** The time limits provided in this Grievance Procedure may be extended by agreement between the Corporation officer and the Brotherhood representative at any step.

It is argued on behalf of the Union that the collective agreement language governing step 3 of the grievance procedure is not mandatory. In this regard article 24.2 provides as follows:

> **24.2** Any complaint raised by employees concerning the interpretation, application or alleged violation of this Agreement or that they have been unjustly dealt with shall be handled in the following manner:
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> ...
>
> *Step 3*
> Within 60 calendar days of receiving decision under Step 2, the National Vice-President of the Brotherhood may appeal the decision in writing to the Director, Labour Relations who will render a decision within 60 calendar days of receiving appeal.

The Union's representative submits that the use of the word "may" in the foregoing provision reflects the understanding of the parties that the time limits provided in respect of initiating Step 3 are not mandatory. I cannot agree. Having regard to the grammatical sense of the provision, the use of the word "may" within article 24.2 plainly refers to the discretion of the National Vice-President of the Brotherhood to decide whether or not to appeal the decision, within the sixty day period provided to him to exercise that discretion. Article 24.2 is subject to the overriding intention of article 24.23 that should he not progress the grievance within the time limits so prescribed it "... will be considered to have been dropped." Moreover, it is clear from the language of article 24.24 that any escape from the requirements of the time limits can only be obtained by way of an extension through agreement between the Corporation's officer and the Union's representative at any given step. If the Union is correct, that provision would not be necessary. With respect, it is difficult to conceive of language more clearly directed to confirm the mutual intention of the parties that the time limits under the grievance procedure are intended to be mandatory. That, indeed, has been the conclusion of this Office is respect of the interpretation of similar provisions as reflected in a number of prior awards. (*See, e.g.,* **CROA 36, 60, 102, 533, 597, 869** *and* **1114**.) In **CROA 597** Arbitrator Weatherill made the following comments:

> ... Article 17-B03 of the collective agreement provides that "when a grievance is not progressed by the Union within the prescribed time limits, it shall be considered as dropped". The effect of that provision is clear. My jurisdiction is not such as to allow any alteration or amendment of the terms of the collective agreement, or to deal with any matter not properly processed through the grievance procedure. The delay in this case was substantial, and I have no jurisdiction to grant relief from its consequences.

> Accordingly, it must be my conclusion that the grievance was to be considered as dropped, and that I have no jurisdiction with respect of it. The preliminary objection must therefore be allowed and the proceedings terminated.

Nor can the Arbitrator accept the submission of the Union's representative that the parties cannot limit the access of an employee to arbitration by the introduction of mandatory time limits into the collective agreement. While it is true that section 57(1) of Part I of the **Canada Labour Code** requires that every collective agreement contain provisions for the final settlement of disputes "by arbitration or otherwise", there is nothing within the language or spirit of that statute which would prevent parties from establishing mutually agreed time limits which are mandatory. The labour relations policy underlying such provisions is relatively obvious, as it brings a degree of certainty and finality to disputes which might otherwise be revived after prejudicial delay. In considering the intention of Parliament, it is also significant to note that the **Canada Labour Code** does not contain a specific provision which gives to boards of arbitration the ability to relieve against mandatory time limits in certain circumstances, as is the case under other labour relations statutes such as the **Ontario Labour Relations Act**. In the result, the Arbitrator is compelled to conclude that the Corporation is correct in its assertion that the time limits established within the collective agreement with respect to the progressing of grievances are mandatory. Accordingly, in keeping with the clear intention of article 24.23, the failure to meet a time limit effectively voids a grievance.

The Arbitrator must also reject the alternative submission of the Union's representative to the effect that a meeting which occurred between the parties on January 13, 1995 was, in effect, a Step 3 meeting within the meaning of the collective agreement. The unchallenged representation of the Corporation is that the meeting was not convened by or on behalf of the Brotherhood's National Vice-President, (now "the Union's National Coordinator") but rather by the grievor's regional union representative. It would appear that what transpired was a meeting convened in an attempt to resolve a number of grievances concerning Mr. Mills, some of which had already been dealt with at Step 3, in a manner supplementary to the steps of the grievance procedure. On that basis, this further submission of the Union's representative cannot be accepted.

There is, however, an issue of greater substance to be considered. As noted above, the Union was granted an extension of time limits for proceeding to Step 3 by the Corporation. That extension was granted until January 31, 1995. In the interim the parties engaged in a joint meeting on January 13, 1995 to discuss, without prejudice, various proposals to settle the four grievances concerning Mr. Mills, including the discharge grievance that is the subject of this arbitration, which had not yet proceeded to Step 3. It does not appear disputed that a key outcome of the meeting was an undertaking on the part of the Corporation that it would be forwarding a proposal to the Union for settlement of all of the grievances. It appears that the Union was hopeful that the Corporation's proposal for settlement could be made by January 17, to allow for the possible return to work of the grievor on January 20th. When nothing further was heard its representative contacted the Corporation on the 17th. He also contacted the employer again on the 26th and the 31st of January to inquire as to the status of the Corporation's intention to provide an offer of settlement. In fact, an offer of settlement was finally made by the Corporation late on the 31st of January, the date previously agreed as the last day for the extension of the time limits. Now, however, the Corporation takes the position that the failure of the Union to proceed to Step 3 on or before the 31st of January is a violation of the time limits, so that the grievance must now be considered to have been dropped.

The Arbitrator has substantial difficulty with that position given the sequence of events. At a minimum, it must be taken that the Corporation held out to the Union that the parties were engaged in ongoing discussions concerning the grievance of Mr. Mills, and that those discussions would result in an offer of settlement to be made by the Corporation, presumably with the opportunity of the Union to consider and respond to that offer. In fact, however, the Corporation's offer came only late on the final day of the agreed extension of time limits. In the result, the Union could reasonably believe that it was entitled to consider the offer which the Corporation had made, and that it could do so without prejudice to the strict application of the time limits. In other words, the Corporation's actions must fairly be construed as consistent with a waiver of the time limits for the purposes of the discussions which it had undertaken with the Union, at least insofar as the making of an offer of settlement by the Corporation and its consideration by the Union was concerned.

In a case referred to by the Union's representative, **SHP-351**, a grievance concerning Canadian Pacific Limited and the International Brotherhood of Electrical Workers, (award dated July 22, 1991) the arbitrator found that an objection as to time limits raised by the union could not be sustained. In that case the company had requested an

extension of time limits to make its decision to discipline the grievor following a formal investigation. The well-established practice of the parties was that such requests were normally granted as a matter of course. However the union's representative awaited the final day of the time limits, and then abruptly advised the company that the extension would not be granted. The arbitrator concluded that in those circumstances the union must be estopped from relying on the strict application of the time limits.

While not precisely the same, the facts in the instant case should be seen as governed by the same principle. The evidence discloses that the Union and the Corporation agreed to an extension of time limits for initiating Step 3 until January 31, 1995. During the interim they commenced negotiations to settle the dispute, on a without prejudice basis. The Union was given to understand from the Corporation that it would be forthcoming with an offer of settlement. That offer, however, was not put into the Union's hands until the final day of the extended time limits. In the Arbitrator's view it would be inequitable to conclude other than that the Corporation has, in these circumstances, waived its right to the strict application of the time limits. In effect, it told the Union to wait for its offer of settlement, a request which must be taken to involve implicitly the opportunity of the Union to consider and respond to the offer. As the matter unfolded, the process of offer and response clearly went beyond the extended time limit. I am satisfied that in this circumstance the Corporation must, by its actions, be taken to have waived the strict application of the time limit of January 31, 1995.

For the foregoing reasons the Arbitrator finds that the preliminary objection of the Corporation with respect to the timeliness of the grievance cannot be sustained, and that the grievance is arbitrable. The General Secretary is therefore directed to schedule this matter for hearing on its merits.

October 13, 1995 **(signed) MICHEL G. PICHER**
ARBITRATOR

On Wednesday, 13 December 1995, there appeared on behalf of the Corporation:

There appeared on behalf of the Corporation:

D. Fisher	– Senior Advisor and Negotiator, Montreal
C. Pollock	– Senior Labour Relations Officer, Montreal
D. Dewolfe	– Section Director, Customer Services

And on behalf of the Union:

T. Barron	– Representative, Moncton
J. Millls	– Grievor

AWARD OF THE ARBITRATOR

The sole issue in the matter at hand is whether the Corporation had just cause to terminate the grievor, Mr. J. Mills, for innocent absenteeism. The principles governing such a termination were expressed in the following terms in **SHP-284**, a grievance involving Canadian Pacific Limited and The International Brotherhood of Firemen and Oilers, award dated November 23, 1989:

> It is well-established that an employer is entitled, where circumstances justify it, to terminate the employment of a person whose innocent absenteeism reaches a degree incompatible with the fundamental contract of service to the employer. As was stated by Arbitrator Shime in *United Automobile Workers Local 458 and Massey Ferguson Industries Ltd*., reported at 24 L.A.C. 344:
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> > Initially, I accept the Company' submissions that excessive absenteeism may warrant termination of the employment relationship and that discharge is justified in a non-punitive sense because the employment relationship is contractual and where an employee cannot report for work for reasons which are not his fault he imposes loss on an employer so that after a certain stage of accommodation of legitimate interests of both employer and employee requires a power of justifiable termination in the employer.
>
> It is generally accepted that for an employer to be entitled to invoke its right to terminate an employee for innocent absenteeism it must satisfy two substantive requirements, namely that the

> employee has demonstrated an unacceptable level of absenteeism as compared with the average of his or her peers over a sufficiently representative period of time, and, secondly, that there is no reasonable basis to believe that his or her performance in that regard will improve in the future. In addition, it has been suggested that it may be appropriate for the employer to give some advance warning to an employee when his or her rate of absenteeism threatens to jeopardize continued employment (*See Re Denison Mines and United Steel Workers (1983), 12 L.A.C.(3d) 364 (Adams*). ...

The evidence before the Arbitrator establishes, beyond any controversy, that the grievor has registered a record of absence from work for illness that is greatly in excess of the average for other employees, dating back to 1985. In each year between then and 1994 Mr. Mills averaged 119 days sick. While it is true that many of those absences were related to a back injury which apparently originated in 1985, other injuries and illnesses have contributed substantially.

Significantly, the grievor's absence commencing August 3, 1994 for dysthymia, described as a form of long term chronic depression, appears to have remained operative, with no clear prognosis of a clear return to work date at late as November 11, 1994, well after Mr. Mills' termination by the Corporation. Moreover, the evidence before the Arbitrator, in the form of a letter dated December 15, 1994 from the grievor's physician, indicating that he is fit to return to work, gives no elaboration of the prognosis for the likelihood of continued freedom from what appears to have been a chronic, long term depressive state.

As difficult as the grievor's personal circumstances are, the Arbitrator must act out of fairness to both the employee and the Employer. I am satisfied that the conditions for the termination of an employee for innocent absenteeism are amply made out on the material before me. The grievor's record of innocent absenteeism is clearly beyond the average for other employees in his classification, bargaining unit and geographical area. It is at a level incompatible with an ongoing contract of employment. Most significantly, the material before the Arbitrator does not contain any clear and elaborated medical opinion to confirm to the satisfaction of the Arbitrator that Mr. Mills' medical condition has normalized to a degree that his reinstatement to employment on a basis of regular attendance can be reliably predicted. The very terse comment by the grievor's physician, as reflected in the letter of December 15, 1994, is simply not sufficient to rebut the inference, based on the grievor's employment history of the last ten years, that he cannot reasonably be expected to maintain an acceptable level of attendance at work.

The Arbitrator must agree with the Corporation that there were efforts made, both through the agreement which led to the award in **CROA 2363**, and direct correspondence to Mr. Mills' Union representative on December 20, 1993, to advise him that his employment was in jeopardy if his attendance should not improve. Nor can the Arbitrator find that the benefits provisions of article 34.1 and Appendix 20 of the collective agreement should be construed so as to prevent the Corporation from taking appropriate action to terminate an employee where the principles governing discharge for innocent absenteeism are fully satisfied. Regrettably, and without fault on anyone's part, this is such a case.

For the foregoing reasons the grievance must be dismissed.

December 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR