

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3391

Heard in Montreal, Thursday, 11 December 2003

concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE – A:

The assessment of a written reprimand to Employee W. for her failure to meet the Corporation's performance standards.

DISPUTE – B:

The Union disputes the assessment of 30 demerits to Employee W. for failing to meet the Corporation's performance standards.

CORPORATION'S STATEMENT OF ISSUE – A:

On September 25, 2002, Employee W. underwent an investigation for her failure to meet the Corporation's standards.

The Union contends that the Corporation has failed to take into account W.'s medical condition when it assessed discipline as a result of her failure to perform at the required levels. The Union submits that the Corporation had a duty to accommodate W., in accordance with VIA's Duty to Accommodate Policy and the Human Rights Act. In addition, the Union further contends that the Corporation is in violation of article 27.12 of collective agreement no. 1.

The Corporation maintains that W. was disciplined because of her continued failure to meet the Corporation's performance standards. The medical evidence does not show that W. suffers from a disability that would prevent her from meeting the required level of performance. The Corporation also denies any violation of article 27.12.

The Corporation has declined the grievance.

CORPORATION'S STATEMENT OF ISSUE – B:

On July 4, 2003 the Corporation conducted an investigation regarding the alleged failure of W. to meet the Corporation's performance standards while working as a Telephone Sales Agent in Toronto. As a result of the investigation W. was assessed 30 demerits and her employment was terminated for accumulation of demerits.

The Union maintains that W. has demonstrated clear and significant improvement in her performance. In addition, the Corporation failed to provide sufficient coaching and support to enable her to meet the standards. Lastly, the Union maintains that W. suffers from a medical condition that hampers or prevents her from achieving the performance standards.

The Corporation submits that W. consistently failed to meet the Corporation's performance standards despite extensive coaching and support. In particular, the Corporation denies W. suffers from any medical condition that prevents her from meeting the Corporation's performance standards.

The Union has grieved the assessment of discipline and the termination of employment. The Corporation has denied the grievance.

FOR THE CORPORATION:**(SGD.) L. LAPLANTE****FOR: DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

L. Béchamps	– Counsel, Montreal
L. Laplante	– Sr. Officer, Labour Relations, Montreal
J-N Morello	– VIA Rail Canada

And on behalf of the Union:

D. Olszewski	– National Representative, Winnipeg
T. Blanchard	– Regional Bargaining Representative, Toronto
R. Masse	– Regional Bargaining Representative, Montreal
K. Erickson	– Sr. Counter Sales Agent, London
W.	– Grievor

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms, beyond any substantial controversy, that the grievor, referred to as "W.", has failed consistently to meet productivity standards in the Telephone Sales Office. The record confirms that she was transferred

to that office in January of 2000. From that time to the events leading to her termination she maintained the worst productivity performance of any telephone sales agent in the office, generally recording half the rate of efficiency of her peers, and being five times less efficient in the area of post-call processing. The nature of the grievor's performance flaws was reviewed more thoroughly in **CROA 3361**, and need not be examined in detail here. The Arbitrator is satisfied that the position of the Corporation, insofar as it concerns the conclusion that the grievor failed to meet the Corporation's performance standards is irrefutable. That conclusion led to the assessment of two heads of discipline and two related grievances which are the subject of this award. On September 25, 2002 a written reprimand was assessed against the grievor for her failure to meet the Corporation's performance standards and finally, on July 4, 2003, she was assessed thirty demerits for her substandard productivity. The latter discipline, coupled with prior accumulation of demerits, resulted in the adjusted accumulation of sixty demerits and the grievor's termination.

The written reprimand, communicated to the grievor on October 4, 2002, following an investigation held on September 25, 2002 was assessed because at that time her disciplinary record stood at fifty-five demerits, and the decision was made to give her a penalty short of discharge. In fact the fifty-five demerits were revised downwards by the two decisions of this Office in **CROA 3361** and **3362**, so that the grievor was restored to a position of thirty demerits. On July 21, 2003, following a disciplinary investigation held on July 4, 2003, W. was assessed a further thirty demerits for her ongoing failure to meet performance standards between May 15 and June 25,

2003. That assessment then placed her at an accumulation of eighty-five demerit marks, which would have placed her in a revised position of sixty demerits, a dismissible position following the awards in **CROA 3361** and **3362**.

The Arbitrator well appreciates the perception which motivated the Corporation's decision to terminate the grievor's services. For a considerable period of time, notwithstanding extensive coaching sessions and varying levels of discipline, W. had consistently failed to progress in respect of meeting performance standards within the Telephone Sales Office (TSO), standards which the Arbitrator is satisfied were reasonable and in respect of which the grievor had shown herself capable of improvement. The record also discloses that W.'s experience in the TSO had led to growing tension between herself and her supervisors (see, e.g., **CROA 3362** and **3392**). In short, her employment relationship was fast becoming highly dysfunctional.

There is, however, a substantial piece of mitigating evidence placed before the Arbitrator in this file. To its credit, the Corporation formed the view that a psychiatric assessment of the grievor should be performed. That decision was made following the submission of a letter from her own physician on February 22, 2002 indicating that the grievor suffered from "panic attacks precipitated by stress." As a result, the grievor was given a comprehensive assessment by psychiatrist Dr. Pierre Bleau, Director of the Crisis, Anxiety, Trauma and Stress Clinic of the McGill University Health Centre.

Dr. Bleau's report is significant for what it reveals of the grievor's difficulties. While Dr. Bleau concludes that W. does not suffer from a psychosis within the definitions found within the DSM IV, he does conclude that she has experienced panic attacks which he diagnoses as related to what he characterizes as her personality problems. He notes that the panic attacks are generally work-related and are the result of "... a certain indisposition or intolerance of anticipated aggressive behaviour directed against her by other people." That condition, according to his report, manifests itself in situations of anticipated conflict or criticism from other people encountered during her work, such as critical customers or supervisors. It is his own diagnosis that the panic attacks experienced by the grievor can be dealt with through a cognitive-behavioural therapy "... so as to give her some tools for understanding where her erroneous interpretations come from." In his view, the grievor's perceptions are the result of coping mechanisms developed over a seriously troubled childhood and could, in his opinion, be greatly assisted by therapy. In that regard he comments, in part:

It is difficult to predict how much time in therapy would be required for [W.] to understand the link between her panic attacks and her previous history, but normally four to eight sessions of psycho-therapy should suffice.

Counsel for the Corporation submits that this is not a case in which the grievor should be found to be entitled to accommodation within the meaning of the **Canadian Human Rights Act**, given the diagnosis that she does not suffer from a recognized psychosis which would constitute a disability justifying such accommodation. Counsel maintains that situational panic attacks resulting from an individual personality problem or disorder is not a protected status within the **Canadian Human Rights Act**, and does

not compel any obligation of accommodation. It may be noted that the grievor has filed a parallel complaint with the Canadian Human Rights Commission with respect to her employment relationship with the Corporation.

The Arbitrator finds it unnecessary to resolve the issue of accommodation for the purposes of disposing of this grievance. Whether personality disorders may constitute disabilities within the meaning of the **Act** is a question which, in any event, would merit greater medical and legal authority than has been marshalled in the context of these grievances. Arguably, so critical a question would be more appropriately resolved upon fuller argument before a specialized tribunal such as the Canadian Human Rights Tribunal. In the Arbitrator's view these grievances are better resolved by reference to general principles of industrial relations discipline and related concepts concerning the discretion of an arbitrator under the **Canada Labour Code** to substitute a disciplinary penalty where it is appropriate to do so.

In that regard, what does the instant case disclose? The grievor is an employee of twenty-nine years' service who is fifty years old and is the sole provider for two children. She worked without apparent substantial difficulty until January of 2000, having been employed, among other things, as a Counter Sales Agent and, immediately before her move to the TSO, as an agent at an information desk, a task which Dr. Bleau notes she apparently performed without any difficulties. The evidence, particularly the report of Dr. Bleau, explains the reason for the difficulties encountered by W. as a telephone sales agent. It does not appear disputed that her personality traits and

susceptibility to panic attacks placed her in a position tantamount to incapacity under the stresses of that assignment. As her long employment history demonstrates, and as noted by Dr. Bleau, there are positions within the Corporation which she can handle without difficulty.

In all of the circumstances the Arbitrator is satisfied that this is an appropriate case for a substitution of penalty, having particular regard to the grievor's long service and to the apparent viability of her continued employment in a situation which is less stressful. It is also my view that it is appropriate, in the circumstances, to make her reinstatement conditional upon her following an appropriate course of therapy, along the lines proposed by Dr. Bleau, to deal with the root causes of her panic attacks. It appears that she is presently under the care of medical doctor for that very purpose.

The Arbitrator therefore directs that the grievor be reinstated into her employment forthwith, without loss of seniority and without compensation for wages and benefits lost. The thirty demerits assessed against the grievor shall be removed from her record, with the period between her termination and reinstatement to be recorded as a suspension. The grievor shall be reinstated into such classification or assignment as the Corporation and Union agree is appropriate for her, and failing such agreement, as may be determined by the Arbitrator. Her reinstatement is further conditioned on her accepting to continue her present course of ongoing therapy with Dr. Felix Klajner, or with such other medical practitioner specializing in psychology or psychiatry as may be

agreed between the parties, for a period which the parties agree is appropriate, and failing agreement, as may be directed by the Arbitrator.

December 15, 2003

(signed) MICHEL G. PICHER
ARBITRATOR