

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3420

Heard in Montreal, Thursday, 16 April 2004

concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE – UNION:

Concerning the assessment of 20 and 15 demerits to bilingual, Toronto Sales Agent, Mr. Kevin Toal.

DISPUTE – CORPORATION:

Whether the assessment of the following discipline to Mr. Toal was justified: 20 demerits for failing to attend an investigation on August 2nd, 2002; 15 demerits for an unauthorized leave of absence between June 6 and August 19, 2002.

UNION'S STATEMENT OF ISSUE:

On June 1st, 2002, the grievor was involved in a serious motor vehicle accident. On July 30th, 2002, the Corporation issued a notice to appear for an investigative hearing, to be held on August 2nd, 2002. The charges against the grievor were "an unauthorized leave". One day prior to the investigative hearing, on August 1st, 2002, Mr. Danny Andru, Union Representative, provided Ms. Leslie Cowan, Manager, with medical information indicating that the grievor was off as a result of injuries sustained in an automobile accident. Mr. Andru also indicated that the grievor would not be able to attend at the investigative hearing the following day. The Corporation refused the medical information and later indicated that the Union had no jurisdiction to provide same on behalf of the employee. It is common ground that Mr. Toal did not attend at the investigative hearing on August 2nd, 2002.

On August 16th, 2002, Mr. Toal was called for a second investigative statement. This second investigative statement, for "failure to attend an investigation on Friday, August 2, 2002." Mr. Toal did attend this second investigative hearing. He was also given a third notice to appear for August 2, 2002, and also attended at the investigative hearing held on August 19, 2002. He

was subsequently assessed 20 demerits for failure to attend an investigation and 15 demerits for alleged “unauthorized leave”.

Ms. Leslie Cowan, Manager of the Toronto Telephone Sales Office, served notice to appear for the investigations, submitted her own evidence into the investigative hearings, acted as the Investigating Officer in the hearings held on August 16 and 19, and assessed the discipline in the instant cases. The grievances were denied by the Corporation, at Step Two of the grievance procedure.

The Union’s position is as follows: First, the grievor was at all material times suffering from injuries sustained in an automobile accident. Second, the Corporation is in violation of past practices and has never called employees for disciplinary hearing when they are off sick. Third, the grievor has been subject to a double jeopardy as all three hearings arose out of the same issue: Mr. Toal’s injuries. Fourth, the Corporation is in violation of the Canadian Human Rights Act when it discriminated against the grievor, by assessing discipline as a direct result of his disabilities. Fifth, the investigative hearings were not “fair and impartial” as outlined in article 24.1 of Collective Agreement No. 1; as Ms. Cowan acted as policeman, judge, jury and executioner in the instant cases. Sixth, the Union also finds a violation of article 2.1 of the collective agreement when Ms. Cowan arbitrarily ignored medical information provided by the Union and summarily informed the grievor that the CAW was not his employer.

The Union requests that the discipline be expunged from the grievor’s record effective the date of issue. That he be compensated for any lost wages and benefits as a result of the discipline. We further requests an award indicating that the Corporation violated the Canada Labour Code and article 2.1 of the collective agreement, when it failed to recognize medical documents provided by the Union and informed the grievor that the Union had no status on the transmission of those documents.

CORPORATION’S STATEMENT OF ISSUE:

On June 1, 2002, the grievor was involved in a motor vehicle accident. Mr. Toal submitted a medical note on June 5, 2002, stating that he would be absent from work from June 7 – June 12 inclusive. On July 6, 2002, Great West Life Insurance Company declined to pay the claim, stating that there was insufficient medical evidence to support a totally disabling condition.

Mr. Toal did not attempt to communicate with his supervisor regarding the status of his claim, nor did he provide additional medical information to support is continued absence from work.

On July 29, 2002, Ms. Cowan wrote to Mr. Toal asking him to clarify his status. During a telephone conversation between Mr. Toal and his supervisor on July 30, Mr. Toal was uncooperative and maintained he did not have to justify his absence as he was off in accordance with his doctor’s instructions.

Consequently, Ms. Cowan sent Mr. Toal a notice to appear for an investigation on August 2nd to explain his unauthorized leave of absence. Mr. Toal did not appear for an investigation and, as a result, was called for a 2nd investigation on August 16 to explain why he failed to appear on August 2nd. The investigation to explain his unauthorized leave was rescheduled for August 19. Mr. Toal was assessed 20 demerit marks for failing to attend an investigation and 15 demerit marks for his unauthorized leave of absence.

The Corporation maintains that the discipline assessed was warranted under the circumstances. Notwithstanding, the grievances for both incidents were untimely at Step 2. The Corporation therefore requests that the grievance be dismissed.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:

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

There appeared on behalf of the Corporation:

- | | |
|----------------|--|
| L. Laplante | – Sr. Officer, Labour Relations, Montreal |
| E. J. Houlihan | – Sr. Manager, Labour Relations, Montreal |
| A. Iacono | – Sr. Officer, Labour Relations, Montreal |
| L. Cowan | – Manager, Telephone Sales Office, Toronto |
| C. Barbosa | – Team Leader, Telephone Sales Office, Toronto |

And on behalf of the Union:

- | | |
|--------------|-------------------------------------|
| D. Olszewski | – National Representative, Winnipeg |
| K. Toal | – Grievor |

AWARD OF THE ARBITRATOR

The Corporation raises a preliminary objection as to arbitrability. It submits that the grievance was not filed in a timely fashion. In the case at hand the disciplinary measure forms were sent to the grievor's residence on September 3, and it appears that he received them on September 4, 2002. Under the provisions of article 24.6 he then had twenty-one calendar days to commence the processing of his grievance at Step 2 of the grievance procedure. The deadline was therefore September 25, 2002. In fact the grievances were dated September 30 and received by the Corporation on October 10, 2002.

At issue is whether the Arbitrator should extend the time limits, within his authority to do as provided under section 60(1)(1.1) of the **Canada Labour Code**. The two requirements for granting such an extension are that the Arbitrator be “satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.” It should be stressed that the above requirements are not the same as requiring the Union to provide a reasonable explanation for the delay incurred. The first question is whether, having regard to the whole of the circumstances, there are reasonable grounds for the extension.

In the case at hand the grievor was absent from work during the course of the events giving rise to the discipline, and at the time he received the notice of discipline. He was then on an extended leave of absence following injuries sustained in an automobile accident. Additionally, in light of subsequent events, the accumulation of demerits took him beyond a dismissible position. Boards of arbitration have been directed that they should not take an overly technical view of the grievance and arbitration process and should strive to deal with the substance of the dispute (**Re Blouin Drywall Contractors Ltd. And United Brotherhood of Carpenters and Joiners of America, Local 2486** (1975), 57 D.L.R. (3d) 199 (Ont. C.A.)). I am satisfied that in this case, in light of the grievor’s circumstances, there are reasonable grounds for an extension of time limits. Nor is it evident to the Arbitrator that an extension of time limits for a period of some fifteen days would materially prejudice the Corporation in its ability to deal with the grievances. The extension is therefore granted, and the objection as to the failure of mandatory time limits must be rejected.

This grievance concerns two heads of discipline, the assessment of twenty demerits for failing to attend an investigation on August 2, 2002 and the further assessment of fifteen demerits for the grievor's unauthorized leave of absence after June 6, 2002. The Arbitrator deals firstly with investigation held on August 19, 2002 which resulted in the assessment of fifteen demerits for the grievor's alleged unauthorized leave of absence. The Union submits that that discipline should be found to be void *ab initio*, based on the conduct of the investigating officer, Manager Leslie K. Cowan. Specifically, the Union alleges that the withholding of a material document in the possession of Ms. Cowan violated the requirement of a fair and impartial investigation as mandated by article 24.1 of the collective agreement.

It is well established in the jurisprudence of this Office that a basic element of a fair and impartial investigation is that the employee be provided with all material documents in the possession of the investigating officer. The material before the Arbitrator confirms that in fact Ms. Cowan was in possession of a letter dated July 6, 2002 received from Case Manager J. Stephney of Great West Life. That letter advised that the insurer viewed the grievor as not being disabled from performing the duties of his regular job and that the claim was therefore denied. The Arbitrator does not consider it necessary to deal with the suggestion of the Union's representative that in fact the insurer's letter was originally prompted by Ms. Cowan herself. The Union's representative stresses that the case manager for the insurance company appears to have been placed in possession of a description of the regular job duties of Mr. Toal,

questioning whether Ms. Cowan herself might have encouraged the insurer to reach the conclusion which it did.

For the purposes of this award it is sufficient to find, as I must, that the letter in question was clearly prejudicial to the grievor's interests, reflecting as it did the opinion of the insurer that Mr. Toal was not entitled to sick leave benefits because, in effect, his injuries did not preclude him from performing the duties of his job. That issue was the very question being examined by Ms. Cowan through the disciplinary investigation process, to determine whether the grievor was in fact on an authorized leave of absence. The Arbitrator must therefore sustain the objection of the Union's representative that the disciplinary process, and consequently the discipline in relation to the assessment of fifteen demerits for the grievor's alleged unauthorized leave of absence, is void *ab initio*. It may further be noted that if it had been necessary to examine the merits of the discipline, the Arbitrator is satisfied that the grievor did suffer injuries which caused him an inability to perform the duties of his job, injuries which in fact ultimately resulted in the payment of Great West Life benefits for at least part of his absence. The grievance might, therefore, have succeeded in whole or in part on its merits.

With respect to the second head of discipline, the assessment of twenty demerits for failing to attend an investigation scheduled for August 2, 2002, the Arbitrator is satisfied that the position of the Corporation is more compelling. There appears to be no dispute that the grievor was duly informed of a disciplinary investigation scheduled for

August 2, 200. While he may have indicated to his Union representative that he might not be in attendance, he clearly made no effort to communicate directly with the Corporation's officer responsible for the investigation to clearly advise that he would not be present or to seek an adjournment of the investigation by agreement. I am satisfied that his actions in that regard were without justification and deserving of discipline. Given the grievor's prior disciplinary record, I am not inclined to disturb the assessment of twenty demerits for his failure in that regard. Nor does the Arbitrator accept that the involvement of Ms. Cowan in that investigation was improper or violated the standards of a fair and impartial investigation under the provisions of article 24 of the collective agreement.

The grievance relating to the assessment of fifteen demerits against the grievor for his unauthorized leave of absence is therefore allowed, and the Arbitrator directs that the fifteen demerits be struck from his record. The twenty demerits for failing to attend the investigation of August 2, 2002, shall stand undisturbed, with the grievor's record to stand at forty demerits.

April 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR