

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3473

Heard in Calgary, Wednesday, 9 March 2005

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Concerning the assessment of 30 demerits to Mr. Marvin States for alleged unauthorized leave of absence between June 21st to July 29th, 2003.

JOINT STATEMENT OF ISSUE:

It is the Corporation's position that Mr. States was scheduled to return to work on June 21st, 2003 but failed to do so. He failed to protect his assignment and did not advise his supervisor that he would not be returning to work as scheduled. An investigation was scheduled on July 29th, 2003 in connection with the aforementioned unauthorized leave. Mr. States attended at the offices on July 29th, but refused to attend and participate in the investigation. He was subsequently assessed with 30 demerits. The discipline was not grieved in accordance with the terms of the collective agreement. It is the Corporation's position that the discipline assessed was appropriate in the circumstances.

It is the Union's position that the grievor was ill at all material times. That his refusal to participate in the investigation was a direct result of his illness, as well as his allegation that he was being discriminated against. It is further the Union's position that the timeliness of the grievance was as a result of Mr. States' illness both mental and physical. The Union asks that the discipline assessed be expunged from the grievor's record.

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
G. Benn – Officer, Labour Relations, Montreal

C. Morrison – Manager, Telephone Sales Office, Moncton

And on behalf of the Union:

D. Olshewski – National Representative, Winnipeg
M. States – Grievor

AWARD OF THE ARBITRATOR

The employer raised a preliminary objection claiming that the grievance was out of time. The disciplinary measure was assessed on August 7, 2003 and received by the grievor on August 10, 2003. The grievance was filed on April 1, 2004.

The parties acknowledge the time limits in the collective agreement are mandatory. The Union agrees that the grievance is out of time but urges me to exercise my jurisdiction under Section 6.(1.1) of the **Canada Labour Code** and extend the time limits. In order to do that there must be **(a)** a reasonable ground justifying the time limit extension, and **(b)** no undue prejudice suffered by the employer by the extension.

In the instant case, the delay was lengthy – over seven months – and the length alone has to be viewed as prejudicial to the employer given the ongoing issues with the grievor, including the subsequent assessment of a further thirty demerits resulting in his discharge.

More importantly, however, I am not satisfied that there is no reasonable ground justifying the time limit extension. The Union justifies the failure to file the grievance on

the basis that the grievor was unaware that the Union does not receive copies of discipline and his problems were so immense that he did not turn his mind to the issue of timeliness. The circumstances of how the grievor comported himself throughout this time does not bear this out.

Not long after his discharge the grievor engaged the services of Mr. Tom Barron, a recently retired CAW representative working as a labour consultant, to act on his behalf to deal with past and ongoing issues with the employer. At sometime, but before January 2004, the grievor met with and consulted with the Union. On January 18, 2004, some ten weeks before filing his grievance, the grievor filed a duty of fair representation complaint with the Canada Industrial Relations Board (CIRB). At all material times following the receipt of his letter of discipline the evidence clearly discloses that the grievor was aware of his situation. It was his decision, for whatever reason, to engage the services of Mr. Barron, making it that much more difficult for his certified bargaining agent to properly represent him. In my view neither the Employer nor the Union can now be attacked by the grievor as it was his own actions that led to the delay in the filing of the grievance.

The preliminary objection of the employer is upheld. There are no reasons justifying the extension of time limits and the grievance is therefore inarbitrable.

March 14, 2005

(signed) M. BRIAN KELLER
ARBITRATOR