CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3474

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 the record of Mr. Marvin States for alleged unauthorized leave of absence between January 3-7, 2004 and his subsequent dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

It is the Corporation's position that Mr. States was due to return to work from sick leave on January 3, 2004. He failed to protect his assignment and failed to advise his supervisor that he would not be returning to work. The Corporation held an investigation on January 8, 2004 to require Mr. States to explain his unauthorized leave. Mr. States failed to provide sufficient medical evidence to justify his prolonged leave of absence, consequently, his disciplinary record was assessed 30 demerits and he was dismissed for an accumulation of 70 demerits. Mr. States was previously assessed 30 demerits on August 7, 2003, for a similar offence. Therefore, the Corporation maintains that the 30 demerits assessed for this second incident is appropriate in the circumstances.

It is the Union's position that the medical evidence suggests that the grievor was both mentally and physically handicapped during the material times. It is further the Union's position that the Corporation had a duty to accommodate the grievor in a gradual return to work, if he was not totally handicapped. The Union alleges discrimination under the Canada Human Rights Act, as a result of Mr. State's disabilities. The Union seeks reinstatement with full wages and benefits, as well as damages, in an amount of $20,000.00 and as a direct result of discrimination at the hands of the Corporation.

The Corporation denies that Mr. States was disabled or that it has discriminated against him contrary to the Canadian Human Rights Act. The Corporation further denies that either Mr. States or the Union made a request for accommodation.

FOR THE UNION:	**FOR THE CORPORATION:**
(SGD.) D. OLSHEWSKI	**(SGD.) L. LAPLANTE**
NATIONAL REPRESENTATIVE	**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 grievor is a long service employee (1981) who suffered an on the job injury for which he was accommodated in 1996. He currently is entitled to a 5% permanent medical impairment to his left shoulder. He has in the past, and at various times received Temporary Earnings Replacement Benefits from the Workers' Compensation Board of Nova Scotia. His most recent application for such benefits was denied as was his appeal of the decision. The matter is currently being pursued further.

The rationale for the refusal was that there was a lack of objective medical evidence, considering the job description of a Telephone Sales Agent (TSA), to warrant the payment of benefits – given that the issue was shoulder pain suffered by the grievor. This finding was consistent with the determination made by Great West Life as well as an orthopaedic surgeon of Medisys Medical Services.

All of the above relates to the past and is just part of the history giving rise to the events leading to discharge. The relevant history starts with carpal tunnel surgery undergone by the grievor in November 2003. A medical note was produced by the grievor from Dr. Teresa Dykeman indicating that he was recuperating from carpal tunnel surgery and indicated a return to work date of January 1, 2004. The grievor did not report for work as scheduled on January 3, 2004, and provided no further medical note prior to January 1, 2004 extending his time away from work. He was called to an investigation on January 8, 2004 to explain his unauthorized leave of absence. On behalf of the grievor the Union attempted to give the employer a medical certificate signed by Dr. Dykeman, dated January 13, 2004, but dealing with absences earlier in the month as well as future expectations. The employer refused to accept the document as it was dated after January 2, 2004, which was the scheduled return to work. The employer subsequently assessed the grievor 30 demerits which, given that he already had 40 demerits, triggered his discharge.

On the basis of the above facts, I find that the assessment of the 30 demerits was inappropriate and is to be removed from the grievor's discipline record. While it is true that the grievor did not provide a medical note prior to his scheduled return to work he did provide one on January 8, 2004 covering his period of absence, outlining his then current medical conditions, providing a prognosis and an expected return to work date. The note was provided by Dr. Dykeman, known to the employer as the grievor's treating physician. The medical conditions described (carpal tunnel surgery, depression, chronic shoulder pain) were consistent with earlier medical notes. In my view it was overly

technical of the employer to refuse to accept the note because it was dated after January 2, 2004 when it clearly covered the time period for which the grievor was absent and beyond. If the employer had issue with Dr. Dykeman's note it could have dealt with them once the note was proffered as Dr. Dykeman was anticipating a return to work date only as of May 2004. Further, it is not as if the note was post-discharge evidence. The employer was still in the investigatory stage and had not yet assessed the demerits. There is no reason for them not to have accepted the document which, at the least, was potentially exculpatory, and considered it along with all other facts prior to making its determination. I therefore conclude that the assessment of the demerits was, at best, premature and, at worst, unwarranted.

The Union, by way of remedy, seeks the reinstatement of the grievor forthwith with a reintroduction to the workplace on a graduated basis. It seeks compensation for lost wages and benefits and $20,000 damages. The latter amount is based on an allegation that the grievor has been discriminated against contrary to the provisions of the **Canadian Human Rights Act**.

Contrary to the assertion of the Union there is no evidence indicating a violation of the **Act**. The actions of the employer in assessing the demerits were based, not on a prohibited ground under the **Act**, but on their perception that the grievor was capable of returning to work based on Dr. Dykeman's November note. Consequently, there is no finding of a violation and no award of damages.

Likewise, there is no award for lost wages. Dr. Dykeman's letter of January 30, 2005 makes it clear that the grievor has not been in a position to return to work since January when he was discharged. She states "This patient has been disabled from his workplace since September 25th, 2002 and ongoing; …".

What then is the appropriate remedy? First, the grievor is the be reinstated into his employment forthwith, with no loss of seniority from the date of his discharge. Second, and given that the discharge is void *ab* initio, and given, therefore, that there has been no effective severance of employment at any time, the grievor is to be placed retroactively to the date of his discharge on whatever benefits and benefit plans he would have been entitled to in January 2004 (*see supplementary award to CROA 2100, dated July 13, 1991*). He is to be paid any benefit monies to which he would have been entitled arising retroactively to that date. Should there be any disagreement as to the appropriate amount the matter may be spoken to.

The grievor, according to Dr. Dykeman, is not yet capable of returning to work. At such time as it is medically determined that he can the parties are to meet in order to accomplish the return to work.

March 14, 2005

(signed) M. BRIAN KELLER
ARBITRATOR