

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

**CASE NO. 3495**

Heard in Montreal Thursday, 16 June 2005

Concerning

**VIA RAIL CANADA INC.**

and

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

**DISPUTE:**

The assessment of a ten day suspension to Mr. Kenneth Fleming for failure to satisfactorily complete duties.

**JOINT STATEMENT OF ISSUE:**

An investigation was held on March 31, 2003 concerning Mr. Fleming's alleged failure to perform his duties on March 16 and 17, 2003. Mr. Fleming was assessed a ten day suspension following the investigation.

It is the Union's position that the investigation held on March 31st was inconclusive and did not show that the allegations were true. Alternatively, even were the Corporation to show that Mr. Fleming's work performance was below standard on March 16 and 17 the discipline assessed was excessive and must be mitigated by the fact that the grievor was suffering from a stomach disorder on the two days in question.

The Union asks that the discipline be expunged and that the grievor be compensated for all wages and benefits lost.

The Corporation maintains that Mr. Fleming failed or refused to complete his assigned duties as required. It submits that the discipline assessed was warranted, progressive and appropriate in the circumstances.

**FOR THE UNION:**

**(SGD.) WM. COOLEN**  
NATIONAL SECRETARY/TREASURER

**FOR THE CORPORATION:**

**(SGD.) G. MARCHAND**  
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

L. Béchamp – Counsel, Montreal  
E. J. Houlihan – Senior Manager, Labour Relations, Montreal  
A. Livingstone – Manager, Customer Services, Halifax

And on behalf of the Union:

- |             |                                      |
|-------------|--------------------------------------|
| B. McDonagh | – National Representative, Vancouver |
| R. Massé    | – Regional Representative, Montreal  |
| Wm. Coolen  | – National Secretary/Treasurer,      |
| K. Fleming  | – Grievor                            |

### **AWARD OF THE ARBITRATOR**

Upon a review of the material the Arbitrator is satisfied that the Corporation has discharged the burden of establishing, on the balance of probabilities, that the grievor was seriously remiss in the completion of his duties on March 16 and 17, 2003. I am satisfied that he did not bring sufficient attention to emptying the waste bins in the station, that he spent excessive time in conversation with members of the public and that he left his cleaning implements unattended for relatively extensive periods of time. While the grievor maintains that he was away from his equipment by reason of stomach cramps and diarrhoea, there is no indication that he brought his condition to the attention of anyone in the workplace, and it is arguable that he should have stayed away from work if that was his true condition.

The grievor is a long service employee with a less than enviable discipline record. He was previously reinstated following discharge in or about 1991 by this Office on a second chance basis and, notwithstanding, he had accumulated a total of fifty-five demerits at the time of the incident giving rise to the ten-day suspension. Indeed, he had incurred other warnings and suspensions which were assessed against him simply as a means to avoid a second termination. Plainly, Mr. Fleming must come to grips with the fact that he is at peril of losing his employment if he does not exercise care and due diligence in the performance of his duties and responsibilities in the future. In the circumstances the Arbitrator is satisfied that a ten day

suspension was well within the appropriate range of discipline, particularly having regard to the fact that he had incurred a three day suspension in September of 2002.

For the foregoing reasons the grievance must be dismissed.

June 20, 2005

**(signed) MICHEL G. PICHER**  
ARBITRATOR