

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3589**

Heard in Calgary, Wednesday, 15 November 2006

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

The assessment of 25 demerit marks to the discipline record of Mr. Denis Fennelly and his subsequent dismissal.

JOINT STATEMENT OF ISSUE:

On October 3, 2005, Mr. Denis Fennelly injured his left shoulder at work. He was considered for Workers' Compensation benefits from October 3 to approximately October 12, 2005.

On October 10, 2005, Mr. Fennelly was part of a foursome in an end of season golf tournament. The Corporation informed the Workers' Compensation Board that Mr. Fennelly had participated in the golf tournament. As a result, Mr. Fennelly's claim was discontinued as of October 9, 2005.

It is the Union's position that the grievor was injured and unable to work at all material times. It is further the Union's position that the "fit declaration" was made on the basis of a report by the Corporation itself and that the Corporation now relies upon a decision of the compensation board to support discipline. In that respect, the Corporation manufactured the evidence to support discipline, without seeking an objective medical opinion.

In the alternative, it is the Union's position that the discipline assessed is extreme in the circumstances. The Union seeks reinstatement with no loss of earnings or benefits.

The Corporation submits that Mr. Fennelly participated in a golf tournament although he was allegedly injured and in receipt of Workers' Compensation benefits. Under the circumstances the Corporation considers the assessment of discipline warranted and appropriate for a culminating incident.

**FOR THE UNION:
(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE**

**FOR THE CORPORATION:
(SGD.) D. STROKA
SENIOR MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

- D. Stroka – Sr. Manager, Labour Relations, Montreal
- G. Larochelle – Manager, Train Operations, Montreal
- A. Richard – Sr. Officer, Labour Relations, Montreal
- G. Benn – Officer, Labour Relations, Montreal

And on behalf of the Union:

- D. Olszewski – National Representative, Winnipeg
- D. Fennelly – Grievor

AWARD OF THE ARBITRATOR

The facts in relation to the instant grievance are relatively straightforward. The Corporation does not dispute that on October 3, 2005 the grievor was involved in a work-related accident. According to his own account, supported by that of another worker, a heavy load of luggage fell on top of him while the passenger bags were being transported on a wagon pulled by a tractor. It appears that the grievor was walking beside the wagon when the load tipped, and that he was knocked to the ground and covered by a substantial number of heavy pieces of luggage. He was taken for immediate medical care for a shoulder and back injury and directed by physicians to remain off work at least through October 12, 2005.

The grievor is an avid golfer, and was scheduled to participate in an end-of-season golf scramble at his club in Jasper on October 10, 2005. In fact, he had attempted to initially change his days off to be able to participate in that event without success. When his efforts at changing days off did not succeed he sought to accelerate his end of season layoff so as to be free on that day, an effort which was also unsuccessful. It is also important to appreciate that on at least one prior occasion, on

September 20, 2004, the grievor was absent from work on an alleged sick leave when in fact he participated in a golf tournament in Hinton, Alberta. Following an extensive investigation he was assessed ten demerits for failing to protect his assignment on that date, discipline which was not grieved. Additionally, as a relatively short term employee with some 2-1/2 years of cumulative compensated service, over his part-time seasonal assignments with the Corporation Mr. Fennelly recorded what the Corporation characterizes as a higher than average frequency of absences for Workers' Compensation claims, as well as personal sick leave.

The record discloses that the grievor's supervisor was advised that notwithstanding his absence from work for injury related reasons, on October 10, 2005, Mr. Fennelly played in a season closing golf tournament at his club in Jasper, as part of a foursome in a scramble. Based on that information, and the grievor's prior record, the Corporation instituted a disciplinary investigation. During the investigation the grievor maintained that he had not played golf in the fullest sense. Rather, he maintains, he captained his four-person team and limited his involvement to driving a golf cart and putting on certain holes. In support of that explanation he provided the Corporation with a letter from one of his golf team mates.

The Corporation did not believe the grievor. As a result it terminated his employment for an accumulation of demerits, after the assessment of twenty-five demerits for claiming WCB benefits while being fit for duty. It also appears that the grievor temporarily lost his WCB benefits by reason of the ruling of an adjudicator who

was provided with the same information as the Corporation concerning Mr. Fennelly's participation in the golf tournament. That ruling was overturned on appeal and his benefits were restored.

The Union's representative submits that the grievor did not violate any obligation to the Corporation, and that there was nothing inconsistent in his physical limitations and his participation, only to the extent of putting, in the golf tournament in question. Alternatively, he maintains that the discharge of the grievor is excessive in the circumstances.

The Arbitrator accepts that the grievor did suffer a work-related, soft tissue injury which justified his entitlement to Workers' Compensation benefits for a period of time. I am also prepared to accept that his participation in the golf tournament on October 10, 2005 was, as he says, limited to acting as captain of his team and only putting on certain holes. That said, however, I am not prepared to conclude that the grievor was not deserving of some discipline in all of the circumstances.

Mr. Fennelly knew, or reasonably should have known, that his disciplinary record was highly doubtful, and contained prior discipline for malingering, including participation in a golf tournament when he was claiming to be ill. As a seasonal employee of only six years' service, he had accumulated forty-five demerits by the time of the events here under examination.

It is trite to say that each case must be determined on its own facts. I am satisfied that in the unusual facts of this case it was incumbent upon Mr. Fennelly, at a minimum, to advise his supervisor that he would be participating in a golf tournament, but doing so only on the limited basis of driving a golf cart and putting only occasionally. In other words, given the grievor's past record, he owed to the Corporation an obligation of full candour with respect to his activities at the time. Having participated in a golf tournament, without any notice to his employer, much less any explanation, he essentially became the author of his own misfortune with respect to the events which ensued. That is particularly so given his documented prior record of being less than honest with respect to the use of sick leave.

What, then, is the appropriate result? I am satisfied that this is not a case in which the discharge of the grievor should be sustained. However, it is not a case for the direction of any compensation. Moreover, the reinstatement of the grievor should be coupled with strict conditions to protect the legitimate interests of the Corporation as regards the future attendance/absenteeism of Mr. Fennelly.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. The grievor's reinstatement shall be conditioned upon his accepting to maintain a rate of attendance at work equal to the average of the employees in his bargaining unit at the same location and classification for a period of not less than two calendar years. Should the grievor record a rate of

absenteeism in excess of the average for any quarter in the next two years he shall be subject to discharge, without access to arbitration save for the purpose determining whether he has violated the conditions so established, having regard to his own absenteeism and the average absenteeism of other employees in his classification at the same location. Should there be any issue with respect to the interpretation or implementation of this award the matter may be spoken to.

November 20, 2006

(ORIGINAL SIGNED BY) MICHEL G. PICHER
ARBITRATOR