CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3675

Heard in Montreal, Thursday, 15 May 2008

Concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Concerning a wage claim on behalf of Mr. Sylvain Muruguppa from August 10, 2006 until January 22, 2007.

JOINT STATEMENT OF ISSUE

Mr. Muruguppa was hired as a Senior Service Attendant on board the trains and is governed by Collective Agreement No. 2. As a result of an injury in December 1998 Mr. Muruguppa was accommodated in a sedentary position in Collective Agreement No. 1. Mr. Muruguppa held a position in that Agreement until June 1, 2004 when Mr. Muruguppa was laid off. On August 10, 2006 Mr. Muruguppa alleges that he met with the Director, Customer Experience, and submitted a doctor's note that declared him fit to return to work in Collective Agreement No. 2 and clearing him of any medical restrictions.

It is the Union's position that Mr. Muruguppa should have been allowed to return to work in Collective Agreement No. 2 on the date that he provided the medical certificate. Further to this, the Union is seeking that Mr. Muruguppa be compensated for all time lost and benefits from August 10, 2006 until January 22, 2007 when he returned to work. The Union alleges a violation of Articles 13.3, 13.4, 28.11 as well as Appendix 7 of the Collective Agreement The Union further alleges a violation of Sections 7 and 32 of the *Canadian Human Rights Act*.

The Union can appreciate the employer's need to assure itself of the griever's fitness. However, the delay was excessive and the griever cannot be held out of service, without wages, while waiting for the Employer's medical department. Accordingly, the Union seeks compensation for the time held out of service.

The Corporation submits that Mr. Muruguppa first met with a Manager, Customer Experience, from Collective Agreement No. 1 on October 2, 2006 and submitted a copy of a doctors note dated August 10, 2006. Due to Mr. Muruguppa's lengthy absence from work, the seriousness of his disability and his subsequent accommodation, Mr. Muruguppa was sent to Medisys for a medical assessment to confirm his status. Following Mr. Muruguppa's medical evaluation, the Corporation's Chief Medical Advisor requested additional medical information from Mr. Muruguppa's personal physician and specialist to clarify his ability to return to work. On January 22, 2007 the Corporation was advised by the Chief Medical Advisor that Mr. Muruguppa was declared medically fit to return to work. As such, Mr. Muruguppa returned to active service on January 23, 2007.

Under the circumstances the Corporation maintains that Mr. Muruguppa was returned to active service once his ability to return to work was validated by the Corporation's Chief Medical Advisor. The Corporation did not therefore engage in a discriminatory practice in breach of section 7 of the *Canadian Human Rights Act*.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:

(SGD.) D. STROKA
SENIOR ADVISOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

D. Stroka	– Labour Relations Advisor, Montreal
Y. Noël	– Director, Customer Experience, Montreal
J-P Moreau	– Customer Experience Manager, Montreal
J. Pastor	– Labour Relations Advisor, Montreal
A. Richard	– Sr. Advisor, Labour Relations, Montreal

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
R. Fitzgerald	– President, Council 4000, Toronto
S. Auger	– Bargaining Representative, Montreal
S. Muruguppa	– Grievor

AWARD OF THE ARBITRATOR

The grievor injured his back on December 6, 1998. He was laid off from work from December 1998 to September 2001. During this period, the grievor underwent numerous treatments from the Corporation medical doctors and other specialists. He also received treatment from his own personal physician, Dr. Savard. All those physicians agreed that the grievor was permanently disabled. In September 2001, the grievor was accommodated, after numerous attempts, in a communications operator position. The grievor held this position until February 2004 when he was displaced by a senior employee facing layoff. There were no other accommodated positions available and the grievor was consequently laid off on February 3, 2004. Other attempts at accommodation were made in the ensuing months but proved unsuccessful.

On June 22, 2004, the grievor was advised in a letter that a vacant position was available and he was to report to work on June 28, 2004. The grievor failed to respond to the letter. He also failed to respond to a follow-up letter dated July 13, 2004. As a result, the position was awarded to another applicant. The Corporation states that it could have terminated the grievor's employment at that point given his refusal to accept an accommodated position. However, the Corporation continued to pay benefits to supplement the grievor's income through to November 2005.

On July 6, 2006, now just over two years after he was laid off, the Corporation wrote to the grievor advising that they considered him to be absent from work without authorization. A copy of the letter was sent to the Union. The letter was returned indicating the grievor had moved but had not left a forwarding address. After verifying the grievor's address with Human Resources, a second letter was sent to the grievor on July 18, 2006, with a copy to the Union, advising that he had lost his seniority and that his services were terminated. This letter was also returned indicating that the addressee was unknown. The grievor's employment was officially terminated on July 18, 2006.

On August 10, 2006, the grievor's personal physician, Dr. Savard, wrote to the Corporation advising that the grievor was fit to return to his original occupation, free of any limitations. The grievor, as noted in the joint statement of issue, initially indicated that he submitted the doctor's note on that same day to the Director of Customer Experience, Mr. Noël. At the arbitration hearing, the Union indicated at the outset of the proceedings that the grievor now recalled that he actually left the August 10, 2006 note with a clerk in the Human Resources department. The Corporation's evidence in that regard is that the doctor's note was indeed left with a clerk in the Human Resources department with no letter of instruction or return address. The clerk, in turn, simply put the doctor's note on the grievor's file. This information was not discovered by the Corporation until February 13, 2008 when the original August 10, 2006 doctor's note was found in his personnel file.

The grievor did not submit the doctor's note dated August 10, 2006 to his station supervisor until October 2, 2006. The station supervisor advised the grievor on October 2, 2006 that his employment had been terminated on July 18, 2006. On November 10, 2006, on the strength of the August 10, 2006 medical note, the Corporation requested that the grievor attend Medisys in order to determine whether or not he could return to work in his hired position as a Senior Service Attendant. The expert consultants' Medisys investigating physician initially determined that the grievor should not return to his previous position. However, a further medical report from one of the grievor's attending orthopaedic physicians indicated that the grievor was fit to return to his position on the trains without restrictions. On that basis, the grievor was returned to active service as a Senior Service Attendant on January 23, 2007. The Union, as noted, is seeking that the grievor be compensated for all lost time and benefits from August 10, 2006 until January 22, 2007.

It is important to note that the evidence presented in the joint statement was that the grievor provided the Director of Customer Experience, Mr. Noël, with a copy of the August 10, 2006 medical note. At the arbitration hearing, the Union advised that the grievor was mistaken and that the note had indeed been left with a clerk and not with Mr. Noël. This change of position on such a critical point casts doubt on the grievor's overall credibility. The whole basis for his claim is that the Corporation had knowledge of his medical circumstances as far back as August 10, 2006 and did nothing about it. For the grievor to now say that he has been wrong about that issue up until these proceedings began, but now recalls what he did with the medical note, is simply not credible. His whole case against the employer, in my view, hinges on his assertion that proper notice of his medical condition was provided to the employer and the employer failed to initiate the process for his return to work, beginning on August 10, 2006, as it should have.

The grievor's actions in leaving a copy of the medical note with a clerk on August 10, 2006 was not the proper step to be followed by an employee seeking to return to work. I accept that the grievor was by that time familiar with the Corporation procedures and the requirement that he advise his supervisor of his interest in returning to work. After all, he has been on disability leave for a number of years and was aware, or should have been aware, of all the administrative requirements of the employer in such circumstances.

In this case, the grievor simply chose not to follow the established protocols. It was only on October 2, 2006, when the grievor presented himself at Central Station and submitted a copy of the August 10, 2006 doctor's note to his station supervisor, that the Corporation was in a position to act on the new medical information. The Corporation, in my view, was diligent in following up on the grievor's request to return to active service once it became aware of the medical note on October 2, 2006. In short, it was the grievor, and not the Corporation, who failed to follow the established return-to-work procedures. On that basis, the grievor's claim for reimbursement for wages due for the period from August 10, 2006 to January 22, 2007 is without merit.

The grievance is dismissed.

May 20, 2008

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR