

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

CASE NO. 3757

Heard in Montreal, Tuesday, 12 May 2009

Concerning

VIA RAIL CANADA INC.

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal the discharge of Locomotive Engineer Garry Robertson of Kamloops, B.C. for “your failure to report for duty, protect assignments, follow instructions and insubordination towards a Corporation officer for not attending investigations as directed by the Corporation.”

UNION’S STATEMENT OF ISSUE:

On April 25, 2008, Mr. Robertson received a voicemail from VIA CMC that he was a successful applicant to VIA/CN Bulletin 2008-120 and that he was to ride Train No. 2 Kamloops to Jasper on April 26 at approximately 01:30. Mr. Robertson did not receive this message in a timely fashion and did not attend Train No. 2 that evening. Mr. Robertson subsequently contacted Ms. Brenda Wilson to enquire as to the proper procedure for transferring to VIA Rail and also stated that he was planning on pulling his bid submitted on VIA/CN Bulletin 2008-120. Mr. Robertson was contacted on two more occasions but was unable to fulfill the request of the Corporation.

On May 2, 2008, Mr. Robertson received a Notice to Appear at his Kamloops, B.C. residence, dated May 1, 2008, directing him to report to Jasper, AB., for an employee investigation on May 7, 2008 in connection with “your failure to report for duty and to protect assignments as directed by the Corporation between April 25, 2008 and May 1, 2008. Mr. Robertson was unable to attend and, given he was unable to contact other Corporate Officer’s, discussed the situation with Mr. Dino Trubiano, Senior Manager System Operations on May 5, 2008, followed by a fax on May 6, 2008 requesting a postponement of the May 7, 2008 investigation. Mr. Trubiano responded by letter dated May 7, 2008, advising Mr. Robertson that any concerns have to be addressed by his manager, Guy LaRochelle. Mr. Robertson was unsuccessful in contacting Mr. LaRochelle in previous attempts.

On May 13, 2008, Mr. Robertson received a second Notice to Appear at his Kamloops, B.C. residence, dated May 7, 2008, directing him to report to Edmonton, AB., for an employee investigation on May 12, 2008 in connection with “your failure to report for duty and to protect assignments as directed by the Corporation between April 25, 2008 and May 1, 2008. Given that Mr. Robertson received the Notice to Appear after the date required to appear, he was unable to attend the second investigation.

On May 20, 2008, the VIA Disciplinary Measures Form, dated May 15, 2008, was hand delivered to Mr. Robertson by Corporation representative, J Gosse. Mr. Robertson had been discharged, effective April 26, 2008.

The Union contends that Mr. Robertson was discharged without a fair and impartial hearing in accordance with the provisions of Article 20 of Agreement 1.4. The Union contends that Mr. Robertson's rights in accordance with Article 104.8 of Agreement 1.4 were violated when he was not provided with the ability to report to another terminal as soon as practicable. The Union contends that Mr. Robertson was not as yet an employee of VIA Rail Canada Inc. when he was discharged.

It is the Union's position that Mr. Robertson's discipline is unwarranted and should be expunged. In the alternative, the discipline should be significantly reduced. Mr. Robertson should be compensated for all loss of wages or benefits.

The Corporation disagrees with the Union.

FOR THE UNION:

(SGD.) T. MARKEWICH

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

- D. Stroka – Sr. Advisor, Labour Relations, Montreal
- A. Richard – Sr. Advisor, Labour Relations, Montreal
- G. Larochelle – Manager, Train Operations, Edmonton
- J. Gosse – Manager, Train Operations, Kamloops
- M. Hopkins – Officer, Crew Control
- B. Wilson – Officer, Crew Control

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- B. Willows – General Chairman, Edmonton
- T. Markewich – Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

Having reviewed the material the Arbitrator is satisfied that the grievor did repeatedly and unreasonably refuse to appear for the initial work assignments given to him, in respect of his orientation, once he was the successful applicant for a transfer from CN to VIA into passenger service. He also unreasonably refused to attend at employee investigations into his conduct as a result of which he was ultimately terminated.

In the Arbitrator's view the conclusion which is compellingly drawn from all of the facts disclosed is, as the Corporation maintains, that Mr. Robertson demonstrated to the employer that he is ungovernable. Nor are there compelling mitigating factors on the face of the record. Sadly, Mr. Robertson has a record of having failed to appear for employee statements in 1988, in 1999 and in 2004, the latter being the subject of an arbitration award in this office (**CROA 3431**).

I am satisfied that the Corporation did have grounds to terminate the grievor's services. However, Mr. Robertson did have long, ongoing employment with CN, employment he left to join the Corporation, dating back to 1974. It appears that he is not far from entitlement to an

unreduced pension. In the circumstances of this case, therefore, the Arbitrator deems it appropriate to make a substitution of penalty.

The grievance is allowed, in part. The Arbitrator directs that the grievor's termination be removed from his record and that he be placed on suspension, such suspension to continue until such time as he becomes eligible for an unreduced pension. At that point of entitlement the grievor shall retire. Should he not accept this condition, the grievance will otherwise be dismissed. Nothing in this award should be construed as limiting the ability of CN to return the grievor to its own service, should it choose to do so, and should he agree.

The Arbitrator retains jurisdiction in the event of any dispute between the parties concerning the implementation of this award.

May 19, 2009

(signed) MICHEL G. PICHER
ARBITRATOR