

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

CASE NO. 3759

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 Leith Rasmussen of Kamloops, B.C., for "insubordination towards a corporate officer for your failure to provide medical documentation as requested by VIA Rail, Canada, Inc. to cover your absence from the workplace between December 22, 2007 and January 9, 2008 while employed as a locomotive engineer."

UNION'S STATEMENT OF ISSUE:

On December 20, 2008, Mr. Rasmussen advised the Corporation that he would be off on sick status from December 22, 2008 to January 9, 2008. Mr. Rasmussen's attempted return to service on January 4, 2008, was not allowed until providing a Doctor's certificate for the time period that he was sick. The Doctor's certificate was provided to the Corporation by fax on January 9, 2008 and Mr. Rasmussen was returned to active service by the Corporation. Mr. Rasmussen then submitted a claim for lost wages for the time period January 5, 2008 to January 10, 2008 that was declined.

On May 2, 2008, Mr. Rasmussen was required to attend an investigation for the reason: "failure to provide appropriate medical documentation for your absence between December 22, 2007 and January 9, 2008".

After an investigation was conducted, Mr. Rasmussen was removed from service for an alleged failure to provide a Doctor's certificate for his absence from December 22, 2007 to January 4, 2008.

On September 8, 2008, Mr. Rasmussen, while still being held from service, was required to attend an employee investigation for the reason "in connection with the circumstances surrounding your failure to provide medical documentation as requested by VIA Rail to cover your absence from the work place between December 22, 2007 and January 9, 2008". Subsequent to this investigation, Mr. Rasmussen was assessed a discharge.

The Union contends that Mr. Rasmussen provided the Corporation with a Doctor's certificate, on January 9, 2008, as required in accordance with the RAC Medical Rules, the Personal Information Protection and Electronic Documents Act, as well as the Canada Labour Code. The Union further contends that the request for medical records must come from the Corporation's Chief Medical Officer to Mr. Rasmussen's Physician and not through the Local Officer.

The Union also contends that Mr. Rasmussen's rights provided in accordance with Article 20 of Agreement 1.4 were violated.

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

The Corporation's only response has been acknowledgement of the Union's grievance, which was submitted at Step III of the grievance procedure on October 22, 2008.

FOR THE UNION:

(SGD.) T. MARKEWICH

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

- A. Richard – Sr. Advisor, Labour Relations, Montreal
- J. Gosse – Manager, Train Operations, Kamloops
- D. Stroka – Sr. Advisor, Labour Relations, Montreal
- G. Larochelle – Manager, Train Operations, Edmonton
- 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
- P. Vickers – General Chairman, Sarnia
- L. Rasmussen – Grievor

AWARD OF THE ARBITRATOR

The record discloses that the grievor was absent from work between December 22, 2007 and January 4, 2008. It is also common ground that before his absence he indicated to his supervisor that he would be absent for what could possibly be an extended period by reason of a medical condition for which he had seen his doctor on that same day, December 20, 2007.

It does not appear disputed that the grievor's return to work on January 4th came earlier than was expected by the Corporation's officers. He was then asked to obtain, and did obtain, a note from his physician certifying that he was fit to return to the performance of safety-sensitive work. The Corporation did not appear to question the *bona fides* of the grievor's absence at that time. It did, however, hold him out of service until such time as he obtained his doctor's note certifying his fitness to return to work. The grievor grieved that effective suspension from service on January 19, albeit the Corporation maintains that the grievance was received on January 28, 2008. It was only some time later, on February 21, 2008 that the Corporation's Director of Train Operations, wrote to its Chief Medical Officer, Dr. Marcel Pigeon, requesting that the CMO take steps to verify the grievor's absence. On March 11, 2008 the grievor's supervisor, Mr. John Gosse, required Mr. Rasmussen to provide to the Corporation's Chief Medical Officer access to his physician's medical information for the period between December 22, 2007 and January 9, 2008. The grievor refused to provide that information, taking the position that there was no obligation on his part to disclose such confidential material to his employer.

Matters deteriorated from there. It appears that the Corporation declined to respond to the grievance, indicating to the Union that it would not do so until such time as the Corporation's Chief Medical Officer was placed in a position to confirm that Mr. Rasmussen's medical condition warranted his absence for the dates in question. That, it appears, was the position

taken notwithstanding that the grievor's personal physician did provide information to the Great West Life Insurance Company which approved his claim for sick leave benefits for the entire period in question.

On May 2, 2008 the Corporation conducted an investigation of the grievor during which he was asked why he was refusing to provide the medical information requested. Mr. Rasmussen responded that he felt that the request made by the Corporation was in fact unlawful and in violation of the **Canada Labour Code**. On the same day he was advised in writing by Mr. Gosse that he was being held out of service indefinitely. In response to that Mr. Rasmussen did acquire a further note from his physician which reads:

Leith was unable to work for medical reasons from December 20, 2007 to January 4, 2008. I have followed his health care regularly .

The Corporation did not consider that the above note was sufficient information and thereafter directed him to arrange to have his physician provide the Corporation's Chief Medical Officer with his medical files covering the absence.

Faced with an ongoing suspension, on May 26, 2008 Mr. Rasmussen wrote directly to Dr. Pigeon explaining his situation and, ultimately, offering to provide the information requested. He stated, in part:

Due to the fact that I am being forced to endure a severe monetary penalty I will provide your office with any information that you require. Please inform me as to what exactly would meet your requirements. It is clear that my doctor's written authorization will not suffice.

At the Corporation's request the grievor did attend a medical assessment in Vancouver, on June 6, 2008. However, because of a train delay he arrived late and the matter was rescheduled for July 2, 2008 in Vancouver. He was then told that he was required to sign a consent form giving to the Corporation's Chief Medical Officer access to his "full medical file" as held by his physician in Kamloops. He declined to agree to that broader request and the medical assessment therefore did not proceed.

Although the grievor remained out of service, he was given notice of a further disciplinary investigation statement to be taken on September 8, 2008. That investigation was to inquire into his ongoing refusal to provide the medical information which the Corporation required. Following the investigation, on September 12, 2008, the grievor was given notice of his termination for:

Insubordination towards a Corporate officer for your failure to provide medical documentation as requested by VIA Rail Canada Inc. to cover your absence from the workplace between December 22, 2007 and January 9, 2008 [sic] while employed as a locomotive engineer.

The Union submits that the suspension and discharge of Mr. Rasmussen should be treated as void *ab initio* because his investigation was conducted by Mr. Gosse, the person with whom the grievor had in fact spoken on December 20, 2007 with respect to his forthcoming medical leave of absence. The Arbitrator is satisfied that at that point the grievor did give Mr. Gosse a sufficient explanation of the nature of the advice which he was receiving from his doctor and the condition for which he was then being treated. The Union maintains that Mr. Gosse then became an actor in the facts of the case, and indeed a witness to events so that it was inconsistent with the Company's obligation to provide a fair and impartial investigation for him to conduct both disciplinary investigations of Mr. Rasmussen, as in fact occurred. In that regard reference is made to **CROA 1720, 1886, 2041, 3061 and 3221**.

With respect to the merits of the grievance, the Union's position is that the grievor did provide the Corporation with sufficient medical certification, that the Corporation was aware that his physician's information has satisfied the medical Insurer, Great West Life and that there was no reasonable basis to hold him out of service or to terminate his employment in all of the circumstances.

The Arbitrator is satisfied that the grievance must succeed. Firstly, with respect to the merits of the case, I have some difficulty understanding the position of the Corporation after the grievor provided to it the note from his physician, on May 8, 2008. That note confirmed that the grievor was unable to work, that he was unable to work "for medical reasons" and that the medical reasons operated from December 20, 2007 to January 4, 2008, under the supervision of his personal physician, Dr. Burriss who signed the note to that effect.

Understandably, there may be circumstances in which an employer chooses to disbelieve a medical certificate or insists on obtaining further information. Such an unusual position must, however be based on compelling facts or circumstances which would justify still greater intrusion into the protected privacy of an employee as regards his or her health information.

In the case at hand the reasonable grounds which the Corporation advances are relatively slim. The grievor is an employee of long service whose record shows no problems of absenteeism or general honesty, with his employer. At its strongest, the Corporation's concern would appear to stem entirely from the fact that the grievor's absence coincided with the Christmas holiday period. While that might be a legitimate concern, in the Arbitrator's view it is more than counterbalanced by the note from Dr. Burriss confirming that the grievor was under treatment for that entire period of time. Indeed, as became evident through evidence given by Mr. Rasmussen at the arbitration hearing, the nature of his medical condition had in fact been stated to Mr. Gosse on December 20, 2008 at the time he indicated he would be undertaking a medical leave of absence. In the result, I am satisfied that Mr. Rasmussen did provide to the Company sufficient medical certification to confirm the legitimacy of his absence over the Christmas period of 2007-2008.

In the alternative, on the unusual facts of this case, the Arbitrator would be compelled to sustain the Union's objection to the fact that the disciplinary investigations in the case at hand were both conducted by Mr. Gosse. It is difficult to disregard the fact that Mr. Gosse was given specific information by the grievor on December 20, 2007 with respect to the fact that he had seen his doctor and the nature of the condition for which he was then under treatment and would continue to be under treatment for some time to come. In effect Mr. Gosse then became possessed of knowledge which effectively made him a witness with respect to the merits of the situation involving Mr. Rasmussen. In that circumstance it was not appropriate for him to conduct the investigations and on that basis alone the discipline, in both instances, must be viewed as void *ab initio*.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with full compensation for all wages and benefits lost and without loss of seniority.

May 19, 2009

(signed) MICHEL G. PICHER
ARBITRATOR