

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

CASE NO. 3779

Heard in Edmonton, Wednesday, 10 June 2009

concerning

VIA RAIL CANADA INC.

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the discipline of Locomotive Engineer Garry Bereska, of Vancouver, B.C., for "Unauthorized leave of absence November 18th and 19th 2006, prior to commencing annual vacation".

UNION'S STATEMENT OF ISSUE:

Mr. Bereska was scheduled for vacation from November 20 to November 26, 2006. Following his vacation. Mr. Bereska was scheduled to attend a Rules class on November 27, 2006 in Montreal. On November 18 and 19, 2006, Mr. Bereska allegedly failed to protect his assignment on Train No. 2.

On January 23, 2007, Mr. Bereska was required to attend an investigation for "...failure to protect your assignment on Saturday November 18, 2006...". On March 4, 2007, Mr. Bereska received the VIA Disciplinary Measures Form, dated February 21, 2007, indicating an assessed discipline of 25 demerits.

The Union contends that Mr. Bereska was granted his leave of absence by the Crew Office and cannot be held responsible for missing a call while on an authorized leave of absence.

The Union contends that Mr. Bereska was disciplined without a fair and impartial hearing in accordance with the provisions of Article 20 of Agreement 1.4.

It is the Union's position that Mr. Bereska's discipline is unwarranted and should be expunged, or in the alternative, the discipline should be significantly reduced. Mr. Bereska 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 April 30, 2007.

FOR THE UNION:

(SGD.) T. MARKEWICH

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

A. Richard – Sr. Advisor, Labour Relations, Montreal

D. Stroka – Sr. Advisor, Labour Relations, Montreal
J. Gosse – Operations, Vancouver

And on behalf of the Union:

M. A. Church – Counsel, Toronto
T. Markewich – Vice-General Chairman, Edmonton
G. Bereska – Grievor

AWARD OF THE ARBITRATOR

This first disciplinary incident involves the grievor's failure to protect his assignment on November 18th and 19th, 2006 for which he was assessed 25 demerits. The nub of this case involves the contradictions in the evidence between the grievor's version of his discussions with the crew office prior to those two days. The grievor stated at his investigation that he was actually called by the crew office on November 16, 2006 requesting that he work "over and above" on Train #1 to Vancouver. He advised the office at the time that he was preparing for a rules class in Montreal, with vacation combined, and that he was taking a flight the following day, November 17, 2006. His understanding, after speaking with the crew office, was that he had received permission for a leave of absence on November 18th and 19th because of his combined vacation and Rules class scheduled in Montreal for November 27, 2006.

The Corporation's evidence is that the crew office left messages for the grievor on November 17th that he would likely be working on Train #2 the following day, as the regular assigned locomotive engineer was on vacation. Telephone messages in that regard were left on both the grievor's home line and cell line but the grievor did not return the call. That same day, the Corporation left a further message on both the

grievor's cell and home phone lines that he would now be required to work the following day, but the grievor did not return the call. That same evening, the Corporation left a "two-hour call" message for the grievor on both his cell and home phone. Again, the grievor did not return the call. The Corporation assigned an emergency employee to the route as a result of the grievor's absence. The Corporation again called the grievor both at home and on his cell phone on the evening of November 18th advising the grievor to protect his assignment for later that evening and into the following day, but the grievor did not return the call. The grievor commenced his scheduled vacation leave on November 20, 2008 through to November 26, 2008; then attended the rules class in Montreal on November 27, 2008; and, then was off again on vacation from November 27, 2008 through to December 6, 2008.

The Arbitrator finds it difficult to accept the grievor's version of events. The grievor was unable to say with any certainty who he spoke with at the crew office on November 16, 2008. Further, the grievor was contacted on three occasions on both his home and cell phones prior to his assignments and yet did not respond to any of the calls. The grievor is an experienced employee who was familiar with the call-in procedure and should have responded to the telephone calls requesting that he protect his assignment. His failure to do so leads to the reasonable inference that he was not about to disturb his travel plans which otherwise would have kept him away from work through to December 6, 2008. The grievor has received discipline of ten and fifteen demerits for two separate incidents in 2004 involving unauthorized leaves of absences. Under the circumstances, and bearing in mind in particular the grievor's recent record of

discipline for similar attendance issues, the Arbitrator finds that the discipline of twenty-five demerits was an appropriate disciplinary response by the Corporation. The Arbitrator would add that the Union's submission with respect to the absence of a fair and impartial investigation due to the 60-day delay in investigating the incident is rejected. There was no demonstrated prejudice to the grievor as a result of the manner in which the late call was investigated nor is the delay in the investigation inordinate given, in particular, the fact that the grievor was absent on vacation until December 6, 2008. For all these reasons, the grievance is dismissed.

June 25, 2009

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