

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

**CASE NO. 3780**

Heard in Edmonton, Wednesday, 10 June 2009

concerning

**VIA RAIL CANADA INC.**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal the suspension of Locomotive Engineer Garry Bereska, of Vancouver, B.C., for "Insubordination in reference to your failure to follow instructions of a Company Officer to attend an employee statement as directed, resulting in a 30 day suspension".

**JOINT STATEMENT OF ISSUE:**

On January 23, 2007, Mr. Bereska was required to attend an investigation for allegedly failing to protect his assignment on Train No. 2 on November 18 and 19, 2006.

Mr. Bereska failed to attend the investigation on January 23, 2007 as he had accepted a call for an assignment the previous day on January 22, 2007. A second investigation was scheduled.

As a result of a second investigation, Mr. Bereska was suspended from duty for 30 days for alleged insubordination for failure to attend an investigation.

The Union contends that the Corporation did not prove its charge of insubordination as alleged and that the discipline is unwarranted under the circumstances.

It is the Union's position that Mr. Bereska's discipline 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 incident arises as result of the grievor's failure to attend an investigation on January 23, 2007 because of his alleged failure to protect his assignment on November 18 and 19, 2006.

The grievor stated that he was called to work by a Corporation officer late on the evening January 22nd for an assignment on January 23, 2007, the date of his scheduled statement into the November 18th and 19th incidents. The grievor claims that, because the call came in late at night, he assumed that the Corporation knew he already had an investigative meeting scheduled for the following day and also assumed that the Corporation would make the appropriate arrangements to cancel the meeting. Mr. Gosse, the Manager of Train Operations for B.C., issued a new Notice to Attend for a re-scheduled investigation to take place on January 29, 2007 as a result of the grievor's failure to attend the January 23, 2007 investigative meeting. Due to a staff transition in the Union's offices, the grievor was unaware which Union officer would attend the meeting with him. The grievor contacted Mr. Gosse on the morning of January 29, 2007 and told him that Union representation could not be arranged, that he would prefer not to proceed without an accredited representative but that he would nevertheless attend the meeting at the hotel. The grievor maintains that he had called Mr. Gosse three times the previous day in regards to rescheduling.

The grievor reported for the investigation on the morning of January 29, 2007 without any Union representation only to find that the meeting room had been cancelled. The investigation was rescheduled a third time for February 5, 2008 at which time the grievor appeared with Mr. Sorba, the new accredited Union officer.

The Arbitrator notes at the outset that the grievor was well-versed in Corporation procedures having been an employee of both VIA and CN for more than 40 years. Based on the evidence before me, I find that the grievor simply took advantage of the call-in in order to avoid having to appear the following day for the scheduled investigation. He should have been forthright when he first spoke with the crew office on January 22, 2007 about his obligation to attend the investigative meeting the next day. His behaviour amounts in my view to no more than a transparent attempt on his part to lay the blame for his absence at the feet of the Corporation, rather than on his own lack of communication to the crew office over his required attendance at the scheduled investigative meeting on January 23, 2007. His actions under the circumstances are deserving of discipline.

The Union raises the issue of the lack of a fair and impartial investigation because of Mr. Gosse's role as both the fact-finder and the investigator at the investigative hearing. The Union cites the recent decision in **CROA 3759** where the Arbitrator found that the investigation did not meet the fair and impartial standard because the investigator had received medical information from the grievor which

effectively made him a witness in the proceedings. In this case, the critical discussion over the January 23, 2007 assignment took place between the grievor and an individual in the crew office and not with Mr. Gosse, who presided over the investigation. Mr. Gosse did not take any part in the January 23, 2007 discussion and, as such, cannot be viewed as being in the conflicting position of both a witness to critical incident information and the person reviewing that same information in the context of an investigative statement.

Further, the Arbitrator finds that the issue of Union representation at the scheduled investigative meeting of January 23, 2007 is not a relevant factor in determining whether there was just cause for discipline. It was the grievor's failure to disclose his assigned shift on January 22nd which forms the basis for the discipline. On the other hand, the Arbitrator finds that the 30 day suspension is not a proportionate disciplinary response under the circumstances. A suspension of 30 days is not in keeping with either the principles of progressive discipline nor does it reflect the gravity of the offending conduct. I would substitute in its place a written reprimand for the grievor's failure on January 22nd to turn down the Spareboard assignment for January 23, 2007 because he was already under a Notice to Attend an investigative meeting on January 23, 2007.

June 25, 2009

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