

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

CASE NO. 4068

Heard in Montreal Wednesday, 14 December 2011

Concerning

VIA RAIL CANADA INC.

And

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

DISPUTE:

The assessment of 30 demerit marks for alleged conduct unbecoming a VIA Rail employee on May 10 and 11, 2010 which resulted in his discharge for accumulation of demerit marks in excess of 60.

JOINT STATEMENT OF ISSUE:

On June 3, 2010, an investigation was held for Mr. D. Rudyk for his alleged conduct unbecoming a VIA Rail employee on May 10 and 11, 2010. During the course of the investigation the Corporation alleged that the grievor was on the property acting in a manner unbecoming an employee of VIA Rail and was under the influence of drugs and/or alcohol. The facts relating to the circumstances of this case are relatively correct and not in dispute.

The Union contends that there are mitigating facts that must be considered including, but not limited to, the fact that the grievor suffers from substance abuse and is being treated for such.

The Union seeks reinstatement with full employment, without loss of seniority and reimbursement of lost wages and all benefits.

The Corporation submits that the employee's behaviour was violent and threatening, that the employee was under the influence of drugs or alcohol on VIA property, was unfit for duty, and behaved in an inappropriate manner, including intimidation of employees. In addition, Mr. Rudyk did not claim to have a drug or alcohol dependency and stated that his behaviour was normal and he is a hyper person.

The Corporation maintains that the discipline assessed was appropriate in the circumstances.

FOR THE UNION:
(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:
(SGD.) B. A. BLAIR
SENIOR ADVISOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
D. Stroka	– Sr. Advisor, Labour Relations, Montreal
J. Maillot	– Sr. Advisor, Labour Relations, Montreal
K. Thomas	– Customer Experience Manager,

There appeared on behalf of the Union:

R. J. Fitzgerald	– National Staff Representative, Toronto
D. Kissack	– Regional Representative, Western Region
D. Rudyk	– Grievor

AWARD OF THE ARBITRATOR

The grievor has been employed by the Corporation for some fifteen years and at the time of the events here under review held a position as a GOC / Stock Checker in the Vancouver Maintenance Centre. Prior the incidents reviewed here, the grievor's disciplinary record stood at forty demerits. He was then assessed twenty demerits for an incident which occurred on May 10, 2010 and thirty demerits for an incident the following day, May 11, 2010, which resulted in his termination.

Monday, May 10, 2010 the grievor was scheduled to work. He called in some 1-3/4 hours late and was advised that his position was covered and he should not come to work. However, it appears that he did come to the workplace that day, apparently under the influence of alcohol. Written statements by a number of employees, the content of which the Arbitrator accepts, reflect that at approximately midday the grievor appeared on Corporation premises, apparently carrying a hammer in a bag and spoke to several employees about a fight he had been involved in, apparently on public transit, on the

evening prior. The accounts given by the employees tend to reflect their concern about his inebriated and aggressive condition.

On the following day, Tuesday May 11, 2010, a day the grievor was not scheduled to work, he again appeared on the premises. He was then confronted by Director of Customer Experience James Kleiner. Mr. Kleiner encountered Mr. Rudyk in the ESC storeroom where he detected alcohol on the grievor's breath. There followed a disjointed and rambling conversation from Mr. Rudyk which included mention of a near-death experience. It appears that Mr. Kleiner finally escorted Mr. Rudyk off the premises, advising him to contact a counsellor.

Subsequently, when employees inquired about Mr. Rudyk being escorted off the property, during a meeting with Mr. Kleiner and Customer Experience Manager Kelly Thomas, several employees disclosed the encounter they had with Mr. Rudyk at work on the previous day. Because of safety concerns expressed by employees, and apparently shared by Ms. Thomas, a report was made to a constable of the Vancouver police the following day, May 12, 2010. On the same date the grievor was advised by letter that he was held out of service pending an investigation of his failure to protect his assignment on May 10 and his reporting for duty intoxicated on May 11, 2010.

Following those investigations the grievor was assessed twenty demerits for his failure to attend at work on May 10 and thirty demerits for his appearing at work inebriated on May 11, 2010.

In the Arbitrator's view, there can be no doubt but that the grievor engaged in the inappropriate conduct described above on both occasions. In the normal course, I am satisfied that he rendered himself subject to discipline, to a serious degree. In light of his prior discipline with respect to attendance issues, the assessment of twenty demerits for his failure to appear to work on Monday May 10, would not, on its face, appear unreasonable. Nor, in my view, would the offence of appearing at work in an intoxicated state, as occurred on May 11, 2010 not deserve discipline in the range of the thirty demerits which were assessed against him.

The real issue in these grievances is the grievor's condition with respect to alcohol consumption, and whether there are mitigating factors which would justify a reduction of penalty and reinstatement involving conditions. The Corporation takes the position that the grievor has not established that he suffers from alcohol addiction, and it consequently puts no weight on the documentation presented by the Union to argue that in fact the grievor did suffer an alcohol problem and that he has taken considerable strides since his termination to overcome that difficulty.

On balance, I am compelled to accept the merit of the case put forward by the Union. Among the documents which it presents is a letter from the Director of "A Better Place" in New Westminster, B.C. A Better Place describes itself as "a registered Transition Home with the Ministry of Social Services and Development". It describes its mission as including "... to find a career suited for the individuals after treatment from

drugs and/or alcohol.” The director’s letter confirms that the grievor followed in-residence treatment at A Better Place between July 1 and November 1, 2011. His letter reports that the grievor has maintained a “clean and sober life style” and that he has been active in community activities and attending support meetings. In that regard, correspondence is also filed from an addictions counsellor with the Surrey Mental Health and Addictions Service confirming that the grievor has undergone an addictions assessment session with him, and was in regular attendance in a six week Fraser Health Addiction Day Program referred to as “Daytox”.

For the purposes of this grievance, I do not consider it necessary to resolve the question of whether the grievor presents at arbitration with a medical diagnosis of addiction to alcohol. I find it sufficient to conclude that he had a serious drinking problem, however that might be characterized, and that following the events leading to his discharge he undertook a personal course of rehabilitation to gain control of that problem. The unchallenged material before me appears to confirm that he remained sober for a substantial period of time.

In my view, this is an appropriate case for a substitution penalty, based on those mitigating factors. The grievor should nevertheless appreciate that the reinstatement ordered herein is conditional and very much intended as a last chance opportunity.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and

benefits lost, without loss of seniority and subject to the following conditions. The grievor must accept, for a period of not less than two years, to be subject to random alcohol and drug testing, to be administered in a non-abusive fashion. As a condition of reinstatement, for the same period he shall also refrain from consuming alcohol or illegal drugs. During the two year period following his reinstatement he shall also maintain ongoing support treatment or meetings with support groups or support services to be approved by the Corporation and the Union, with quarterly written reports being provided to confirm his ongoing attendance. Should the grievor fail to respect any of the conditions of this reinstatement he shall be subject to termination.

December 19, 2011

(signed) MICHEL G. PICHER
ARBITRATOR