

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

CASE NO. 4096

Heard in Calgary, Wednesday 14 March 2012

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA – COUNCIL 4000**

DISPUTE:

The assessment of 15 demerit marks against Mr. M. States for alleged failure to provide justification for his absence from March 7, 2008 and expected date of return March 2008, April 2008, and January 2009 to April 2009 and failure to provide personal address for communication with the Corporation March 2008 – February 2009.

JOINT STATEMENT OF ISSUE:

The grievor, a Moncton based employee, was absent from March 7, 2008 until June 13, 2011. He decided to seek medical attention from his family physician in Halifax. On March 14, the Manager of Telephone Sales sent a letter to the grievor at his Moncton address which was returned. After a March 18, 2011, telephone conversation with the grievor the Manager's further correspondence was sent and received at the proper address.

The Union contends that the grievor did provide his new address in a reasonable time after his decision to stay in Halifax for medical treatment and any delay or gaps in medical evidence rest with the medical provider's possesses. The Union seeks reinstatement with full employment, without loss of seniority and reimbursement of all lost wages and benefits.

The Corporation's position is that Mr. States, a telephone sales agent based in Moncton, New Brunswick, was absent without authorization as of March 7, 2008. Mr. States had 40 demerit marks on his file. He was repeatedly advised by letter of his obligation to submit medical documentation to justify his absence from work and the expected duration of his absence. Mr. States responded to the letters requiring medical justification on an irregular basis and only after the Corporation had sent additional letters advising of the consequences of non-compliance.

Mr. States returned to his position of telephone sales agent in Moncton on June 13, 2011. He was investigated on June 24, 2011. Mr. States was subsequently awarded 15 demerits for his period of unauthorized absence, bringing the total of his file to 55 demerits.

The Corporation submits the discipline was warranted and justified.

FOR THE UNION:

(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:

(SGD.) B. A. BLAIR
SR. OFFICER, LABOUR RELATIONS

There appeared on behalf of the Corporation:

B. A. Blair – Sr. Officer, Labour Relations, Montreal
C. Morrison – Manager, Telephone Sales, Moncton

And on behalf of the Union:

R. Fitzgerald – National Representative, Toronto
M. States – Grievor

AWARD OF THE ARBITRATOR

The grievor was assessed fifteen demerits for failing to provide medical justification for his absence from work which commenced on or about March 7, 2008. At that time he was employed as a Telephone Sales Agent at Moncton, occupying an accommodated position which was established for him following shoulder injuries which he suffered on the job in 1996.

The grievor's explanation appears to be that he was then suffering considerable pain from his shoulder injuries and needed to be in Halifax where he could get care for that condition. He apparently spoke to a supervisor by telephone on March 18, 2008, to explain his circumstances.

The issue is not whether the grievor contacted the employer in respect of his absence following March 7, 2008. It is whether Mr. States failed to properly respond to repeated requests on the part of the Corporation for periodic medical reports to justify his ongoing absence.

The Corporation's representative submits that the matter must be understood in context. She draws to the Arbitrator's attention attendance records which confirm that Mr. States was absent from work for virtually all of 2005, 2006, 2008, 2009, 2010 and 2011 up to the point of his return to work on or about June 13, 2011. It is only after that return to work that the Corporation conducted an investigation into the grievor's alleged failure to maintain adequate medical documentation and to keep the employer apprised of the reasons for his ongoing absence. Following that investigation Mr. States was assessed fifteen demerits for having failed in his obligation to respond to the Corporation's requests for current medical documentation to support his extensive period of absence. As his prior record stood at forty demerits, that would have brought the total of his demerits to fifty-five.

It is well settled that an employee bears an obligation to provide full information, including medical notes and other documents where appropriate, to justify an ongoing extended absence. Upon a close examination of the facts in the instant case, I am satisfied that Mr. States did fail in that obligation. His explanation, which is essentially that he relied on his doctors to provide the necessary explanations to the Corporation, and that it was their fault if there were delays in documentation, is simply not acceptable. The obligation of ongoing communication with the employer resides with the employee, not with his or her physician. If the grievor's circumstance was that he was not receiving the cooperation of his doctors, it was plainly his obligation to convey that information to the Corporation. That he did not do.

Having regard to the material before me, and to the evidence heard at the arbitration, I cannot find that there was any violation of the collective agreement on the part of the Corporation in the disciplinary treatment of Mr. States upon his return to work after his extended absence of some three years. Nor can I see any substance in the allegation of the Union that the grievor was discriminated against contrary to the **Canadian Human Rights Act** either on the basis of his disability or his race. Neither of those heads of status can shield Mr. States from his obligation towards the Corporation, an obligation which he clearly failed to discharge.

For the foregoing reasons the grievance is dismissed.

March 19, 2012

MICHEL G. PICHER
ARBITRATOR