

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4220**

Heard in Montreal, July 9, 2013

Concerning

VIA RAIL CANADA INC.

And

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

DISPUTE:

The termination of employment of Ms. Francine Allard for unauthorized absences, fraud and attempted fraud towards Via Rail.

JOINT STATEMENT OF ISSUE:

Ms. Allard held the position of Janitor at VIA Rail. On April 16, 17, 2012 Ms. Allard was videotaped outside her home by an investigator at the request of Via Rail. The evidence revealed Ms. Allard working in a physical manner incompatible with Ms. Allard's alleged medical restrictions. Based on the evidence produced in the Video the Corporation terminated Ms Allard's employment , alleging that Ms. Allard has no physical limitations and that her claim of medical restrictions was fraudulent. The Union submits that the grievor did nothing improper; that the company did not have proper grounds to undertake surveillance of Ms. Allard at her home and that there was no cause for any discipline.

The Union submits that Ms. Allard be reinstated back to her former position, and be made whole in all respects, including where appropriate, the payment of compensation for lost wages with interest.

The Corporation submits that the discipline issued was appropriate in all circumstances.

**FOR THE UNION:
(SGD.) J. Fournier
National Representative**

**FOR THE COMPANY:
(SGD.) B. Blair
Senior Officer, Employee Relations**

There appeared on behalf of the Company:

B. Blair	– Senior Advisor, Labor Relations, Montreal
D. Brouillette	– Supervisor Gestion des Installations, Montreal

There appeared on behalf of the Union:

J. Fournier	– CAW National Representative, Toronto
S. Auger	– Regional Representative, Montreal
M. Laroche	– President des Grief, Montreal
B. Kennedy	– President Council 4000, Edmonton
F. Allard	– Grievor, Montreal

AWARD OF THE ARBITRATOR

The record confirms that following video surveillance of the grievor, who was observed spring cleaning and gardening at her home, the Corporation concluded that her personal activities were inconsistent with her absence from work on paid sick leave by reason of certain claimed medical conditions.

The Union submits that the Corporation has not demonstrated that it was justified in resorting to the extraordinary measure of surreptitiously videotaping the grievor's personal activities. The Arbitrator cannot agree with that assertion. The record before me confirms, without substantial dispute, that the grievor had a long standing and pronounced pattern of excessive absenteeism. Her absenteeism rate averaged in excess of forty percent over a six year period. Additionally, she had made an off-hand comment to a supervisor that she would in all likelihood continue to have accidents and illnesses and should be considered "malade à vie".

I am satisfied that the Corporation did have justification for the surveillance which was conducted. As noted above, a videotape of the grievor, taken over a period of close to four hours on April 16, 2012, shows her performing spring cleaning and gardening duties both at the rear and front of her home. The work which she then performed was

roughly compatible with work she would perform in her position as a janitor with the Corporation.

Thereafter the Corporation had the grievor undergo a medical evaluation by Dr. Jean Vezina. Based on his examination and, apparently on his viewing of the videotape, Dr. Vezina concluded that Ms. A had no medical limitations which would prevent her from doing the full range of her functions as a janitor.

Subsequently, on June 4 the grievor communicated with her supervisor a note from her Urologist Dr. Dessurault who indicated that she was fit to return to work on May 30, 2012. That communication appears to have also included a medical note from a Rheumatologist dated some three months prior indicating that she was then fit to do light duty work as of March 13, 2012.

Ultimately, on June 21, 2012 the Company conducted a disciplinary investigation of the grievor for non-authorized absences commencing May 3, 2012 and concluded that she had engaged in fraud and had attempted to mislead the Corporation by falsely claiming a physical inability to work. Following that investigation she was terminated effective July 4, 2012.

Upon a review of the whole of the evidence the Arbitrator is less than convinced that the grievor deliberately engaged in a scheme to defraud her employer by falsely claiming medical conditions which justified her medical leave of absence. The material

before me confirms that she has an extensive record of medical problems relating both to arthritis and serious kidney/urological problems for which she has had extensive treatment, including surgery. Nor am I persuaded that the videotape evidence clearly confirms a fraudulent course of conduct on the part of the grievor. The tasks which she is observed performing in cleaning up her property, including raking and weeding, are not in my view conclusive of the fact that she did not suffer the medical conditions then being confirmed by her personal physicians, including a urologist and a rheumatologist.

There are, however, reasons to be concerned about certain aspects of the grievor's conduct. For large periods of time she remained unreachable by telephone, notwithstanding repeated efforts on the part of her supervisor. It also appears that the diagnosis of her ability to return to light duties was not shared with her employer for a period of some three months commencing in March of 2012. To a significant degree, the grievor contributed to the Corporations belief that she was engaged in a course of medical fraud, albeit I am fully satisfied that she did not in fact intend to do so.

For these reasons, I am satisfied that the grievance should be allowed, in part. The Arbitrator directs that the grievor be reinstated into her employment forthwith, with her entitlement to sick leave benefits or any other benefits to be immediately restored. Her return to active service shall be dependent on the successful completion of an independent medical examination, to be conducted by a physician agreed upon between the parties and failing agreement to be appointed by the Arbitrator. In the circumstances, there should be no compensation to the grievor for any wages or

benefits lost. I retain jurisdiction, however, to hear submissions from the parties, if necessary, as to the ability of the grievor to repay and restore pension benefits which she was apparently compelled to call upon, as well as the overall question of her general pension status and entitlement.

July 12, 2013

MICHEL G. PICHER
ARBITRATOR