CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4276

Heard in Montreal, January 14, 2014

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS – LOCAL 2004

DISPUTE:

The closing of employment file for Thermite Welder J. Solarte.

JOINT STATEMENT OF ISSUE:

On December 4, 2012, the Company closed the employment file of J. Solarte for failure to protect his assignment since November 7, 2012.

The Union contends that the employee was unjustly dealt with, in an alleged violation of Article 1.5 of Agreement 10.1, the Canadian Human Rights Act and the Canadian Charter of Rights and Freedoms.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. Piché	**(SGD.) S. Prudames**
Staff Representative	**Labour Relations Officer**

There appeared on behalf of the Company:

S. Prudames	– Labour Relations Officer, Toronto
S. Grou	– Senior Manager Labour Relations, Montreal
A. Hayter	– Senior Manager Track Services, Toronto
J. Hishmeh	– Program Supervisor, Toronto
L. Waller	– Manager Benefits, Toronto
M Lancia	– Human Resources Manager, Toronto
B. Laidlaw	– Manager Labour Relations, Winnipeg

There appeared on behalf of the Union:

M. Piché	– Staff Representative, Toronto
T. Cotie	– Chief Steward, Sudbury
J. Solarte	– Grievor, Six Nations

AWARD OF THE ARBITRATOR

On behalf of Mr. Solarte ("the Grievor"), the United Steelworkers Union, Local 2004 ("the Union") alleges that CN ("he Company") violated Article 1.5 of Agreement 10.1 when it closed the grievor's employment file for failure to protect his assignment. In other words, the grievor was discharged for being absent from work without leave. The Union also alleges a violation of the *Canadian Human Rights Act*. Article 1.5 states:

> It is agreed by the Company and the Union that there will not be any discrimination or harassment towards an employee based on the employee's age, marital status, race, colour, national or ethnic origin, political or religious affiliation, sex, family status, pregnancy, disability, union membership, sexual orientation, or conviction for which a pardon has been granted.

The grounds of discrimination upon which the Union relies are disability and race.

On December 4, 2012, the grievor's employment file was closed for failure to protect his assignment since November 7, 2012. There is no dispute that the grievor was on an authorized leave of absence until October 16, 2012.

The determination I must make is whether in closing the grievor's employment file, the Company discriminated against him based on his race or disability. As will become apparent from the chronology set out below, there is no basis upon which this grievance can be sustained. Simply put, there is no evidence before me to support the Union's position. A thorough review of the material before me reveals that the grievor abandoned his employment.

The facts are not substantially in dispute. Where they are, I prefer the Company's version of events for the reasons articulated below.

The Company hired the grievor in March 2007. When he failed to meet the requirements of an Apprentice within the Signals and Communications group he was released. The Company secured other work for the grievor nevertheless. At the time of the closure of the grievor's file his disciplinary record stood at 59 demerit points. Nine of those 59 demerit points had been assessed against him in June 2012 for failure to protect his assignment.

On July 21, 2012, outside the workplace, the grievor fell and hurt his back. He applied and received Short Term Disability Benefits through the Company's insurance provider, Great West Life ("GWL"). On July 24, 2012, when GWL approved the grievor's claim for benefits, his employment status was changed to reflect an authorized illness until October 16, 2012.

On September 28, 2012, GWL wrote to the grievor and explained that he was to attend at an Independent Medical Assessment ("IMA") on October 16, 2012. GWL advised the grievor if he could not keep the scheduled appointment, he was to advise his GWL case manager before October 10, 2012.

The grievor spoke with his case manager at GWL on October 10, 2012. There is no dispute that the grievor did in fact leave a voice message with the case manager

early on the morning of October 11, 2012, advising that he was leaving the country. However, there is no mention in the case manager's letter to the grievor on October 15, 2012 regarding the grievor's mother having suffered a stroke or of his intention to leave the country to visit her. What the case manager writes is that on October 10, 2012, she made clear to the grievor the importance of attending the IMA, and that if he chose not to attend, his benefits would be terminated and that he would be charged the cancellation fees.

I accept the Company's version of events that the grievor did not advise GWL on October 10, 2012 of his mother's medical condition or of his intention to absent himself from the scheduled IMA on October 16, 2012. Had he done so, surely the case manager would have made some reference to those circumstances in her correspondence. Furthermore, it makes no sense for the grievor to have left a voice message on October 11, 2012 with the GWL case manager informing her of his intent to leave the country if he had already communicated that information to her on October 10, 2012.

I note that in the GWL case manager's letter to the grievor of October 15, 2012, she also sets out the deadline for appeal of any decision to terminate benefits as December 13, 2012. Finally, the letter urges the grievor to contact his supervisor if he plans on returning to work.

The grievor contends that he contacted his supervisor at the Company on October 11, 2012. While the grievor's telephone records reveal a less than one minute call to the supervisor within minutes of leaving a message with his case manager at GWL early October 11, 2012, the supervisor himself gave evidence at the hearing and testified that he received no message from the grievor on October 11, 2012. I accept the supervisor's evidence that the Company was unaware that the grievor had left the country on October 11, 2012.

As stated above, there is no dispute that as of October 16, 2012, the grievor was on an unauthorized leave of absence. In that context, and since the Company was unaware the grievor had gone to Colombia at the time, it sent the grievor two letters. On November 7, 2012, the Company sent the grievor a notice to appear to provide an employee statement in connection with his failure to protect his assignment. The date of grievor's statement was scheduled for November 13, 2012. The grievor failed to appear. When the grievor failed to appear, the Company sent him another letter, this one dated November 13, 2013, recalling him from an unauthorized leave of absence. The November 13, 2013 letter clearly puts the grievor on notice that he would be deleted from the seniority list within 15 days (by November 28, 2012) if he failed to report for work. It also set out a contact number to call and a contact name for information should he require any information.

The grievor returned home from Colombia on November 22, 2012. On his arrival at home he discovered the October 15, 2012 letter from GWL, and the November 13,

2012, letter from the Company. The grievor picked up the November 7, 2012 from the Company, which had been sent by registered mail, on November 27, 2012. The grievor therefore had all relevant correspondence from GWL and the Company indicating to him that he would be deleted from the seniority list if he did not report for work. The Company waited beyond November 28, 2012 until December 4, 2012 to close the grievor's employment file. The grievor made no attempts upon his return from Colombia to contact the Company even as late as December 4, 2012 or thereafter.

At step III of the grievance procedure, by way of its submission on January 28, 2012, the Union informed the Company that the grievor had gone to see his family physician on December 28, 2012. The note speaks to modified duties for the grievor commencing December 31, 2012. The Union also provided the Company with a letter from the grievor dated January 9, 2013, whereby the grievor articulates his view that in dismissing him, the Company ignored his medical condition despite his having provided proper documentation from his doctor. The grievor makes the further point that he feels that he was mistreated because of his race and background.

This grievance has no merit. The Company did not have medical documentation to support the grievor's continued absence beyond October 16, 2012 when it closed employment file on December 4, 2012. An allegation of discrimination on the basis of disability cannot be sustained in such circumstances. Moreover, a bold allegation of racial discrimination cannot lead to a finding that the non-discrimination clause of the

collective agreement or the *Canadian Human Rights Act* have been violated given the chronology set out above. The Union adduced no facts in support of that allegation.

In this case the grievor failed in fulfilling his obligation of communicating with the Company after his medically supported leave became an unauthorized leave of absence. Even if I accepted that the grievor informed the Company that he was leaving the country on October 11, 2012, which I do not, the grievor had ample opportunity upon receipt of the Company's and GWL's correspondence upon his return on November 22, 2012 to communicate with the Company. He did not do so. In such circumstances the Company was entitled to close his employment file. There are no mitigating circumstances, such as a clean disciplinary record or extraordinary years of service with the Company, hat would warrant my considering the grievor's reinstatement.

For the foregoing reasons, this grievance is dismissed.

January 20, 2014

CHRISTINE SCHMIDT
ARBITRATOR