CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4394

Heard in Calgary, May 13, 2015

Concerning

VIA RAIL CANADA INC.

And

UNIFOR

DISPUTE:

The termination of employment of Ms. J. Brown following her failure to report for duty.

JOINT STATEMENT OF ISSUE:

The Union maintains the Corporation is in violation of Articles 7.2 (vii), 7.3 13.13, 13.14, 13.15, 13.16, 24.6, and 24.21 of Collective Agreement Number 2 for terminating the employment of J. Brown.

The Union requests the reinstatement of Ms. Brown effective immediately, without loss of seniority, and compensation for any and all lost wages and benefits.

The Corporation maintains the termination was proper as per the terms of the collective agreement and there is no compensation owed.

Ms. Brown was a laid off on-board employee from Halifax who was recalled to work but failed to report for duty. Consequently, she forfeited her seniority rights, her name was removed from the seniority list and her employment was terminated, as per the terms of the collective agreement.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. J. Fitzgerald	**(SGD.) B. A. Blair**
National Staff Representative	**Senior Advisor, Employee Relations**

There appeared on behalf of the Company:

B. A. Blair	– Senior Advisor, Employee Relations, Montreal
S. Duffy	– Senior Manager Customer Experience, Montreal

There appeared on behalf of the Union:

B. Fitzgerald	– National Representative, Toronto
D. Andru	– Regional Representative, Toronto
B. Kennedy	– National President, Edmonton
J. Brown	– Grievor, Halifax

AWARD OF THE ARBITRATOR

This case involves the termination of the grievor, Jennifer Brown. She was terminated for not reporting to work following her recall. The Corporation says this was an administrative termination under the Collective Agreement and relies on Article 13.16 of the Collective Agreement between these parties. That Article provides:

> Laid-off employees recalled under the terms of this Article, who fail to report for duty or to give reasons satisfactory to the Corporation for not doing so within 10 days from the date of the delivery of notification at their last known address, shall forfeit their seniority rights, their name shall be removed from the seniority list and their employment will be terminated.

The Union asserts that the Grievor should not have been terminated as her recall was to be for less than sixty day and relies on Article 13.15:

> Laid-off employees who are employed elsewhere at the time of recall will not be required to report for service provided.
> a) It is definitely known that the duration of the work is for less than 60 days.
> b) Other laid-off employees in the same occupational classification are available.
> c) During the period October 1 to June 1 laid-off employees who are employed elsewhere will be recalled as required in reverse seniority order if no other laid-off employees are available, and if they fail to report they will forfeit their seniority.

Further the Union contends that the termination was in fact disciplinary in nature and no proper investigation was held.

The Grievor was hired by the Corporation on October 27, 1999, and for the majority of that time (other than a short 6 month period) she was a spare-board employee and did not hold a permanent assignment.

Her last day of work was July 15, 2013. She was on sick leave from July 16 to November 11, 2013. She was medically authorized to return to work on November 12, 2013.

Although authorized to return on November 12, 2013, the grievor was one of twenty-three employees laid off from October 30 to November 28, 2013 due to lack of work. All the laid off employees including the grievor were advised by letter dated November 30, 2013 that, in order to meet the holiday demand, they were to be recalled from December 15, 2013 to January 5, 2014. The November 30 letter also advised employees of the provisions of the Collective Agreement in respect of the terms and conditions of the recall.

The grievor was sent this letter by registered and regular mail and it was signed for on December 5, 2013.

In the period November 23 – December 15, 2013 the Corporation attempted to contact the grievor on twelve occasions. The Corporation did not take action at this time as other laid off employees were available and so the provisions of Article 13.15 were applied. Specifically, the Grievor did not have to report to work and there were no consequences under Article 13.16 because the Corporation’s required complement of workers could be met by those laid off workers who were available.

This situation changed on December 15, 2013 when the Corporation required all employees to attend to active duty as the holiday season began. On six occasions from December 16 - December 26 the Corporation tried to call the Grievor but was unable to contact her. On December 18, 2013 she was sent a registered letter, which was again signed for, advising of the requirement to report for duty and quoting Article 13.16. The letter ended with the warning that failure to report by December 28, 2013 would result in termination.

The Grievor called in on December 27, 2013 and advised she would be accepting work. However, she failed to attend and after calling her again on December 28 and 31, 2013 the Corporation resorted to the provisions of Article 13.15 and terminated the Grievor's employment effective January 1, 2014. It asserts this is an administrative termination and as such no investigation was required.

The Union argues that the grievor was treated differently from other employees although the material presented at the hearing bears out that while some employees did not come in for certain shifts during the required period, none (other than an employee who was also administratively terminated) failed to attend for the entire period.

The Union submits that the Grievor was employed elsewhere and as such she was not obliged to attend work of a duration of less than sixty days under the provisions of Article 13.15(a). It relies on the fact that the recall was not permanent nor was it to be

more than sixty days. The Corporation submits that only applies where other laid off employees are available.

A reading of Article 13.15 does not assist the grievor. The grievor was called on a number of occasions and did not report to work. Notably, she did not, as provided for under Article 13.16 of any reason why she would not report and in fact on December 27, 2013 she said she would report and did not.

The Corporation was not required to conduct a disciplinary investigation (**CROA&DR 3549**) as this was not a disciplinary termination. This principle was also referred to in *Cargill Value Added Meats v. U.F.C.W., Local* 175, 2011 Carswell Ont 5920, 106 C.L.A.S. 185, 209 L.A.C (4th) at paragraph 51:

> Notwithstanding that as a practical matter there is a disciplinary element inherent in a deemed termination provision, it is not a disciplinary provision in the labour relations sense of the term. Consequently, although the employer must not act in a manner that is arbitrary, discriminatory or in bad faith, and must establish that a deemed termination provision applies in the particular circumstances (including, to paraphrase the arbitrator in *Quality Meat Packers Ltd.*, a proper accounting of the alleged absence without leave), the employer need not otherwise show "just cause" in the disciplinary sense of the term.

In *Cargill*, supra the Board of Arbitration went on to write that:

> To summarize, because the consequences to an employee are so severe, it is appropriate to construe a deemed termination provision strictly and narrowly against the employer. However, such a provision must have real meaning, however harsh the consequences may appear to be in a particular case. An employer has the discretion to waive the application of a deemed termination provision in a particular case. But in the absence specific collective agreement language which gives an arbitrator the discretion to do so, an arbitrator has no jurisdiction to relieve against the application of a deemed termination provision. In the absence of collective agreement language that specifies otherwise, such a provision is one of strict liability.

The Union submission is that the Grievor's reason for her non-attendance was that she had other employment and did not want to work for a short duration. Without determining whether she could do that under Article 13.16 there remain two difficulties with that submission. First, the Grievor did not provide that reason at the time of her failure to attend at work on December 15 and second she said on December 27 that she would attend at work and then did not do so and again offered no reason. On these facts, the Corporation was entitled to rely on the terms of Article 13.16 and terminate the Grievor.

Accordingly the grievance is dismissed.

June 8, 2015

MARILYN SILVERMAN
ARBITRATOR