CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5175

Heard in Montreal, May 14, 2025

Concerning

VIA RAIL INC

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the Wrongful Dismissal of Mr. Andre Durocher for alleged abandonment of Assignment.

JOINT STATEMENT OF ISSUE:

The union contends that upon his first re-instatement; he was continually badgered by local management to the point where he felt that he was being targeted. Mr. Durocher was initially wrongfully dismissed by VIA Rail for not being vaccinated against Covidl9. When he was fully re-instated and was in the process of refamiliarizing himself on live equipment he was removed from service and held without pay due to a mistake made by staff at Workplace Medical. The Union further contends that VIA Rail was purposely vague in its direction to the employee. The Union seeks the remedy of full re-instatement without loss of service and seniority as well as that he is made whole for all lost wages and benefits.

The Corporation contends that, upon his reinstatement, Mr. Durocher demonstrated behaviour which required the intervention of management, including but not limited to failing to arrive to scheduled shifts on time or at all, failing to take part in job briefings, failing to wear personal protective equipment and various other performance concerns. Mr. Durocher's behaviour and the concerns regarding his performance were seen as very out of character and needed constant intervention. Mr. Durocher was also- incoherent is his explanations or justification of his behaviour at time and his behaviour reached a point where the employer felt it necessary for him to be medically assessed to confirm that he was medically fit to operate a train. Mr. Durocher refused to take part in this assessment and any subsequent processes despite multiple attempts and warnings. Mr. Durocher refusals to comply with any meeting reached a point that the Corporation had no choice but to consider Mr. Durocher to have effectively abandoned his employment.

For the Union:
(SGD.) P. Hope
General Chairperson

For the Company:
(SGD.) C. Gauthier-Daigneault
Senior Human Resource Business Partner

There appeared on behalf of the Company:

C. Trudeau – Counsel, Fasken, Montreal
R. Coles – Specialist Director Employee Relations, Nova Scotia

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
P. Hope	– General Chairperson, TCRC-C, Toronto
S. Pepper	– Local Chairperson, Division 469, Ottawa
A. Durocher	– Grievor, Locomotive Engineer, Ottawa

AWARD OF THE ARBITRATOR

Context

1. The Grievor is a long service employee, having some 26 years of seniority when his employment was terminated for an alleged abandonment of position.

2. In January, 2022, he had been placed on an Administrative Leave of Absence for not receiving a Covid-19 vaccine and then terminated in June 2022. He was reinstated in June 2023, cleared for work both medically and professionally, and worked his first shift in August 2023.

3. In September and October 2023, the Company identified multiple behaviours of the Grievor which were of concern to it. This led to a October 30, 2023 decision to hold the Grievor out of work, initially with pay, pending an Independent Medical Exam.

4. For the next three months, there were a series of investigations and correspondence dealing with both discipline and repeated demands for an IME. The Grievor did not attend an IME and his file was administratively closed as of January 29, 2024.

Issues

A. Did the Company have grounds for concern about the Grievor's behaviour?
B. Was the Company entitled to request an IME in the circumstances?
C. Has the Company demonstrated that the Grievor abandoned his position?
D. If not, what remedy is appropriate in the circumstances?

Did the Company have grounds for concern about the Grievor's behaviour?

Position of Parties

5. The Company takes the position that there were multiple indicia of troubling behaviour, including forgetting work material, failure to protect an assignment, failure to wear PPE

and releasing brakes. It further submits that the behaviour of the Grievor was out of the ordinary during investigations.

6. The Union submits that the behaviour was not significant, yet treated as such by the Company. In the case of the release of brakes, there was no investigation and the Union and Grievor learned of the concern only upon the filing of the Company Brief. It argues that the investigation transcripts do not reveal troubling behaviour.

Analysis and Decision

7. I find that the first three items invoked by the Company are grounds for concern, but at a low level. Forgetting work material, failing to protect an assignment because of a mix-up in dates, and failing to wear PPE could give rise to concerns about a lack of attention to detail or difficulties with reintegration to work. It does not seem reasonable that the incidents would, of themselves, generate a reasonable concern about the mental health of the Grievor.

8. I find it troubling that the objectively far more serious allegation, that of releasing brakes while employees were working under the train, was not the subject of an investigation or of any discipline. This allegation was never raised by the Investigating Officer and the Grievor has never been given a chance to respond. I agree with the Union position that the Company is not entitled to raise such a serious allegation only in its Brief, and will disregard the allegation for the purposes of this matter.

9. The Company also invokes a number of verbal warnings to the Grievor, which were required to have him perform correctly (see Tab 4.1, Company documents). It does appear that the Grievor did require frequent reminders.

10. The Company also invokes the manner in which the Grievor responded to questions during two investigations, particularly the very lengthy time required for them. A review of the transcripts of the two investigations (see Tabs 5 and 7, Company documents), however, does not reveal that the Grievor was incoherent or confused, although some of his comments are curious:

> “Q 19 Are you satisfied with the manner in which this investigation has been conducted?
> A 19 No, because this investigation is pejoratively pernicious to the desired aim of the Company.”

11. There is no doubt, however, that the investigations themselves took an unusually long time.

12. On the whole, I find that the Company did have at least some grounds for concern, given the three incidents and 30 Demerits that had been given in the space of one month. It does not seem reasonable, however, that the level of concern would be high.

13. Whether the Company was entitled to a mental health evaluation, and a mental health evaluation in the form of an IME, will be discussed in the next section.

Was the Company entitled to request an IME in the circumstances?

Position of the Parties

14. The Company takes the position that the behaviour discussed above warranted an IME of the Grievor. He works in a safety critical occupation as a Locomotive Engineer on passenger trains, and the Company could not wait for a more serious incident to occur.

15. The Union argues that the Company had no right to request an IME in the circumstances, and in any event, it should have begun with questions to the Grievor's treating physician, rather than proceeding to an invasion of privacy through an IME before a doctor chosen by the Company.

Analysis and Decision

16. For the following reasons, I find that, in these circumstances, the Company was not entitled to request an IME.

17. It is clear that the Company has a duty to be concerned about the physical and mental health of its employees, to ensure that they can properly perform their functions in a dangerous and safety critical environment. It is equally clear that employees have a right to personal autonomy. A nuanced approach is required in balancing these sometimes-competing rights.

18. Arbitrator Picher in **SHP 667** held that employers must have compelling reasons to justify a medical or psychiatric assessment:

> I turn to consider the merits of the dispute. It should be noted that boards of arbitration have traditionally exercised extreme caution in dealing with the right of an employer to require an employee to be subjected to a medical examination, including a psychiatric assessment. While arbitrators recognize that the employer has the inherent right to require the medical or psychiatric assessment of an employee to demonstrate his or her fitness for work, boards of arbitration have ruled that an employer must have compelling reasons to justify such a demand.

19. Arbitrator Picher also noted that less extreme options must first be explored. He cites Arbitrator Stewart in **Re Brinks Canada Ltd. and Teamsters Union, Loc. 141** (1994), 41 LAC (4TH) 422:

> It is my view that at the relevant time it was not reasonable for the employer to require Mr. Matchett to undergo a psychiatric assessment. As Ms. Huebscher emphasized, it was open for the employer to request further information from Mr. Matchett's doctor. This avenue was not pursued. Mr. Matchett's offer to attend to be examined by another general practitioner of the employer's choice was also not pursued. While it is possible that these avenues of obtaining information may ultimately not have provided the employer with the assurance it reasonably required, it is quite possible that such an assurance could have been provided. In my view, in the circumstances of this case, it was unreasonable for the employer to insist on the significantly more intrusive approach of requiring a psychiatric examination without first exploring the less intrusive options.

20. There are multiple issues, in my view, with the approach followed here by the Company.

21. Firstly, the concerns held by the Company were not clearly and explicitly enunciated in writing. M. Gatien had a phone conversation with the Grievor and then makes only a general reference to security concerns in a subsequent email (see Tab 10, Company documents):

> "Comme discuté lors de notre conversation téléphonique de 17h, en réponse aux derniers évènements survenus depuis votre retour au travail, une évaluation sera effectuée, afin de valider votre aptitude à accomplir de façon sécuritaire les tâches liées au poste de mécanicien de locomotive."

22. The investigation of the Grievor on November 13, 2023 makes clear that he is still searching for reasons for the IME (see Tab 8, Union documents):

> Q22 Can you confirm whether or not you will be attending the Medical Assessment required by VIA Rail on a date to be determined by the employer?
>
> Mr. Durocher: Not until I get proof and the reason why I'm being assessed, proof that I've done something that requires this. Show me where it was compromising, I want to know.
>
> […]
>
> Q25 As per the previous question we therefore confirm that you do not wish to attend the medical assessment or any assessments

> despite with IT being required by VIA Rail and being allowed under the collective agreement.
>
> Mr Durocher: I have no issues attending this assessment, I just want VIA Rail to prove why they want the assessment. What have I done.
>
> […]
>
> Q27 We therefore confirm that you do not wish to attend this medical Assessment (or any other assessment) despite it being required by VIA Rail and being allowed under the Collective Agreement? Is this correct?
>
> Mr. Durocher: I have no issues taking the assessment I just want VIA Rail to show me where and what actions I did to have them request this assessment.
>
> [...]
>
> Q30 Do you have anything further to add to this statement?
>
> Mr. Durocher: As I said I will go for this medical assessment when I can get answers as to the reason why VIA is requiring it. (underlining added)

23. Secondly, the Company could have put their concerns in writing to the Grievor's doctor. He advised the Company that his doctor had no issues with him during the November 13 investigation, yet he was never asked to provide proof of this, nor was his doctor contacted. Had his doctor been contacted, presumably the doctor would have responded as she did in a note from November 28, 2023 (see Tab 9, Union documents):

> "Andre Durocher has been my patient since 2016. Based on my assessments as his family physician over the years, I have never had any concerns regarding his mental health or cognitive capacities".

24. The company could have put specific questions to his doctor and then made a decision whether serious doubts remained which required a more in-depth medical evaluation. Unfortunately, this was never done.

25. Thirdly, there is no evidence that the Company even considered the privacy rights of the Grievor in coming to a decision. Indeed, some of the correspondence from the Company would appear to indicate that it believed that it had an unrestricted right to demand an IME. In a December 4, 2023 email, M Larose wrote (see Tab 17, Company documents):

> "During this statement, you confirmed that you would not attend a medical assessment without knowing the why such an assessment was required. While not required to provide

> the reasons, it was explained to you that your supervisors have noticed some concerns with your behaviour…." (underlining added)

26. Fourthly, an IME in front of a doctor selected by the Company represents a substantial intrusion to the privacy of the individual. It is likely that an individual exhibiting extreme behaviour would warrant an immediate IME, but that is not the case here. As noted in the preceding section, the Company was entitled to have concerns, but they were at the low end of the scale. Arbitrator Picher in **SHP 667** did not find statements from a Grievor that he would bring a knife to work, when looked at in context, warranted an IME. Arbitrator Stewart did not permit an IME in **Brinks**, despite the fact that the Grievor carried a firearm as part of his duties, and there was some concern about a threatening comment made to a supervisor. Here, the mistakes made and the behaviour exhibited by the Grievor were objectively much less concerning than the behaviours discussed above.

27. I therefore conclude that the Company was not entitled to demand an IME in these circumstances.

Has the Company demonstrated that the Grievor abandoned his position?

Position of the Parties

28. The Company submits that it gave the Grievor multiple chances as well as additional delays in which to comply with the IME demand. It informed the Grievor that his employment could be in jeopardy if he did not comply. When the Grievor repeatedly refused to do so, it was entitled to administratively close his employment file.

29. The Union argues that there was no right to an IME in the circumstances. It submits that the Grievor did not in fact refuse an IME, but merely sought the reasons for such a demand. The Grievor never failed to remain in contact with the Company, unlike many of the cases cited where abandonment has been found.

Analysis and Decision

30. The Company discharged the Grievor for having abandoned his position (see Tab 1, Company documents). It did not discipline the Grievor for his refusals to attend an IME. The Company bears the burden of proof to establish that the Grievor has indeed abandoned his position.

31. I find that the jurisprudence cited by the Company is distinguishable from the instant matter.

32. The most directly apposite matter is that of **CROA 4476**, where a Grievor refused to provide a hair follicle for drug testing purposes. Arbitrator Flynn found that his refusal was unfounded, but noted a further lengthy failure of the Grievor to communicate:

> The Grievor's unfounded refusal to subject himself to a hair sample drug test and his further failure to properly communicate with the Company are the causes of his subsequent dismissal. The Company was diligent in its numerous attempts to reach Mr. White and even offered him a non-safety sensitive position until the case was settled, which would have greatly reduced any financial consequences for the Grievor. The closing of Mr. White's assignment is the result of his faults and cannot reasonably be attributed to the Company's actions.

33. In **SHP 667**, Arbitrator Picher found that an IME was not justified, and reinstated the Grievor.

34. In **CROA 4077**, Arbitrator Picher found that an IME was justified in the circumstances, but nonetheless reinstated the Grievor with a 60-day period in which to comply.

35. **CROA 5011** and **CROA 3116** both dealt with Grievor's who failed to remain in communication with the Company and were found to have abandoned their positions.

36. The Union cites **CROA 3847**, **CROA 4276** and **CROA 4504** as instances where abandonment was found due to a failure to communicate for lengthy periods of time, and contrasts the situation in the present matter.

37. Here, I find that the Parties were in almost constant communication with one another from November 15, 2023 until January 29, 2024, when the Grievor was informed of the closure of his file (see Tabs 10-22, Company documents). I am struck by the number of exchanges (13) in such a short period of time (2.5 months, including the holiday period).

38. Factually, there was clearly a dispute about the refusal to accept an IME, but the Grievor and his Union cannot be said to have failed to communicate.

39. Given the earlier findings with respect to the Company not establishing a right to demand an IME in the circumstances, and there being no failure to properly communicate, I find that the Company has not established that the Grievor has abandoned his position.

If not, what remedy is appropriate in the circumstances?

40. Given the above findings with respect to the IME and abandonment issues in favour of the Grievor, I find that he should be reinstated without loss of seniority and with compensation for lost wages and benefits, less mitigation.

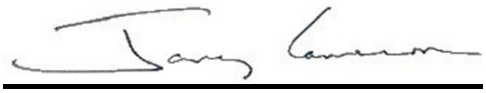
41. It will be open to the Company to require that the Grievor demonstrate that he is fit to return to work and remains fit to work. This could result in an IME being properly requested if serious concerns remain and the necessary steps are taken prior to such a demand being made.

Conclusion

42. The Grievance is therefore allowed.

43. I remain seized with respect to any issues of interpretation or application of this Award.

July 18, 2025



JAMES CAMERON
ARBITRATOR