CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5189

Heard in Ottawa, June 11, 2025

Concerning

VIA RAIL INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Dismissal of Mr. Karson Mackie (or the "Employee") for abandoning his position as a Locomotive Engineer at VIA Rai.

JOINT STATEMENT OF ISSUE:

The Union contends that Mr. Mackie was not afforded a fair and impartial hearing as required in Article 16.2 of the 1.4 collective agreement before being dismissed and having his file closed. The Union contends that the Corporation did not consider the Employee's disability and provide alternative solutions up to the point of undue hardship. The Union's position is that the termination is unjust given the mitigating factors and requests that the Employee be reinstated to service without loss of seniority and benefits and that he be made whole for all lost wages and benefits with interest, or in the alternative as the arbitrator sees fit.

The Corporation contends that Mr. Mackie abandoned his employment with VIA Rail. The Employee undertook a leave of absence that was initially medically justified. The Employee's leave of absence was prolonged, and he was requested to provide continued medical justification for the ongoing absence. The Employee failed to do so. The Employee was Informed on numerous occasions that he was required to provide medical justification for his absence and attend meetings related to the unjustified leave of absence. The Employee was also duly informed that his failure to justify his absence would be considered job abandonment and his employment relationship with the Corporation would thus end. The Corporation contends that the Employee was given ample opportunity to provide the clearly requested medical forms or otherwise communicate with the Corporation.

The Corporation was reasonable in their conclusion that the Employee had abandoned his job with VIA Rail. The Corporation also notes that at no point during the process up to the Employee's job abandonment did he raise any accommodation concerns.

For the Union:	**For the Company:**
(SGD.) P. Hope	**(SGD.) R. Coles**
General Chairperson	Senior Advisor, Employee Relations

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken, Montreal
T. Shannon-Drouin	– Senior Advisor, Employee Relations, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Dunn	– Vice General Chairperson, Brantford
K. Mackie	– Grievor, Locomotive Engineer, Toronto

AWARD OF THE ARBITRATOR

Context

1. The Grievor had some 7 years of seniority when he was terminated for abandonment of position in October 2022. His discipline record was good.

2. Prior to his termination, he had been on Short Term Disability until June 2022. The insurer had sought an IME of the Grievor, who did not attend a scheduled appointment. His insurance file was then closed (see Tabs 6-7, Company documents). The Grievor did not appeal this decision (see Tab 8, Company documents).

3. The Company repeatedly sought a copy of the Grievor's medical file without success (see Tabs 8-18, Company documents).

Issues

A. Was the termination of the Grievor an administrative decision or a disciplinary one?

B. If the decision was administrative, was the decision arbitrary, discriminatory or taken in bad faith?

A. Was the termination of the Grievor an administrative decision or a disciplinary one?

Position of Parties

4. The Company takes the position that the closure of the Grievor's file was an administrative decision and as such, article 16.2 of the Collective Agreement has no application. A "fair and impartial" investigation is only required for disciplinary matters, which this was not.

5. The Union submits that the Company was required to provide a fair and impartial investigation, prior to terminating the employment of the Grievor.

Analysis and Decision

6. For the reasons that follow, I find that the closure of the Grievor's employment file was an administrative matter, not entitling the Grievor to the fair and impartial investigation protections of article 16.2 of the Collective Agreement.

7. Article 16 (see Tab 20, Company documents) deals with investigations in relation to discipline:

> 16.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established.
>
> […]
>
> 16.6 A locomotive engineer and his accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on the locomotive engineer's responsibility to offer rebuttal through the presiding Officer by the accredited representative. The Local Chairman and/or the General Chairman to be given a copy of statements of such witnesses on request.

8. The jurisprudence is clear that a failure to properly communicate with the employer for a lengthy period of time can result in an administrative closure of the employee's file. As noted by Arbitrator Picher in **CROA 3847**:

> The fact of an injury or medical leave of absence does not absolve an employee from his or her responsibility to communicate on a reasonable basis with his or her employer. I do not consider that it was inappropriate for the Company to seek the medical updates which it did nor to confirm, given the apparent long silence from the grievor, that he intended to continue in his employment at CN. <u>His failure to give any response is, in my view, evidence which the Company could use to conclude that he had effectively abandoned his employment. In the Arbitrator's view this is not a circumstance in which the Company was under an obligation to conduct a disciplinary investigation, as the action taken constituted a non-disciplinary, administrative closure of Mr. Vlutters' employment file. For the reasons related above, I am satisfied that the grievor is the author of his own misfortune and that he did, as the Company asserts, effectively abandon his employment.</u> (Underlining added)

9. This reasoning has been followed by Arbitrator Yingst Bartel in **CROA 4867** and this arbitrator in **CROA 5016**.

10. A review of the correspondence between the Parties reveals some initial ambiguity as to the nature of proceedings between the Company and the Grievor. Indeed, the August 10, 2022 letter from the Company to the Grievor (see Tab 20, Union documents) requiring a formal investigation mentions article 16. However, it also notes:

> The purposes of this investigation will be divided into two parts. The first part is to determine the circumstances surrounding your absence at investigation on August 8, 2022. The second part is regarding your unjustified absence since June 12, 2022.
> Please note that this is a final notice and if you do not contact Catherine Gauthier-Daigneault by Friday August 19, 2022 at 4 pm we will be obligated to take action that may lead to an administrative termination of your employment, without further notice or delay. (Underlining added).

11. Subsequent letters make it clear that the Company is requesting information to justify the absence of the Grievor.

12. The September 28, 2022 letters from the Company notes:

> As of today, your continued absence since June 12, 2022 remains unjustified.
> In order to assess your condition and determine if your absence is justified, we will require you to complete an Independent Medical Evaluation (IME)…Should you choose to not provide the necessary consent, this will be seen as a failure to cooperate with the IME process and we will have no choice but to administratively terminate your employment.

13. An October 12, 2022 letter from the Company to the Grievor is to the same effect (see Tab 26, union documents).

14. Notably, the October 17, 2022 termination letter only makes mention of the failure to provide the requested consent forms for an IME, to justify his current absence (see Tab 27, Union documents).

15. As such, I find that the decision to terminate the employment of the Grievor was an administrative one, based on a dispute concerning his continued absence and failure to provide requested consent forms for an IME requested by the Company. The decision was an administrative rather than disciplinary one, and as such, the protections of article 16.2 do not apply.

B. If the decision was administrative, was the decision arbitrary, discriminatory or taken in bad faith?

Position of Parties

16. The Union takes the position that the decision was indeed arbitrary, discriminatory and taken in bad faith. It points out the remarkable rapidity with which the decision was taken in less than 3 months, unlike many of the cases cited. It argues that the Grievor did produce a medical certificate justifying his absence, which was not challenged. It notes that an IME with a doctor selected by the Company can only take place in exceptional circumstances, after information has been sought from the Grievor's own doctor, which never happened. It argues that the termination of an employee who manifestly is unwell is discriminatory and that the decision was taken in bad faith.

17. The Company submits that the decision was taken for valid reasons, after the Grievor was given every chance to respond. It notes that the Grievor was repeatedly warned that his employment was in jeopardy, but chose not to respond. The termination for abandonment of position should be upheld.

Analysis and Decision

18. As the decision was administrative, rather than disciplinary, the decision may only be reviewed on the basis of whether it was arbitrary, discriminatory or taken in bad faith (see **CROA 5016**, **CROA 4602**).

19. The Company argues that the decision was proper as 1) the Grievor failed to communicate with it; 2) the Grievor failed to provide medical information justifying his absence from work; and 3) the decision to terminate was valid.

20. For the reasons that follow, I find that 1) the Grievor did not fail to communicate with the Company; 2) the Grievor did provide medical information to the Company justifying his absence from work; and 3) the decision was arbitrary and cannot stand.

21. The Company argues that the Grievor was off work for 10 months at the time of the initial request for medical information, and approximately 1 year at the time of his termination (see paragraph 62, Company Brief). However, the Grievor was receiving STD benefits from Sun Life until June 12, 2022. The Company would not be entitled to medical information during this time.

22. After the Grievor was cut off benefits by Sun Life, the Company sought medical information repeatedly from July 20,2022 to October 17, 2022, with statements about the possibility of administrative closure of his file should he not comply (see Tabs 1, 8,11,16,19, Company documents).

23. However, either the Grievor or his Union representative were in communication with the Company on several occasions during this 3-month period (see Tabs 13, 15, 17 and 18, Company documents). The Company may certainly assert its need for an IME, but it is difficult to conclude that the Grievor and his Union had failed to communicate with it. This is very different factually from other matters, where grievers remained incommunicado for lengthy periods (see for example, **CROA 3847**, **CROA 4276**, **CROA 4504**, **CROA 4585**, **CROA 4612**).

24. The real dispute was over the Grievor’s refusal to provide consent for the release of medical information, so the Company could perform an IME.

25. In my view, insufficient attention was paid by the Company to the medical certificate given by the Grievor's treating physician, Dr. Reid Cameron. The Union provided a medical certificate to the Company on August 11, 2022 (see Tab 11, Company documents). In it, Dr. Cameron notes the following:

> To whom it may concern:
>
> This patient was seen on Thursday, August 11, 2022.
>
> Additional Notes:
> Mr. Mackie has been reviewed June 26, 2022, August 4, 11, 2022.
> I was away from the practice in July.
> He remains unfit for work duty.
> He is compliant with regular medical care and counselling.
> He is awaiting specialist consultation.

26. Dr. Cameron's note clearly establishes that the Grievor was not fit for work, was being followed medically and would see a specialist. The note clearly addresses the expressed Company concern that the Grievor justify his absence.

27. It is noteworthy that the Grievor was not seeking anything additional from the Company. He was not receiving benefits from Sun Life or being paid by the Company. He was not seeking an imminent return to work, in which case the Company might well have been entitled to particulars.

28. The jurisprudence indicates that a Company will be entitled to additional medical information when the medical information is either non-existent or ambiguous (see **CROA 3847**, **CROA 4612**).

29. This is not the case here, however. The treating physician of the Grievor, who saw him on a regular basis, had certified that he was unable to work.

30. If the Company had questions about that medical opinion, or about the specialist the Grievor would be seeing, they could have posed these questions to Dr. Cameron. They could have asked, for instance, the nature of the speciality, whether the specialist

was aware of the safety critical nature of the Grievor's work, when he would be seen or when he was likely to be able to work, etc.

31. None of these questions were asked. Instead, the Company persisted in requesting consent for disclosure of the Grievor's medical files. This is not in keeping with the jurisprudence.

32. In **Telus Communications Co and TWU 2010** CLAD No 11 Member Lanyon found that the Company first has an obligation to address issues with the grievor's own doctor:

> However, the Employer is always able to challenge medical evidence if it has reasonable grounds to do so; for example, if the information is insufficient or contradictory. And the Employer is able to question the medical evidence either at the initial stage or any subsequent stage. Once again there must be reasonable grounds to do so.
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> This takes us to the second question: if the Employer does require additional information in certain circumstances, are they required to tum first to the employee's own physician; and if further information is required from a specialist can that specialist be selected by the employee's treating physician.
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> In short, the answers are yes. This selection process is consistent with the principle of applying the least intrusive measure. Thus, the Employer is required to go back to the employee's own physician first for additional information. If a specialist is required because the family doctor does not have the necessary expertise then the employee should be given the option of attending a specialist of their own choice.

33. In **Metro Vancouver and GVRDEU** 2014 Carswell BC 2709, Member Nichols found that there must be a balancing of the right to employee privacy with the right of the employer to validate absences from work:

> 97 The first question is whether the Employer was entitled to require the Grievor to attend the JME when it did so. This must be assessed using the balancing of interests approach, which necessarily turns on all the particular circumstances of the situation. Thus, the facts here are critically important to the determination of the issue.
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> […]

> 101 An employer has a continuing right to inquire into absences from work and an employee has a continuing obligation to account for their absence. An employer is not required to accept any medical certificate and, with reasonable grounds (e.g., the information is insufficient or contradictory), may make further inquiries to determine whether the absence is bona fide. A note from a family physician indicating that the absence is due to illness and the return date is unknown has been recognized as being insufficient. Yet, the employer must use the least intrusive means of obtaining the infom1ation and the disclosure of further information must be reasonably necessary in the circumstances, which may vary with the stage of the medical inquiry (see Castlegar School District No. 9 v. Castlegar District Teachers' Assn. (Dudley Grievance), supra at paras. 25-28; British Columbia Crown Counsel Assn. (Fell Grievance), supra at paras. 55, 58-60, 84; TELUS Communications Co., supra at paras. 82, 112-113). The information that has already been disclosed and the reasons for the request for further disclosure will also be important considerations. There may be reasonable grounds for seeking an IME where there is a conflict in the medical evidence which may raise concerns about the bona tides of the illness, where the circumstances raise questions about whether there may be "medicalization of a workplace dispute" or where the treatment plan and prognosis are such that there are questions about the effectiveness of current treatment (British Columbia Crown Counsel Assn. (Fell Grievance), supra at paras. 92, 94-95).

34. Arbitrator Saunders in **Government of the province of British Columbia and BC Crown Counsel Association**,2019 CanLii 118409 noted an arbitral consensus with respect to the importance of employee privacy:

> 131 There is a well-established arbitral consensus that the right to manage does not confer direct access to its employees' physicians on-demand, and without first exhausting the least intrusive means to answer reasonable inquiries. That principal rests on arbitral recognition of an employee's "strong right to privacy with respect to their bodily integrity and medical treatment": IHA, at paras. 135 and 136-138, citing R. v. Dyment, [1988] 2 S.C.R. 417; Rio Tinto Alcan and Unifor, Local 2301, [2016] B.C.C.A.A.A. No. 44 (Lanyon) at paras. 51-52 and 54; and TELUS Communications Co. and TWU (2010), 192 L.A.C. (4th) 240 (Lanyon) at paras. 115-116.
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> 132 An employer's right to require employees to provide medical information to manage absenteeism, to ensure workplace safety, to administer claims for disability benefits, to facilitate the accommodation process or to fulfill a duty to inquire about a disability, must be balanced against the employee's fundamental right to privacy regarding their medical information…

35. In the face of the above facts, I find the Company decision to be arbitrary. In the face of an existing medical certificate justifying the Grievor's absence from work, insisting on an IME, with a failure to provide consent resulting in a conclusion of abandonment of position, cannot be viewed as reasonable. This is still more the case in light of the indicated meeting with a specialist. The Company could easily have put any concerns to Dr. Cameron or to the specialist.

36. While the decision was arbitrary, I do not find that there has been sufficient evidence led with respect to discrimination or bad faith. Both appear unlikely, given the past accommodations given by the Company to the Grievor.

37. Given all the circumstances, I do not find that this is a case for damages.

Conclusion

38. The grievance is upheld with respect to the discharge of the Grievor based on abandonment of his position.

39. The Grievor is reinstated without loss of seniority.

40. He should be made whole for the period in which the Grievor would have been able to work at the Company, less mitigation. This issue is remitted to the Parties.

41. I remain seized with respect to this issue should the Parties be unable to agree, together with any issues of interpretation or application of this Award.

August 15, 2025

JAMES CAMERON
ARBITRATOR