CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2441

Heard in Montreal, Wednesday, 12 January 1994
concerning
VIA RAIL CANADA INC.

and
CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT & GENERAL WORKERS

DISPUTE:
The alleged unjust dismissal of Mr. W. Podolsky.

JOINT STATEMENT OF ISSUE:
On July 5, 1992, Mr. Podolsky booked sick and did not return to work. Following requests for medical justification for his absences, he was sent a letter to attend a formal investigation into his failure to respond and failure to provide the requested information, as well as to explain his absence. The grievor failed to attend the hearing.

Following further inquiries, on March 4, 1992, the grievor's personal physician advised the Corporation that he had completed the required SunLife forms December 22, 12992, and similar forms on November 17, 1992 and again on February 18, 1993. He further indicated that there was some progress in the therapy but that Mr. Podolsky was not able to resume gainful employment and the physician was, at the time, unable to predict when the grievor would be able to return to work.

The Brotherhood contends that the Corporation has violated past practice and Articles 11.3, 24.1, 24.2 and 24.5 of Collective Agreement No. 1, when the grievor was released from service.

The Corporation maintains that the grievor was not disciplined for his absences, and that it is the employer's right to dismiss employees for innocent absenteeism when they are unable to attend work on a regular basis.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) T. N. STOL	(SGD.) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock.	- Senior Officer, Labour Relations, Montreal
C. Rouleau	- Senior Officer, Labour Relations, Montreal

And on behalf of the Brotherhood:

P. Askin	- Representative, Vancouver
W. Podolsky	- Grievor

AWARD OF THE ARBITRATOR

Upon a review of the evidence the Arbitrator is satisfied that the grievor did incur a rate of innocent absenteeism which, standing alone, justified the Corporation's decision to terminate his services. A letter dated March 4, 1993 addressed to his section director by Dr. M. Mattas, the grievor's physician, indicated an inability on the part of the doctor to predict when

the grievor would be able to return to work. As the record discloses, Mr. Podolsky had averaged some 114 sick days per year over a period of nine years. At all relevant times the Corporation was unaware of any medical prognosis which would suggest that Mr. Podolsky could maintain a regular rate of attendance at work.

The record before the Arbitrator, however, reveals more. Firstly, I am satisfied that the grievor's absenteeism record is substantially attributable to his diagnosed condition of anxiety and depression. This has plainly afflicted him over a period of several years and has negatively impacted his ability to be in regular attendance at work. In such a case, as noted in CROA 2371, the following principles apply:

> It is generally accepted that for an employer to be entitled to invoke its right to terminate an employee for innocent absenteeism it must satisfy two substantive requirements, namely that the employee has demonstrated an unacceptable level of absenteeism as compared with the average of his peers over a sufficiently representative period time, and, secondly, that there is no reasonable basis to believe that his or her performance in that regard will improve in the future.

I am satisfied that in the case at hand the first of the two conditions is established, and I am further of the view that the Corporation had no reason, at the time of the discharge, to believe other than that the grievor would be unable to be regular in his attendance in the future. At the hearing, however, further evidence was adduced. The record establishes that Mr. Podolsky pursued ongoing treatment for his condition, both through Dr. Mattas in Winnipeg, and through registered psychologist Sally J. Whitmore of Victoria, British Columbia. In a letter dated November 23, 1993 Dr. Mattas states, in part, "... I saw Mr. Podolsky ... October 5/93. At that time, he was doing well. He has maintained his remission and he has now fully recovered from his depression. He is, therefore, capable of returning to work."

The Arbitrator is satisfied, in light of the foregoing, that the Brotherhood has tendered sufficient evidence in satisfaction of the second condition. There is substantial reason to believe, on the balance of probabilities, that Mr. Podolsky is now capable of resuming regular attendance at work. In so concluding I share the view of the preponderance of Canadian arbitrators that in such a case it is appropriate to consider evidence with respect an employee's medical condition, even when it involves treatment and diagnosis following the employee's discharge.

This is not, in my view, a case for reinstatement with compensation. At the time of the grievor's termination the Corporation had every reason to believe, as it did, that both conditions, an unacceptable level of absenteeism over a sustained period of time, and a lack of any basis to expect that the grievor's attendance would improve in the future, were satisfied. This, in my view, a case for a conditional reinstatement upon terms which will protect the interests of the employer, while responding to the submission made on behalf of Mr. Podolsky that he is now in control of his condition. It is appropriate, I think, to fashion conditions of reinstatement which are predicated on the correctness of the grievor's claim that he will

be regular in his attendance at work in the future.

For the foregoing reasons the grievance is allowed, in part. Mr. Podolsky shall be reinstated into his employment, without loss of seniority and without compensation. His reinstatement shall be conditional upon his maintaining a rate of absenteeism which will not exceed that of the average of all other station employees in VIA West, for a period of not less than two years from the date of his reinstatement. Should Mr. Podolsky's rate of absenteeism exceed the average, calculated over any of the four six-month periods within the two years, his employment shall be subject to immediate termination, with any further recourse to arbitration to be limited to the issue of the calculation of the applicable rates of absenteeism.

14 January 1994_____

MICHEL G. PICHER
ARBITRATOR