CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2663

Heard in Montreal, Wednesday, 11 October 1995

concerning

VIA Rail Canada Inc.

and

CAW-CANADA

DISPUTE:

The termination of the conditional reinstatement of Mr. J. Mills.

JOINT STATEMENT OF ISSUE:

On May 16, 1993, Mr. J. Mills was granted a conditional reinstatement pursuant to CROA 2363. On August 1, 1994, Mr. Mills booked sick. Mr. Mills remained absent continuously after that date. On October 6, 1994, the Corporation wrote to Mr. Mills informing him that, effective October 7, 1994, his "conditional reinstatement was terminated and his services "dispensed with"." It is common ground that Mr. Mills' absence was in excess of the average for Chefs in VIA Atlantic.

The Union alleges that the Corporation violated the just cause standard contained in the provisions of article 24.21 of collective agreement no. 2, and the Canadian Human Rights Act. It is the Union's position that the Corporation was not within its rights to sever Mr. Mills' employment. The Union further argues that to discharge an employee when he is receiving benefits is a violation of article 34.1 and Appendix 20 of collective agreement no. 2. The Union also alleges a violation of article 24.6 due to the fact that the Corporation "did not conduct an investigation prior to discharging Mr. Mills". Lastly, the Union alleges that the Corporation violated Appendix 7.

The Union requests that Mr. Mills be reinstated with full wages and benefits.

The Corporation does not believe that this grievance was progressed in a timely fashion by the Union and, therefore, it is not arbitrable.

FOR THE UNION: FOR THE Corporation:

(SGD.) A. S. Wepruk (SGD.) D. S. Fisher

National Coordinator for: Department Director, Labour Relations and Human Resources

There appeared on behalf of the Corporation:

D. S. Fisher– Senior Advisor & Negotiator, Labour Relations, Montreal

C. Pollock – Senior Labour Relations Officer, Montreal

And on behalf of the Union:

T. Barron – Representative, Moncton

J. Beed– Local Chairman, Halifax

Preliminary AWARD OF THE ARBITRATOR

The only issue to be resolved in this preliminary award is whether the grievance is untimely. The substance of the dispute concerns the failure of the Union to progress the grievance to Step 3 of the grievance procedure prior to January 31, 1995. It is common ground that that was the date to which the Corporation's Director of Labour Relations agreed to extend the time limits, in response to a request from the Union's National Coordinator, as reflected in a letter from the Corporation's Director of Labour Relations, dated January 9, 1995.

The first submission of the Union's representative is that the

time limits found in article 24.23 of the collective agreement are not mandatory. The Arbitrator has considerable difficulty with that submission. Article 24 provides, in part, as follows:

INDENT 24.23Where any grievance is not progressed by the Brotherhood within the prescribed time limits, the grievance will be considered to have been dropped. When the appropriate officer of the Corporation fails to render a decision with respect to a claim for unpaid wages within the prescribed time limits, the claim will be paid, but this will not constitute an interpretation of the collective agreement. Where a decision with respect to a grievance other than one based on a claim for unpaid wages is not rendered by the appropriate officer of the Corporation within the prescribed time limits, it will be processed to the next step of the Grievance Procedure.

INDENT 24.24The time limits provided in this Grievance Procedure may be extended by agreement between the Corporation officer and the Brotherhood representative at any step.

It is argued on behalf of the Union that the collective agreement language governing step 3 of the grievance procedure is not mandatory. In this regard article 24.21 provides as follows:

INDENT 24.2 Any complaint raised by employees concerning the interpretation, application or alleged violation of this Agreement or that they have been unjustly dealt with shall be handled in the following manner:

INDENT...

INDENT Step 3

INDENT Within 60 calendar days of receiving decision under Step 2, the National Vice-President of the Brotherhood may appeal the decision in writing to the Director, Labour Relations who will render a decision within 60 calendar days of receiving appeal.

The Union's representative submits that the use of the word "may" in the foregoing provision reflects the understanding of the parties that the time limits provided in respect of initiating Step 3 are not mandatory. I cannot agree. Having regard to the grammatical sense of the provision, the use of the word "may" within article 24.2 plainly refers to the discretion of the National Vice-President of the Brotherhood to decide whether or not to appeal the decision, within the sixty day period provided to him to exercise that discretion. Article 24.2 is subject to the overriding intention of article 24.23 that should he not progress the grievance within the time limits so prescribed it "... will be considered to have been dropped." Moreover, it is clear from the language of article 24.24 that any escape from the requirements of the time limits can only be obtained by way of an extension through agreement between the Corporation officer and the Union's representative at any given step. If the Union is correct, that provision would not be necessary. With respect, it is difficult to conceive of language more clearly directed to confirm the mutual intention of the parties that the time limits under the grievance procedure are intended to be mandatory. That, indeed, has been the conclusion of this Office is respect of the interpretation of similar provisions in reflected in a number of prior awards. (See, e.g., CROA 36, 60, 102, 533, 597, 869 and 1114.) In CROA 597 Arbitrator Weatherill made the following comments:

INDENT... Article 17-B03 of the collective agreement provides

that "when a grievance is not progressed by the Union within the prescribed time limits, it shall be considered as dropped". The effect of that provision is clear. My jurisdiction is not such as to allow any alteration or amendment of the terms of the collective agreement, or to deal with any matter not properly processed through the grievance procedure. The delay in this case was substantial, and I have no jurisdiction to grant relief from its consequences.

INDENT Accordingly, it must be my conclusion that the grievance was to be considered as dropped, and that I have no jurisdiction with respect of it. The preliminary objection must therefore be allowed and the proceedings terminated.

Nor can the Arbitrator accept the submission of the Union's representative that the parties cannot limit the access of an employee to arbitration by the introduction of mandatory time limits into the collective agreement. While it is true that section 57(1) of Part I of the Canada Labour Code requires that every collective agreement contain provisions for the final settlement of disputes "by arbitration or otherwise", there is nothing within the language or spirit of that statute which would prevent parties from establishing mutually agreed time limits which are mandatory. The labour relations policy underlying such provisions is relatively obvious, as it brings a degree of certainty and finality to disputes which might otherwise be revived after prejudicial delay. In considering the intention of Parliament, it is also significant to note that the Canada Labour Code does not contain a specific provision which gives to boards of arbitration the ability to relieve against mandatory time limits in certain circumstances, as is the case under other labour relations statutes such as the Ontario Labour Relations Act. In the result, the Arbitrator is compelled to conclude that the Corporation is correct in its assertion that the time limits established within the collective agreement with respect to the progressing of grievances are mandatory. Accordingly, in keeping with the clear intention of article 24.23, the failure to meet a time limit effectively voids a grievance.

The Arbitrator must also reject the alternative submission of the Union's representative to the effect that a meeting which occurred between the parties on January 13, 1995 was, in effect, a Step 3 meeting within the meaning of the collective agreement. The unchallenged representation of the Corporation is that the meeting was not convened by or on behalf of the Brotherhood's National Vice-President, (now "the Union's National Coordinator") but rather by the grievor's regional union representative. It would appear that what transpired was a meeting convened in an attempt to resolve a number of grievances concerning Mr. Mills, some of which had already been dealt with at Step 3, in a manner supplementary to the steps of the grievance procedure. On that basis, this further submission of the Union's representative cannot be accepted.

There is, however, an issue of greater substance to be considered. As noted above, the Union was granted an extension of time limits for proceeding to Step 3 by the Corporation. That extension was granted until January 31, 1995. In the interim the parties engaged in a joint meeting on January 13, 1995 to discuss, without prejudice, various proposals to settle the four grievances concerning Mr. Mills, including the discharge

grievance that is the subject of this arbitration, which had not yet proceeded to Step 3. It does not appear disputed that a key outcome of the meeting was an undertaking on the part of the Corporation that it would be forwarding a proposal to the Union for settlement of all of the grievances. It appears that the Union was hopeful that the Corporation's proposal for settlement could be made by January 17, to allow for the possible return to work of the grievor on January 20th. When nothing further was heard its representative contacted the Corporation on the 17th. He also contacted the employer again on the 26th and the 31st of January to inquire as to the status of the Corporation's intention to provide an offer of settlement. In fact, an offer of settlement was finally made by the Corporation late on the 31st of January, the date previously agreed as the last day for the extension of the time limits. Now, however, the Corporation takes the position that the failure of the Union to proceed to Step 3 on or before the 31st of January is a violation of the time limits, so that the grievance must now be considered to have been dropped.

The Arbitrator has substantial difficulty with that position given the sequence of events. At a minimum, it must be taken that the Corporation held out to the Union that the parties were engaged in ongoing discussions concerning the grievance of Mr. Mills, and that those discussion would result in an offer of settlement to be made by the Corporation, presumably with the opportunity of the Union to consider and respond to that offer. In fact, however, the Corporation's offer came only late on the final day of the agreed extension of time limits. In the result, the Union could reasonably believe that it was entitled to consider the offer which the Corporation had made, and that it could do so without prejudice to the strict application of the time limits. In other words, the Corporation's actions must fairly be construed as consistent with a waiver of the time limits for the purposes of the discussions which it had undertaken with the Union, at least insofar as the making of an offer of settlement by the Corporation and its consideration by the Union was concerned.

In a case referred to by the Union's representative, SHP-351, a grievance concerning Canadian Pacific Limited and the International Brotherhood of Electrical Workers, (award dated July 22, 1991) the arbitrator found that an objection as to time limits raised by the union could not be sustained. In that case the company had requested an extension of time limits to make its decision to discipline the grievor following a formal investigation. The well-established practice of the parties was that such requests were normally granted as a matter of course. However the union's representative awaited the final day of the time limits, and then abruptly advised the company that the extension would not be granted. The arbitrator concluded that in those circumstances the union must be estopped from relying on the strict application of the time limits.

While not precisely the same, the facts in the instant case should be seen as governed by the same principle. The evidence discloses that the Union and the Corporation agreed to an extension of time limits for initiating Step 3 until January 31, 1995. During the interim they commenced negotiations to settle the dispute, on a without prejudice basis. The Union was given to

understand from the Corporation that it would be forthcoming with an offer of settlement. That offer, however, was not put into the Union's hands until the final day of the extended time limits. In the Arbitrator's view it would be inequitable to conclude other than that the Corporation has, in these circumstances, waived its right to the strict application of the time limits. In effect, it told the Union to wait for its offer of settlement, a request which must be taken to involve implicitly the opportunity of the Union to consider and respond to the offer. As the matter unfolded, the process of offer and response clearly went beyond the extended time limit. I am satisfied that in this circumstance the Corporation must, by its actions, be taken to have waived the strict application of the time limit of January 31, 1995.

For the foregoing reasons the Arbitrator finds that the preliminary objection of the Corporation with respect to the timeliness of the grievance cannot be sustained, and that the grievance is arbitrable. The General Secretary is therefore directed to schedule this matter for hearing on its merits.

October 13, 1995 (signed) MICHEL G. PICHER
ARBITRATOR