

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2804

Heard in Montreal, Wednesday, 11 December 1996

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Appeal of 25 demerits assessed to the record of R. Lefebvre for an unauthorized leave of absence from May 28, 1994 to October 31, 1994 effective October 31, 1994, resulting in his discharge for accumulation of demerit marks.

EX PARTE STATEMENT OF ISSUE:

On May 28, 1994, Mr. Lefebvre attended the offices of his family physician and was authorized off work for a week because of his mental health. Subsequently, Mr. Lefebvre contacted the Employee Assistance Program and began to visit the offices of Jacqueline Gravel, a psychologist, associated with the Employee Assistance Program. Ms. Gravel arranged for Mr. Lefebvre to be referred to a psychiatrist, Dr. DesRoches. Mr. Lefebvre attended Dr. DesRoches' offices on September 15, 1994. Dr. DesRoches completed an "Attending Physician's Statement" indicating that Mr. Lefebvre would be absent from work from May 28, 1994 through October 17, 1994.

By letter dated July 12, 1994, Mr. Lefebvre was advised that the Corporation had arranged for a medical examination to be conducted by Dr. Pigeon at Medisys. The examination took place on July 22, 1994. On October 17, 1994, Mr. Lefebvre was advised that he was required to undergo a further examination by Dr. Pigeon. The examination was held on October 30, 1994. In a report dated November 4, 1994, Dr. Pigeon advised the Corporation that it was his opinion that Mr. Lefebvre was fit to perform his regular duties on the dates of both appointments.

An investigation interview was conducted on December 21, 1994. Mr. Lefebvre was advised by a notice dated January 5, 1995 that he had been assessed 25 demerits for his absence from May 28, 1994 through October 17, 1994. Additionally, Mr. Lefebvre was advised by a second notice that he was terminated because of accumulation of demerits.

The Union filed a grievance concerning Mr. Lefebvre's discharge. The Corporation declined the grievance.

FOR THE UNION:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Officer, Labour Contracts, Montreal
J. C. Grenier	– Labour Relations Officer (ret'd), Montreal
J. M. Lalonde	– Chief of Transportation, Montreal

And on behalf of the Union:

M. Russel	– Counsel, Toronto
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R. Beatty	– Vice-General Chairman, Hornepayne
G. Bird	– Vice-General Chairman, Montreal
R. Skilton	– Local Chairman,
R. G. Woehl	– Local Chairman, BLE, Hornepayne
R. Lefebvre	– Grievor

AWARD OF THE ARBITRATOR

In this grievance the Arbitrator is faced with conflicting medical evidence. The opinion of the Corporation's physician, Dr. Marcel Pigeon, is that the grievor was, at all material times, physically and mentally fit for duty. His opinion is based on examinations of the grievor conducted on September 17, 1993, March 9, July 22, and October 31, 1994. On the opposite side of the ledger, the Union has tendered in evidence a written report signed by a psychiatrist, Dr. Benoît DesRoches, indicating that the grievor suffered from an adaptation difficulty syndrome as a result of the death of his mother, that he was in psychological counselling, was taking a prescription drug for anxiety, and that by reason of his medical condition he was absent from work from May 22, 1994 to October 17, 1994. The grievor's evidence confirms that Dr. DesRoches provided him with the medical report to facilitate his obtaining SunLife benefits, following an examination conducted by the psychiatrist for approximately one and one-half hours.

Dr. Pigeon indicated during the course of his testimony that he placed no weight on the psychiatrist's opinion, questioning how a specialist could formulate a diagnosis for a period of time prior to his examination of the patient, which occurred on or about September 15, 1994. He described the document prepared and signed by Dr. DesRoches as "*un certifiact de complaisance*", meaning that it was inspired more by friendly intentions than by a concern for the truth. Indeed, he suggested that Dr. DesRoches' written statement bordered on questionable ethics. When asked, in cross-examination, whether he consulted with Dr. DesRoches with respect to the basis of his diagnosis, after his fourth examination of the employee on or about October 31, 1994, when he was presented with a copy of the specialist's opinion, Dr. Pigeon indicated that he felt that it might be unduly embarrassing to Dr. DesRoches for him to speak with him about it. He further indicated that on October 31, 1994 he formed his own opinion that there had been no serious emotional or psychiatric impediment to the grievor working at any time, based in part on the fact that during his examination by Dr. Pigeon the grievor did not talk about his dead mother.

Certain facts are not disputed. Mr. Lefebvre was the winner of a substantial amount of money in a well-known lottery in March of 1933. Subsequently, in August of 1993 he was assessed twenty demerits to failing to be sufficiently available for work. It may be noted that he had previously been disciplined for the same infraction on two prior occasions, in 1990 and 1992. On May 15, 1994, Mr. Lefebvre's mother passed away. He testified that, as an only child, he was severely impacted by that event, and found himself extremely disoriented, anxious, and unable to concentrate. He initially sought the medical attention of his family physician, Dr. Legault. Dr. Legault prescribed Ativan and Resteril to reduce the effects of anxiety. According to the grievor his state was such that he could not drive his own car.

Mr. Lefebvre continued to remain off duty, and eventually, on the advice of his Union's local chairman, contacted EAP representative Jacqueline Gravel, a psychologist. By his own account he had a number of meetings with Ms. Gravel who, ultimately, took steps to have him referred to a psychiatrist, which led to his appointment with Dr. DesRoches. In the result, the grievor did not present himself as able to return to work prior to October 17, 1994.

The Corporation's view is that Mr. Lefebvre was malingering, and that he ceased to have any serious interest in protecting his assignment following the substantial windfall of his lottery winnings. Its representative questions why, at the beginning of his period of absence commencing in May of 1994, Mr. Lefebvre did not seek to obtain sick leave benefits to which he was entitled, and only did so at or about the time of his return to work in October. It submits that, based on his prior record of poor attendance, he breached his obligation to the Corporation and was deserving of a serious measure of discipline. The Corporation maintains that the assessment of twenty-five demerits was appropriate in the circumstances, given the prior assessment of five and ten demerits for attendance problems in 1990 and 1992 respectively, as well as the twenty demerits assessed against Mr. Lefebvre in August of 1993. Further, given that his disciplinary record stood at forty-five demerits, it submits that his termination for the accumulation of demerits is appropriate.

Upon a review of the evidence, the Arbitrator cannot disagree that the grievor did fail in his duty to the Corporation, particularly with respect to the obligation to provide good and sufficient information as to his medical condition, the reasons for his extended absence and some prognosis as to the likely date of his return. For reasons which he best appreciates, Mr. Lefebvre was not forthcoming with information of that kind. Quite simply, if, as appears plausible, he was suffering an anxiety disorder or a serious condition of adaptation difficulty following his mother's death, it was incumbent upon him to communicate that situation to the Corporation, well before the filing the psychiatrist's certificate in October of 1994. Given the delay in Mr. Lefebvre's actions, and the arguably contradictory information or, at the least, impression, which he gave Dr. Pigeon, the Corporation had every reason to suspect that he was deficient in his obligation to be at work when its own medical advice indicated that he was fit for duty, as repeatedly confirmed by Dr. Pigeon.

There are, however, mitigating factors to be taken into account in this case. Firstly, the Arbitrator is not prepared, as is Dr. Pigeon, to reject out of hand the opinion of Dr. DesRoches. Absent extensive expert testimony with respect to the feasibility of a psychiatrist making a retroactive diagnosis as to a patient's mental or emotional condition or a general practitioner such as Dr. Pigeon making what may well be a complex psychiatric diagnosis based on what appears to be a physical examination coupled with a general conversation, this Office cannot responsibly conclude that Dr. DesRoches' opinion should be accorded no weight. At a minimum, it does stand as evidence, albeit perhaps less than ideal evidence, that the grievor did suffer from a debilitating emotional condition, extended over a period of several months, as reflected in his own testimony. Moreover, while the Arbitrator does not disregard the grievor's prior discipline for the failure to protect his assignment, the record discloses that the grievor's railroading career extends back some twenty-six years, to the date of his first hire by CN in March of 1970. Moreover, given that there was a degree of fault on the part of Mr. Lefebvre, I am satisfied that the circumstances allow for the fashioning of remedial order which will protect the interests of the Corporation with respect to his future attendance at work, while allowing this long service employee the opportunity to return to active employment.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without compensation or benefits, and without loss of seniority, with his disciplinary record to stand at forty-five demerits. The period of time from his termination to the date of reinstatement shall be recorded as a suspension for failure to provide proper information and documentation to his employer in respect of his extended period of absence between May and October of 1994. Further, the grievor's reinstatement is conditioned upon his agreeing that he will be liable to termination should he register a higher rate of absenteeism or unavailability for assignments than the average for the employees in his classification at his terminal, calculated on any six month basis, over the period of three years following his reinstatement.

December 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR