

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3262

Heard in Calgary, Thursday, 16 May 2002

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

Concerning the dismissal of Ms. D. Acre-Smith.

JOINT STATEMENT OF ISSUE:

On August 24th, 2001 the grievor was assessed 15 demerits for allegedly "failing to comply with written instructions". The grievor had previously been assessed 55 demerits with the result that her record now stood at 70 demerits.

It is the Union's position that the grievor was not afforded a fair and impartial hearing in accordance with the provisions of article 24.2 of collective agreement no. 1. First, the investigating officer (Mr. Guy Larochelle) entered evidence in the form of a memo sent to him from fellow employee Mr. John Oberkersch. Second the grievor asked that fellow employee Oberkersch represent her at the hearing, she was not informed at the time of her request, that it was on the basis of evidence obtained from Oberkersch that she was being investigated. Because it was Mr. Guy Larochelle who gathered the evidence against the grievor he could hardly conduct a "fair and impartial" hearing.

Secondly, the grievor was not treated in a fair and even-handed manner. She was assessed 15 demerits while fellow employee S. Munsie was not investigated or disciplined for the same infraction.

It is further the Union's position that the discipline is excessive and unwarranted. The Union seeks reinstatement without loss of seniority, benefits or wages.

FOR THE UNION:

(SGD.) D. OLSHEWSKI

NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation [among others]:

L. Laplante – Sr. Officer, Labour Relations, Montreal

And on behalf of the Union [among others]:

D. Olshewski – National Representative, Winnipeg

D. Acre-Smith – Grievor

The hearing was adjourned by the Arbitrator until June 11, 2002.

AWARD OF THE ARBITRATOR

The first issue to be addressed is the contention of the Union to the effect that the Corporation failed to observe the requirements of article 24.2, concerning notice of the charges against the grievor, as well as article 24.1, which mandates a fair and impartial investigation.

Upon a review of the material the Arbitrator must agree with the Union that in the circumstances disclosed the Corporation's written notice to the grievor of the impending investigation did fail to give sufficient notice of the specific charges against her, as required by in article 24.2. The phrase used by her supervisor "... for failure to comply with the Edmonton manager's written instruction's" (sic) is, in the Arbitrator's view, simply too broad to be in conformity with the requirements of article 24.2. However, in the exceptional circumstances of this case the Arbitrator is satisfied that the form of the notice, albeit deficient, did not operate in a manner so prejudicial as to violate the fundamental standard of a fair and impartial investigation. For reasons she best appreciates, the grievor was not assisted by a Union officer, and expressly waived any objection to the form of the notice provided to her. There was, therefore, every opportunity for the grievor to object to the form of the notice provided to her, and to seek an adjournment of the proceedings to obtain more specific particulars and, if she chose, to have a Union officer to assist her. In the circumstance, therefore, this is not a circumstance in which the Arbitrator finds that the Company's actions resulted in nullifying the investigation process, or the discipline which resulted.

I am satisfied that the grievor was deserving of demerits for the three infractions which were the subject of the investigation. The evidence discloses, beyond substantial contradiction, that the grievor did board a passenger train at a time and place on the platform which was directly contrary to the orders of her supervisor. She likewise failed, over an extended period of time, to submit her measurements to facilitate the ordering of a new uniform. Finally, she exhibited a pattern of lateness for work on some ten occasions between May 5, 2001 and August 11, 2001, without apparent excuse. With fifty-five demerits on her record, the assessment of fifteen demerits was not unreasonable

In all of the circumstances, however, the Arbitrator is persuaded that this is an appropriate case for a substitution of penalty and the reinstatement of Ms. Acre-Smith into employment, subject to certain conditions. The record reveals that the grievor is an employee of some twenty years' service who, prior to recent times, was a good and productive employee. The flurry of negative discipline which she has incurred more recently appears to the Arbitrator to be directly prompted by a medical condition for which she has not apparently sought and obtained consistent care and medication. In the Arbitrator's view it is appropriate, as a final chance alternative in keeping with the general duty of accommodation, to reinstate Ms. Acre-Smith to her employment, without loss of seniority and without compensation, subject to the conditions which follow.

As a condition of reinstatement the grievor must agree to undergo a full medical examination, both physical and psycho-emotional, to determine her fitness to return to work or her entitlement to sick leave, by a physician mutually acceptable to the parties. Should she be found unfit to return to work at the present time she shall have entitlement to her full rights as an employee in respect of sick leave benefits, long term disability benefits or any other similar provisions which arise under the collective agreement. At such time as she is deemed medically fit to return to work by a physician mutually acceptable to the Corporation and the Union, she shall be reinstated into her employment. Her reinstatement at that time shall, however, be conditional upon her agreeing to maintain an ongoing relationship of care with the physician so chosen, and to maintain faithful adherence to any course of medication prescribed by him or her. Such ongoing care and continuing medication shall involve periodical assessments by the physician

in question, not less than quarterly, with written confirmation to the Corporation, copied to the Union's designated officer, for a period of not less than two years, calculated on the basis of active service. Such reports shall verify the grievor's attendance at her medical appointments and her adherence to any medication program. The failure on the part of Ms. Acre-Smith to honour those conditions shall render her liable to the termination of her employment.

Should the grievor initially be assessed as medically unfit to return to work, the same conditions with respect to periodic medical appointments and adherence to any prescribed course of medication shall apply for two calendar years. In any event, the grievor's entitlement to sick leave benefits, long term disability benefits or any other similar benefits under the collective agreement shall be subject to the normal conditions of entitlement and medical documentation which may apply.

The Arbitrator retains jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this award.

June 14, 2002

(signed) MICHEL G. PICHER
ARBITRATOR