

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3419**

Heard in Montreal, Thursday, 15 April 2004

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE - UNION:

Concerning the dismissal of Mr. Tim O'Connor.

UNION'S STATEMENT OF ISSUE:

Mr. O'Connor was subjected to a formal investigation on July 22, 2003 for his late arrival for work on May 29th, and June 19th, 2003. Following the investigation he was dismissed for the accumulation of demerits.

At the investigation hearing the grievor presented a number of mitigating factors for his tardiness on the days in question. First, there was evidence presented at the investigative hearing that there was a power outage on the night of June 19th, affecting his alarm clock. Second, Mr. O'Connor suffers from sleep apnoea, a condition which he revealed at the investigative hearing.

It is also the Union's position that Mr. O'Connor is a long service employee whose dismissal must also be mitigated by his admitted medical conditions including "anxiety and depression". Accordingly, the Union is requesting that he be reinstated forthwith with full compensation for wages and benefits lost.

CORPORATION'S STATEMENT OF ISSUE:

On July 22, 2003, Mr. O'Connor underwent an investigation for his late arrivals at work on May 29th and June 19th. The grievor was assessed 20 demerit marks for the offences, resulting in his dismissal for the accumulation of 75 demerit marks.

The Union contends that the Corporation has failed to take into account mitigating factors for Mr. O'Connor's lateness: there was a power outage on June 19th which affected his alarm clock;

Mr. O'Connor suffers from sleep apnoea; Mr. O'Connor suffers from anxiety and depression; Mr. O'Connor was not treated even-handedly with respect to his peers and as it relates to tardiness at the Edmonton station.

The Union is seeking reinstatement with full compensation for loss of wages and benefits.

The Corporation submits that Mr. O'Connor's attendance problems extended over a period of five years and the events of May and June, 2003 were the culminating incidents of unacceptable behaviour. The Corporation denies that Mr. O'Connor suffers from any medical condition that would cause his attendance problems and puts the Union to the strict proof thereof.

The Corporation maintains that discipline was warranted and dismissal was appropriate in the circumstances.

FOR THE UNION: FOR THE CORPORATION:

(SGD.) D. OLSHEWSKI (SGD.) L. LAPLANTE

NATIONAL REPRESENTATIVE FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

E. J. Houlihan - Sr. Manager, Labour Relations, Montreal

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

A. Iacono - Sr. Officer, Labour Relations, Montreal

G. Larochelle - Manager, Customer Services, Edmonton

And on behalf of the Union Brotherhood:

D. Olszewski - National Representative, Winnipeg

T. O'Connor - Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievor did render himself liable to discipline by reason of his failure to respond to counselling and prior discipline for his chronic habit of being late for work. I am satisfied that the Corporation was justified in assessing discipline when it did. The only issue is whether the imposition of twenty demerits, resulting in the grievor's discharge, is justified in the circumstances, or whether the penalty of discharge should be reduced by the exercise of the Arbitrator's discretion.

In the case at hand there are mitigating factors to be considered. Firstly, the Arbitrator does not accept the argument advanced by the Union to the effect that the grievor was dealt

with in a discriminatory fashion or in a manner which distinguished his disciplinary treatment for attendance problems from the treatment of other employees. A powerful factor in mitigation, however, is the grievor's longevity of service. He commenced working for the Corporation in 1978, and had some twenty-five years' of service at the time of his termination. While the grievor does have an extensive disciplinary record, with a few exceptions it is almost entirely to do with his being late for work. In the circumstances it appears to the Arbitrator that a substitution of penalty can be fashioned in terms which protect the Corporation's legitimate interest, while giving a long service employee a second chance.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation and without loss of seniority, subject to the following conditions. For the period of two years from the date of his reinstatement the grievor shall be required to maintain a record in relation to lateness for work which shall not exceed the average of the employees in his classification and location, calculated on the basis of any three month period. Failure to meet or exceed the average shall render the grievor subject to discharge with recourse to arbitration only on the issue whether he did or did not exceed the average in a given three month period. Should the grievor undertake to accept these conditions he shall be reinstated as directed.

April 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR