CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3453

Heard in Montreal, Thursday, 14 October 2004

concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE:

The termination of employment of Employee "B".

UNION'S STATEMENT OF ISSUE:

On September 3, 2002, Employee "B" was dismissed for an alleged violation of article 17.5 of collective agreement no. 1. Specifically, she was alleged to be absent without leave.

It is the Union's position that there was no violation of article 17.5 of collective agreement no. 1 and that Employee "B" was on a medical leave of absence at all material times. Indeed, the grievor was diagnosed with "post traumatic stress disorder", "anxiety" and "depression". In the Corporation's view the medical information was "insufficient". The Union takes issue with the dismissal and the degree of medical information required by the Employer.

In the Union's opinion, the Corporation had sufficient information on file not to engage in disciplinary action. The Employer has used problems with the insurer as evidence that the grievor was not disabled. However, a denial of weekly indemnity benefits should not be used as a culpable activity in the absence of legitimate evidence. Further, if there was any delay in the delivery of medical information, it can be directly attributed to the grievor's illness.

The Union seeks complete redress, including reinstatement without loss of wages, benefits or seniority.

CORPORATION'S STATEMENT OF ISSUE:

On September 3, 2002, Employee "B"'s services were terminated following her failure to attend an investigation on July 11, 2002 as well as her failure to adequately justify her continued absence and her failure to communicate her intentions to the Corporation.

It is the Corporation's position that this termination is in accordance with article 17.5 of collective agreement no. 1. As such it is to be viewed as administrative in nature and not disciplinary.

The termination is also consistent with the Corporation's general management right. Employee "B" was given every opportunity by the Corporation to adequately justify her absence, but she repeatedly refused or neglected to do so.

The Corporation seeks that the grievance be denied.

FOR THE UNION:	FOR THE CORPORATION:
(SGD.) D. OLSHEWSKI	**(SGD.) L. LAPLANTE**
NATIONAL REPRESENTATIVE	**FOR: DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

L. Béchamp	– Counsel, Montreal
L. Laplante	– Sr. Officer, Labour Relations, Montreal
C. Watson	– Manager, Customer Service, Toronto
D. Stroka	– Officer, Labour Relations

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
"B"	– Grievor

AWARD OF THE ARBITRATOR

The grievor first began her employment with the Employer on July 15, 1985. She had no disciplinary record. Her last day of work was on September 4, 2001 and prior to her next scheduled shift on September 2001 she called in sick. She has not returned to work since.

An initial claim for short term disability was filed with Great West Life Insurance Company, the insurance carrier, shortly thereafter. The expected duration of the absence was to be approximately eight weeks. What followed for a number of months was a series of requests by Great West Life to the grievor seeking further medical information, denials of her claim, appeals, and ultimately, on July 26, 2002 a decision by Great West to approve benefits but for the first six weeks of absence only, that is from September 7, 2001 to October 21, 2001.

During the whole of this period and at various times the grievor was seeing Dr. Dennis Brodie, her family physician, or Dr. Karen Galbraith a psychologist. Subsequent to her discharge from employment the grievor was referred to and saw other medical practitioners including a psychiatrist. For the purposes of this decision there is no need to consider her medical state past the date of her discharge.

Commencing on December 19, 2001, shortly after a December 11th, 2001 determination by Great West that the grievor was not totally incapable of assuming her job duties, the Employer first attempted to contact the grievor. The purpose of the attempt to contact her was to obtain additional justification for her absence and/or return to work. On January the 8th, 2002, the grievor spoke with a representative of the Employer and advised that she was appealing the Great West Life decision. The Employer agreed it would wait until a sixty day appeal period was over before readdressing her file. The appeal was denied on March the 8th, 2002, and following that denial the Employer attempted on a number of occasions to contact the grievor by

telephone and by mail, all without any success. Commencing mid-June a more concerted attempt to contact the grievor was undertaken by the Employer and this concerted attempt continued until a final registered letter was sent to the grievor on July 5, 2002 requesting that she attend an investigation scheduled for July 11th at 9:00. On that date representatives of both the Employer and the Union attended but the grievor never did. The grievor claims she never received any notice of the meeting.

On July 28, 2002 the Employer received by fax a note from the grievor dated July 9, 2002, as well as a copy of a medical certificate dated January 28, 2002. In her letter the grievor indicated that she wished to return as soon as possible, provided a home telephone number and indicated that she would either contact the Employer or the Employer could contact her. The grievor never did contact the Employer subsequent to that letter to make any arrangements regarding her return to work. The medical note that was sent was a note signed by Dr. Brodie that indicated in part that the grievor was incapable of working due to post traumatic stress disorder and that she would be off work from 05/09/01 and with respect to the expected recovery date indicated “indefinite”.

The Employer did not consider the medical certificate as, in its view, it was seeking more recent medical information from a treating specialist and as a result of that and the fact that the grievor did not return to work or attend the investigation within a thirty day period as provided in article 17.5, her employment was terminated effective September 3, 2002. Article 17.5 reads as follows:

> **17.5** Employees, at the discretion of the Corporation, may be granted a personal leave of absence without pay for up to four months, permission to be obtained in writing. The leave of absence may be extended by application in writing to the proper officer of the Corporation in ample time to receive permission or return to duty at the expiration of such leave.
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> Unless such extension of leave of absence is granted, or the employee provides a bona fide reason explaining why such return is prevented, a registered letter will be sent to the employee instructing him to report for an investigation in connection with the unauthorized leave of absence. If within a period of 30 calendar days from the date of the letter he fails to report for duty and investigation, he shall forfeit his seniority, his name shall be removed from the seniority list and his employment shall be terminated.

The determination to be made by the Arbitrator in the instant case is different from the determination that had to be made by Great West Life Insurance. The only determination to be made by the Arbitrator is whether or not there was just cause for the discharge of the grievor. I have carefully reviewed the medical documentation adduced in evidence by both parties and although it appears to be somewhat contradictory in some elements the common thread that runs through it is that the grievor was at all material times suffering from post traumatic stress syndrome and acute adjustment disorder with anxiety, both medically accepted psychological disorders.

It is a fact that the grievor never responded to the letters and phone calls of the Employer. It is a further fact that she did not attend the investigation meeting of July the 11th. With respect to that meeting there is a dispute as to whether the Union gave the Employer a letter indicating that it was the Union's understanding that the grievor was then under the supervision of her doctor. Ultimately, nothing turns on this.

The above facts however do not, in the view of the Arbitrator, dispose of the issue such as to maintain the discharge. This Arbitrator accepts, based on the available medical documentation, as stated above, that the grievor was at all material times suffering a psychological disorder. It is not unreasonable to reach the conclusion that her actions in not replying to the Employer and not attending the July 11th meeting (assuming she had actually received notice of the meeting) during this time were significantly influenced by her medical disorder. At the same time, the Employer cannot be said to have acted improperly in light of what limited information it had at the time. It was not up to the Employer to divine the condition of the grievor. It could only base its decision at the time on the basis of the information it had both from the grievor and from Great West Life.

After considering all of the above, the Arbitrator is satisfied that the grievor cannot be held responsible for her actions at the time. The Arbitrator has also taken into account the long service of the grievor and her discipline free record. On the other hand, it would not be reasonable to hold the Employer liable for any period of back pay or compensation given that at the time that it made its decision it acted within its scope of knowledge.

The Arbitrator was informed by the Union that the grievor is now capable of returning to work. This is confirmed by a letter from Dr. Brodie dated September 22, 2004. It is ordered, therefore, that she be returned to employment forthwith, without any

compensation whatever, the discharge be rescinded and that the entire period of her absence from work be treated as a medical leave of absence.

October 18, 2004

(signed) M. BRIAN KELLER
ARBITRATOR