CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4615

Heard in Edmonton, March 13, 2018

Concerning

VIA RAIL INC.

And

UNIFOR

DISPUTE:

The assessment of 25 demerit marks and the subsequent discharge of Station Services Attendant (SSA) Katherine Natynczyk on January 5, 2017, following a Last Chance Agreement (LCA) signed December 4, 2015.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Union contends that the Corporation's investigation, which was held in connection with the grievor's; *"alleged failure to meet the Corporation's Attendance Management Standards"*, was neither fair nor impartial as in keeping with its obligations under Article 24.1 of Collective Agreement No. 1. The Union further contends that the grievor was in compliance with her LCA and a subsequent letter that clarified the Corporation's expectations of her; that the Corporation's contention that the grievor had been aware of its expectation that she was required to provide a doctor's note immediately upon her return to work is not supported by the evidence; and that the Corporation imposed an unreasonable, short deadline on the provision of a medical certificate. The Union finally contends that the grievor sought the input of the manager on duty on the day she returned to work, who gave her permission to provide the medical certificate some two days later, when her reporting manager returned to work; and that the grievor's reliance upon this apparently faulty instruction should significantly mitigate her eventual discipline.

The Union requests that the instant discipline be expunged, that the grievor be reinstated without loss of salary, benefits, or seniority, and that she is made whole.

The Corporation denies the Union's contentions and has declined the grievance to date.

THE CORPORATION'S EXPARTE STATEMENT:

Ms. Natynczyk has been employed by the Corporation since October 17, 2001. Upon her termination, she held the position of Station Services Attendant.

Following a long history of attendance problems, the Corporation, along with Ms. Natyczyk and the Union, signed a Last Chance Agreement on or about November 4, 2015. The Last Chance Agreement was entered into following an unjustified absence from work between June 8 and June 20, 2015. Furthermore, Ms. Natynczyk had failed to meet the Corporation's attendance standard over the last five years. Therefore, according to the Last Chance Agreement, Ms. Natynczyk

agreed that her disciplinary record would stand at 50 demerit marks upon her return to work and that for a period of two years of cumulative compensated service, should would show an attendance rate equal to or exceeding that of the departmental target rate at Union Station or any other department station or terminal where she might elect to protect the positon. The letter also provided that failure to adhere to these conditions would result in Ms. Natynczyk's discharge.

Despite the last -chance agreement, Ms. Natynczyk's attendance problems persisted. She was met on numerous occasions by the Corporation. Her absences for the month of June 2016 were addressed in a letter by the Corporation which reiterated her obligations pursuant to the Last Chance Agreement and stated that the Corporation was willing to maintain her employment, despite the recent infractions.

In the fall of 2016, Ms. Natynczyk was again absent from work on two separate occasions. On those two separate occasions, she was coached by the Corporation, which clearly expressed that the requirement was that she needed to have a valid medical note upon her return to work.

In December of 2016, Ms. Natynczyk failed to bring a valid medical note to justify her absence of December 14, 2016 upon her return to work. Ms. Natynczyk came back to work on December 18, 2016, but only submitted a medical note on December 20, 2016, despite being reminded by an officer of the Corporation of her obligation to bring a valid medical note upon her return to work.

The Corporation contends that Ms. Natynczyk failed to comply with instructions from an officer of the Corporation on December 20, 2016, failed to comply with her Last Chance Agreement dated November 4, 2015 and failed to comply with a letter clarifying said agreement dated July 21, 2016. The Corporation contends that it conducted a fair and impartial investigation in keeping with its obligations under Article 24.1 of Collective Agreement #1. Furthermore, the Corporation's contention is that the grievor was aware of its expectation to require a Doctor's note immediately upon her return to work and such expectation is supported by the evidence. Finally, the Corporation contends that the deadline for the provision of the medical certificate was reasonable in the circumstances.

Therefore, the grievance should be dismissed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) B. Kennedy	**(SGD.) E. Houlihan**
National Representative	**Director, Labour Relations**

There appeared on behalf of the Company:

E. Houlihan	– Director, Labour Relations, Montreal
B. Blair	– Human Resources, Business Partner, Montreal

There appeared on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
A. Stephen	– Regional Representative, Toronto
D. Kissack	– President, Winnipeg
J. Murray	– Regional Representative, Moncton
K. Natynczyk	– Grievor, Toronto

AWARD OF THE ARBITRATOR

Ms. Natynczyk's attendance record, over the last several years, has not only been poor, but has demonstrated a pattern of absences that led the Employer to be skeptical

of the *bona fides* of many of her absences. Absences too often coincided with holidays and days off.

By November 3, 2015, the Employer was at the point of termination. However, following discussions with the Union, the Employer agreed to continue her employment under a “Last Chance Agreement”.

This followed an absence from June 8, 2015 to June 20, 2015. During that period she had sought disability insurance coverage but benefits had been denied due to her failure to provide sufficient medical support. During 2015, the Employer recorded quite a few absences that it viewed as suspect and part of the same pattern. Cumulatively, the Corporation records showed the following percentages of attendance.

2011	75.65%
2012	84.03%
2013	75.29%
2014	90.93%
2015 (3/4 year)	85.95%

The express terms of this last chance agreement were:

> 1. Ms. Natynczyk’s disciplinary record will stand at 50 demerit marks upon her return to work:
>
> 2. For a period of two (2) years of Cumulative Compensated Service, Mrs. Natynczyk must show an attendance rate equal to or above that of the departmental target rate at Union Station or any other department, station or terminal where she might elect to protect a position pursuant to her rights under the Collective Agreement;
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> 3. Attend a Treatment Program as determined by Shepell-fgi and provide the Corporation with proof of her regular attendance, on a quarterly basis;
>
> 4. Ms. Natynczyk agrees to withdraw any and all outstanding disciplinary grievances upon signature of the present agreement.

> 5. Ms. Natynczyk undertakes to not file any grievance, complaint or action relating to the facts or situations mentioned in the present agreement.
>
> Failure to adhere to these conditions by Ms. Natynczyk will result in her discharge. All parties agree that in that event the only matter that could be grieved and/or referred to arbitration would be the question of whether or not Ms. Natynczyk adhered to and satisfied the conditions as set forth herein;
>
> Should Ms. Natynczyk develop medical difficulties that preclude her from meeting the terms of this agreement, she will be required to promptly submit the appropriate paperwork to the Corporation and will consent to a review by a medical official of the Corporation's choosing, pursuant to its Attendance Management Program.

This is not a situation where any need for accommodation has been raised. This agreement was signed by the grievor, along with the Union, recognizing human rights protections. The Union does not dispute its having freely agreed to this last chance agreement. Several more attendance issues arose between December 4, 2015, (the date of the agreement), and the incident that precipitated this termination.

The final event was her absence from work on December 14, 2016. She had a vacation day scheduled for December 15 and two assigned days off on December 16 and 17. She returned to work on December 18, without a medical note. Her attendance record, up to that point was also below the attendance rate set by condition (2) of the agreement.

On December 20 the grievor's manager asked to meet with Ms. Natynczyk. Her explanation for her absence was not viewed as acceptable. She was told she was suspended. The grievor then produced a doctor's note that read:

> Above named patient notified me that she missed work on December 14th due to medical reasons.

The Employer's Attendance Management Policy sets the following minimum for a satisfactory note.

> Valid Medical Note
>
> Is a medical document from a qualified medical practitioner licensed to practice in Canada, confirming the employee's ability (fit to return to work note) or inability to work (unfit to work note), which shall include at the minimum the following information:
>
> - Name of the employee,
> - Name of physician including his address,
> - Confirmation that the medical condition rendered the employee incapable of doing his normal work duties,
> - Duration or estimated duration of the employee's inability to work,
> - Date the employee is, or will be, fit to return to work.

On December 23 the grievor was called to an investigation set for December 29, 2016 "in connection with (1) your alleged failure to comply with instructions from an officer of the Corporation on December 20, 2016 and (2) your alleged failure to compy with your last chance agreement." The investigation was held as scheduled. On January 5 the grievor was assessed 25 demerit points and, as a result, terminated for essentially the same reasons listed in the notice, although the agreement was identified as having been signed on December 4, 2015 and being subject to a letter clarifying such agreement signed on July 21, 2016.

The July 21, 2016 clarification letter arose from absences on June 5 and 6, 2016 and a failure to notify her supervisor she would be away. She was suspended for this on July 21, 2016 and on July 7, 2016 provided a medical note. The Corporations's letter of

July 21, 2016 said that, despite this breach of the last chance agreement, it was willing to further maintain her employment, treating the time off work as a suspension without pay. It then said:

> Should you need to be absent from work, you must respect at all times the following conditions:
>
> a) In accordance with the procedure for reporting all absences, you must advise without fail your supervisor or local duty officer of said absence and provide the required explanation;
>
> b) A medical certificate will be mandatory to support any absence;
>
> Please note that failure to adhere to these conditions as well as any breach of your last chance agreement will lead to further discipline, including termination of employment.

This was, in effect, a further last chance after a last chance had already been given.

While acknowledging its acceptance of the negotiated agreement, the Union argues that:

- The investigation fell short of the fair and impartial standard;
- The grievor did not or has not been proved to have breached the terms of the last chance agreement;
- The Arbitrator's *Canada Labour Code* discretion should be invoked to mitigate the penalty;

The objection that the investigation lacked the necessary fairness and impartiality is based on the length of the investigation (almost 5 hours), the argument that the investigator asked unfair and loaded questions, and that the investigator was badgering the grievor. The grievor, with her Union representative present, was asked at Q71, whether she was satisfied with the manner in which the investigation was conducted and

replied that she was. Even without this, a full review of the transcript does not support the Union's objection that it fell short of the fairness and impartiality requirement.

The Union's argument that there was no breach of the agreement is based on the propositions that:

> (a) The grievor was never explicitly told she had to provide a medical certificate immediately upon her return to work.
> (b) That she in fact provided a medical certificate, dated December 19 on December 20, and
> (c) That a Ms. Eno authorized the grievor to provide a certificate to Ms. Manderson on Ms. Manderson's return to work on December 20, which she did.

The Union, in arguing that there was no breach established, points to the wording of the last chance letter:

> Should [she] develop medical difficulties that preclude her from meeting the terms of the agreement, she will be required to promptly submit the appropriate paperwork to the Corporation.

I agree this is less precise than it might be. The letter of July 21 adds that "a medical certificate will be mandatory to support any absence." This too does not set a clear time for the submission of the note. However, it does incorporate the Attendance Management Policy's minimum requirements for a medical certificate. That policy does not specify immediate producton on a return to work. There is a difference about whether Ms. Natynczyk was told orally in September by Ms. Manderson that she would have to produce such a note on her return. Two memoranda from Ms. Manderson say she was told so in September.

On September 23 Ms. Natynczyk called Ms. Manderson. Ms. Manderson's detailed memo said:

> She wanted to know if she needed to bring a note in for her to return to work, as she believes that the Canada Labour Code allows her 15 days to bring a note in. She said she was going on Vacation as of Sunday and would need to give the note in upon her return from vacation (around October 4th). … I went to check her file and found her last chance agreement, and then called her back. I said that I was surprised to see how far down the line she was in this regard, and that I would expect that she bring a note in for her return. She hung up the phone on me while hysterically crying.

Ms. Natynczyk then texted her back saying she had been "too emotional to talk on the phone and asking:

> Can you please confirm whether or not I can return to work tomorrow and bring in a doctor's note upon my return from vacation on October 4th.

Ms. Manderson's note says she checked further and called her back. Her memo continues:

> I then let her know that she did need a note for her return. I also let her know that if I were in her position, and on a last chance agreement, I would not be playing on the edge with technicalities, or misunderstandings. She is aware she needs a note for every absence, so going after she returns from vacation does not show why she was absent in the first place. She said she understood.

In the investigation Ms. Natynczyk maintained (in Answer 52) that when Ms. Manderson called her back:

> She did not have a clear answer for me and advised me it would be in my best interest to bring it in when I came back to work …
>
> She nor any other manager have ever clarified or given me anything stating that I must bring in a note prior to returning to work.

To Ms. Manderson's statement that she told the grievor she did need a note for her return, the grievor says, from her memory, that is untrue. She went on to suggest a number of other of Ms. Manderson's statements were also untrue.

Ms. Natynczyk similarly took issue with a statement from Ms. Edo as to what took place on December 18 and 20. Ms. Edo's memo says Ms. Natynczyk "admitted that she realized she forgot to go get a note until signing in Sunday afternoon" and that she knew she was supposed to bring the note in for her return.

The reference to s. 239(1) of the *Canada Labour Code* does not assist the grievor legally. The 15 days it refers to is the limited period in which the Employer can demand a certificate, not the time the employee has to deliver one. However, it does partly explain why Ms. Natynczyk felt it unfair to be required to provide one upon a return to work.

On the balance of probabilities, I find the grievor knew full well she was expected to have a certificate on her return to work. What she failed to do, as soon as possible after she suffered food poisoning, was get to the clinic in time so that a doctor could certify her condition. Rather, she left it until after she had recovered and returned to work. The consequence was that the doctor had nothing to enable her to report upon what Ms. Natynczyk self-reported to her, which was essentially useless. The physician's note reflects that.

> "… patient notified me that she missed work on Dec 14th due to medical reasons".

The evidence satisfies me that Ms. Natynczyk indeed suffered from gastric distress following attending a pot luck supper. I accept that, upon her return to work on the 18th, she asked Ms. Edo, as the relief manager, if she could bring in her note the next day and was told instead to bring it in on December 20 when her regular manager, Ms. Laura Manderson, would be back at work.

I have difficulty accepting that the grievor could not have attended the clinic between December 15 and December 18 to obtain a note at a point where the doctor could verify the medical cause of her absence rather than just certify her self-report. Nothing Ms. Edo said to her suggested the conditions she was under had changed in any way. It was quite natural for Ms. Edo to tell her to see her regular manager. Either, as I find the grievor said on the 20th, "she forgot" or more probably she just took less effort than necessary to comply with what she knew was required of her. Given the agreement and her history of absenteeism, those requirements were not unreasonable.

The Employer has established that the grievor was, at the point of termination, over the absenteeism limit set out in the last chance agreement. Aside from the timeliness issue, the note she produced on December 19 was totally inadequate, not because it did not specify a diagnosis or return date but because it did nothing more than say she went to the doctor and reported that in the grievor's own view her absence was due to medical reasons. This is not surprising given that she delayed seeing the doctor until her symptoms had all passed and her doctor had nothing from which to form her own opinion. The grievor was not displaying the attentiveness to the back to work agreement Ms.

Manderson counseled in September. I find that the grievor was indeed in breach of the back to work agreement.

I have considered whether this is a case where I should relieve against the penalty imposed. I am not persuaded it would be just and equitable to do so, partly for the reasons set out in:

> *Canadian Union of Postal Workers v. Canada Post Corporation* (2007) 89 CLAS 332 (Dorsey)
>
> Through the terms of a last chance agreement, everyone should know the standard of employee conduct that is expected and required in the future. Acceptance of the bargaining terms of the last chance agreement and the consequences for their breach is the consideration the union and employee give to the employer in exchange for reinstatement.

Added to this is the significant leniency shown to the grievor after the agreement was entered into, in particular in the July 21 letter.

For these reasons the grievance is dismissed.

March 29, 2018

ANDREW C.L. SIMS, Q.C.
ARBITRATOR