

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 27

Heard at Montreal, Monday, March 21st, 1966

concerning

ALGOMA CENTRAL RAILWAY

and

BROTHERHOOD OF RAILROAD TRAINMEN

DISPUTE:

Dismissal of Brakeman R.W. Shaule for accumulation of 60 demerit marks, as a result of his record being assessed 60 demerit marks for desertion of duty, at Hawk Junction, Ontario, October 12, 1964.

JOINT STATEMENT OF ISSUE:

R.W. Shaule completed his previous assignment in Work Train service about 9:10 p.m., October 11, 1964, on arrival Hawk Junction terminal. Effective with change of Timetable at 12:01 a.m., October 12, Shaule was assigned to spare board service at Hawk Junction by virtue of his voluntary bid in the exercise of seniority. He was notified accordingly on his arrival at the terminal.

Shaule booked himself "unfit for duty" on the crew sheet giving no advice of his intentions and thereafter proceeded by highway and private automobile to Sault Ste. Marie.

Investigation of the matter was conducted October 15 by the Assistant Superintendent, as a result of which Shaule's service with the Company was terminated.

The Brotherhood contends that dismissal of the employee was not justified.

FOR THE EMPLOYEES:

(SGD.) C. E. MCCLELLAND
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. A. THOMPSON
VICE-PRESIDENT – RAIL OPERATIONS

There appeared on behalf of the Company:

H. R. Wootton – Manager Rail Operations, Sault Ste. Marie

And on behalf of the Brotherhood:

C. E. McClelland – General Chairman, Sault Ste. Marie

AWARD OF THE ARBITRATOR

Brakeman R.W. Shaule, 18 years of age, was hired by this railway as a trainman in May, 1963. At the time in question he had exercised his seniority rights by bidding and being assigned to spare board service at Hawk Junction. Going off duty at that point at approximately 9:35 p.m. Saturday, October 11, he was advised he had been assigned on the spare board at that point, effective Sunday 12:01 a.m. that he would be required to protect this assignment the next day.

Upon being advised to this effect, he signed in as “unfit for duty”. He did not then give the explanation, as he did later, that he was having “trouble with his stomach” and decided he should see a doctor in Sault Ste. Marie, a point 160 miles distant. He then drove there.

The result, following the formal investigation required under Article 55, was an assessment of the maximum demerit marks and dismissal.

For the employee Mr. McClelland urged that he had been employed on the work train continuously for the previous 30 days, averaging 12 hours a day. Another member of the crew, Brakeman W. Lapointe, who had been working with him, also booked unfit for duty and went home.

In the investigation concerning these two employees, it was disclosed that Brakeman W. Lapointe had previously booked unfit for work. When it was discovered he had been able to carry out his duties he had received 30 demerit marks. On this occasion he was assessed 45 demerit marks.

Mr. McClelland urged the 60 demerit marks imposed on the grievor was unjust when compared with the penalty imposed upon Lapointe for his first offence. He stressed this was the first formal action taken against Shaule.

During the efforts made by the Brotherhood on Shaule’s behalf, the Company agreed to rehire Shaule as a new employee. Later this was changed to an offer permitting him to return to work carrying 60 demerit marks, on the basis that if he did not receive any demerit marks for one year, he would then have 40 demerit marks.

Mr. McClelland urged the penalty imposed should be changed to an offer permitting him to return to work carrying 30 demerit marks, and that he should be paid what he lost in the meantime as provided in Article 55.

For the Company Mr. Wootton stressed the matter of booking “sick” or “unfit for duty” when such was not the case was a recurring problem to the Company, creating an unnecessary hardship upon those employees who had to assume extra duties of replacement.

Mr. Wootton claimed this was not a first but rather a fourth offence for Mr. Shaule. The first was said to be in November, 1963, while working the spare board at this same point, when he had not been available to take a call to work. He had not requested leave of absence. He gave as a reason he had driven a friend 80 miles to a point where an acquaintance of this friend had been in an automobile accident. In view of his brief service with the Company, the assistant Superintendent reprimanded him with a caution as to future behaviour.

In March, 1964, Shaule drove to Sault Ste. Marie without permission of the assistant Superintendent. He did report to the Trainmaster at Sault Ste. Marie at 6:00 p.m. that day that he was sick. He was instructed to obtain a “clearance” from the Company as to his fitness to work before returning to Hawk Junction for duty. He returned without a clearance and was not permitted to resume duty. Upon an interview with the assistant superintendent, however, he was again permitted to work.

On September 9, 1964, Shaule again “booked sick” and motored to Sault Ste. Marie. He returned on the 12th of September with a “clearance” form from the Company physician, declaring he was fit for duty.

During the official investigation Shaule maintained that on the final occasion he was actually suffering from stomach trouble. At no time did he admit otherwise. His explanation for not telling this when booking sick was “It didn’t seem to make any difference to any of the staff there whether I was sick or half dead.”

During the investigation he was asked:

Q. You apparently booked off a number of times on account of sickness without any advance notice. Is this common for the type of sickness that you have?

No details were given as to the “number of times” involved in that question. I take it this referred to the examples given by Mr. Wootton The grievor replied:

A. No. I do know that last summer the arrangements that I made with Mr. Abbott to be off and relief was not granted and I had to book sick or unfit for duty to get off.

Q. In these incidents, when you had to book unfit for duty or sick to get off there was actually nothing wrong with your health. Is this correct?

A. Yes, that is correct. It seemed that every time I requested off to Mr. Abbott and was given assurance that I would have relief, I would take my arrangements and nearly every time Mr. Abbott would come back at the last minute and cancel my time off.

Questioned as to the disparity in the penalties imposed as between Lapointe and Shaule, Mr. Wootton distinguished between what he described as the willingness on the part of Lapointe to admit his culpability, whereas on the previous occasions when Shaule had conversations with the assistant superintendent, as described previously, he had maintained his position. From this he concluded the latter was less reliable and therefore a less desirable type of employee.

In a letter addressed to Mr. Shaule on January 6, 1965, Mr. Wootton said in part:

Authority has been obtained from Management to rehire you as a new employee.

I have requested this authority because, although you were dismissed from the Company service for a serious disregard of Company regulations and authority, I feel you are fully aware of the errors made by you and are prepared to meet your responsibilities both to the Company and to your fellow employees. If this is not the case, I would suggest you forget future employment with the Railway for your attitude and sense of duty will be watched very closely upon re-hiring.

When the Brotherhood intervened on behalf of this employee the Assistant General Manager, Mr. J. A. Thompson, ruled in this fashion, in a letter addressed to Mr. McClelland under date of January 20, 1965:

Your letter January 13th suggests that discipline should be reduced and that he should be returned to work. On receipt of same I immediately cancelled the previous authority granted to Mr. Wootton to rehire this man. The reason being that if your suggestion were followed, it would, in effect, be an admission that discipline assessed in the first place was unjust. I do not, of course, concur that this is so and regret to advise we cannot consider reduction of the discipline. We might, however, consider his return to service with seniority restored, provided you concur on condition that the discipline stands as is and will be deferred for one year, provided he can maintain a clear record in that interval.

In this matter, in my opinion, there has been no convincing evidence produced by the Company to vitiate the explanation offered by Shaule that on this occasion he was actually suffering as he described. Undoubtedly the frank admission he made as to previously improperly reporting himself "unfit for duty" weighed in the final decision. As to those previous occasions, however, it is to be remembered no formal investigation had been held concerning them as required in Article 55. Had there been, the explanation he offered concerning what he alleged as the unfair treatment he received from Mr. Abbott would have had to be fully investigated and considered.

The excuse of being ill is undoubtedly one of the most difficult to disprove, especially when the alleged nature of the ailment does not produce observable symptoms. However, once made, it cannot be lightly dismissed in order to justify a penalty. It could be true. Those who carry the heavy responsibility of imposing penalties must always remember that the guilty often go unpunished because of lack of evidence.

While entirely sympathetic to the problem outlined by Mr. Wootton as to the difficulty created by those bidding for these extra duties not being available when required, it is to be remembered that the imposition of disciplinary penalties is a gravely serious responsibility that must be carried out judiciously and with an awareness of the quantity and quality of evidence available to support such action should the matter proceed to arbitration.

For these reasons I believe the 60 demerit marks should be expunged from this employee's record First, because of the lack of evidence described as to the final incident, and secondly, because a proper investigation as to the previous incidents was not held, permitting, as contemplated, formal investigation and consideration of any excuse offered – in this case, the alleged unfair treatment by the official concerned. Had the employee been formally charged with respect to those previous occasions, it is possible the Brotherhood would have decided to have him represented and required the official concerned to testify.

Under this ruling Mr. Shaule should be forthwith reinstated and paid a minimum day for each twenty-four hours for time held out of service at schedule rates for the class of service in which he was employed, less any sum he has earned in the interval or received from unemployment insurance.

Dated at Brampton, Ontario, this 24th day of March, 1966

(signed) J. A. HANRAHAN
ARBITRATOR