

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 981

Heard at Montreal, Tuesday, September 14th, 1982

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Dismissal of Mr. T. Preet, Motorman, effective October 13, 1981 for unavailability for duty as Motorman at the Concord Express Terminal, Toronto, Ontario.

JOINT STATEMENT OF ISSUE:

Mr. Preet was dismissed on October 13, 1981 because of his unavailability for duty. The Brotherhood contends that the Company should have participated in a Temporary Absence Program which would have made Mr. Preet available for service. They also contend that Mr. Preet should be reinstated and paid all loss of wages and benefits.

The Company has declined the Union's appeal.

FOR THE EMPLOYEES:

(SGD.) J. D. HUNTER
NATIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
DIRECTOR LABOUR RELATIONS

There appeared on behalf of the Company:

B. Noble – Manager, Labour Relations, Montreal
K. A. Pride – Manager, Personnel & Labour Relations, Montreal
K. W. Taylor – Manager - Employee Relations, Toronto

And on behalf of the Brotherhood:

T. N. Stol – Representative, Toronto

AWARD OF THE ARBITRATOR

The grievor, an employee of some seven years' service and who had, at the time, a clear discipline record, did not report for work on October 5, and again on October 6, 1981. On the latter day the Company was advised that the grievor was in jail, and that he could not report for work on that account.

An investigation was carried out promptly, being held at the jail, and the grievor advised that he had been convicted of breaking and entering and sentenced to six months in jail. It was expected that he would actually have to serve four months of this sentence.

These were not circumstances in which the Company would have been obliged to grant a leave of absence (see **Case No. 583**), nor, it appears, was leave of absence requested. At the conclusion of the investigation, the grievor was directed to report back to his position of Motorman. There is, I think, no particular conclusion to be drawn from the fact that such direction was given. It might serve to indicate that the grievor was under a continuing obligation to report for work and do his job, although in the circumstances it was obvious that he would not be able to do that. On the 13th of October, the grievor was discharged on account of unavailability for duty.

The Union's argument is that the grievor would have been available for duty under the Temporary Absence Program, which would have released him from jail in order to attend at work. The grievor was, following the investigation, transferred to a jail from which he would have gone to work regularly. The Company did not agree to participate in such a program in the grievor's case. It is argued that the Company ought to have participated in the program, and that since it did not, it effectively prevented the grievor from being available for work, and cannot therefore discipline him on that account.

Nothing in the Collective Agreement requires the Company to participate in a Temporary Absence Program, nor in any sort of program of that nature. There was no violation of the Collective Agreement. The situation was of course created by the grievor's own criminal act, and his consequent incarceration was the basic cause of his unavailability for work. In assessing the discipline imposed for that unavailability, however, an Arbitrator may properly take into account all of the circumstances, including, in this case, those relating to the Temporary Absence Program. It could not be said that there is a general obligation to participate in such a program – that would, in effect, add to the Collective Agreement a provision which the parties had not negotiated – but it is proper, I think, to consider the reasonableness of the Company's refusal in assessing the discipline imposed.

In the instant case, it is my view that the Company's refusal to participate in a Temporary Absence Program involving the grievor was reasonable. The grievor is a Motorman, responsible for delivery of express parcels. Many of these are of such a nature as to make them the objects of theft. Losses of express goods have been substantial, and the Company has a proper concern with procedures of all sorts to prevent such losses. This includes a concern with the employees having responsibility for express goods. As appears from the grievor's statement, he had recently been convicted for breaking and entering, and he had previously (about a year before), been convicted of theft. Whether or not it might be desirable to give such an employee "a third chance", it cannot, I think, be said that the Company was under an obligation to do so, or that it acted unreasonably in refusing to do so in this case.

There has been no violation of the Collective Agreement, and I do not consider, in all of the circumstances of this case, that the penalty imposed was excessive. Accordingly, the grievance is dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR