

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1645

Heard at Montreal, Tuesday, May 12, 1987

Concerning

### CANADIAN NATIONAL RAILWAY COMPANY

and

### BROTHERHOOD OF LOCOMOTIVE ENGINEERS

#### **DISPUTE:**

Appeal of the discipline assessed the record of Locomotive Engineer J.C. Bateman of Kamloops, B.C., October 10, 1985.

#### **JOINT STATEMENT OF ISSUE:**

Locomotive Engineer J.C. Bateman was dismissed from Company service effective October 10, 1985, account being absent without authorized leave between July 3, 1985 and September 25, 1985.

It is the Brotherhood's contention that the discipline assessed was unwarranted and should be removed.

The Company has declined the appeal.

#### **FOR THE BROTHERHOOD:**

**(SGD.) P. SEAGRIS**  
GENERAL CHAIRMAN

#### **FOR THE COMPANY:**

**(SGD.) D.C. FRALEIGH**  
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. B. Bart	– System Labour Relations Officer, Montreal
D. Lord	– System Labour Relations Officer, Montreal
K. G. Macdonald	– Manager Labour Relations, Edmonton
G. Pichette	– Assistant General Superintendent, Edmonton
J. Dear	– Superintendent, Kamloops
B. Ballingall	– Labour Relations, Officer, Edmonton

And on behalf of the Brotherhood:

P. Seagris	– General Chairman, Winnipeg
J. C. Bateman	– Grievor

## AWARD OF THE ARBITRATOR

Locomotive Engineer Bateman grieves his discharge after 21 years of service with the Company. He is an alcoholic. On November 3, 1984, while off duty, he suffered a blackout caused by his alcoholic condition while driving a motor vehicle. A serious accident, involving one fatality, resulted. Mr. Bateman subsequently pleaded guilty to a charge of criminal negligence.

On July 8, 1985, he was sentenced to 30 months' imprisonment, with the Court ruling that he should not be eligible to continue working under the Temporary Absence Program while serving his sentence. While it was known that the earliest date at which parole could be granted the grievor was in approximately 10 months, or May 7, 1986, the Company declined to grant Mr. Bateman a leave of absence for that period. His incarceration necessarily resulted in his absence from work without leave and, following an investigation in compliance with the disciplinary procedures of the collective agreement, by notice dated October 10, 1985, Mr. Bateman was advised that he was dismissed from Company service account being absent without authorized leave between July 3, 1985 and September 25, 1985.

It is not disputed that the incident that caused the grievor's incarceration was not work related and was caused entirely by his alcoholic condition. The evidence establishes that shortly after the accident Mr. Bateman undertook extensive treatment and counselling and was successful in achieving full rehabilitation as an alcoholic. Mr. Bateman has remained completely abstinent since December of 1984, a period of approximately two and a half years to the date of this hearing. He initially followed treatment at the Phoenix Centre, an alcohol counselling service of the Kamloops Society for Alcohol and Drug Services, and also retained the counselling assistance of a psychologist in Vancouver to help deal with the broader range of his emotional and marital difficulties at that time. He participated and continues to remain involved in the on-going program of Alcoholics Anonymous. After his parole, on May 14, 1986, the grievor became a volunteer Crisis Line worker for the Thompson Valley Crisis and Counselling Services Association. Following an initial period of training, since December of 1986 he has worked as a volunteer in telephone counselling, crisis intervention and suicide prevention for that agency. In brief, his efforts to overcome his alcoholic condition and his subsequent rehabilitation have been sustained, impressive and successful.

The first question to be determined is whether the circumstances for the grievor's absence without leave gave the Company just cause to terminate his services. Even if the answer to that question is affirmative, a related issue is whether the Arbitrator should apply his discretion, in the light of mitigating circumstances, to substitute a lesser disciplinary sanction. I do not propose to dispose of this case on the basis of whether the grievor should have been granted a leave of absence by the Company. Without expanding on the matter, it would appear, in any event, that the granting of such a leave would, under the terms of the collective agreement, have been entirely within the discretion of the Company. The more substantial issue is whether the grievor's absence without leave, and the circumstances giving rise to it, should warrant sustaining Mr. Bateman's disciplinary discharge.

It is well established, as a general rule, that an employee's absence without leave due to incarceration can justify the termination of his or her employment. **CROA 583** concerned the discharge of a trainman sentenced to 9 months imprisonment on charges of impaired driving and driving while his license was suspended. In dealing with that case the Arbitrator made the following observations respecting the approach to a grievance of that kind:

Whether it is proper for an employer to discharge an employee who is unable to report for work because he is in jail is a question which has arisen in a number of arbitration cases. The result will, however, depend on the circumstances of each case. In the instant case, which is one of a long-service employee, special care must be taken to insure that the Company's action was justified.

In that decision, the Arbitrator noted that the grievor had been previously discharged and subsequently reinstated following earlier drinking problems, and had a record of convictions and fines for drinking offences on a number of occasions. Indeed, according to the Company's brief in that case, the presiding judge of the Court noted that the previous criminal penalties, apparently in some six cases, had had no apparent effect on the accused. In that circumstance the Arbitrator saw no reason to overturn the Company's decision to terminate the grievor's employment.

Similarly, in **CROA 981** this office upheld the discharge of a motorman sentenced to a six month term for break and enter. In dismissing the grievance the Arbitrator stressed that the decision of the Company to decline participation in a Temporary Absence Program was not unreasonable. In the case then at hand the grievor was responsible for the delivery of express parcels which, in the past, had been the subject of thefts. Noting that in

addition to his conviction for break and enter the grievor had, approximately a year prior, been convicted of theft, the Arbitrator concluded that there was no obligation on the Company to give him 'a third chance'.

A similar result was reached in **CROA 1476** which concerned the discharge of two employees with 11 years' service who were convicted and incarcerated on a charge of importing cocaine for the purposes of trafficking. The Arbitrator there adopted the following passage from **Re Alcan Products and United Steel Workers** (1974) 6 L.A.C. (2d) 366 (Shime) at p. 393:

It is clear that the employer has an interest in not having production disrupted and in not being unduly inconvenienced due to absenteeism for a jail sentence. While it is understandable that an employee may be excused for absenteeism resulting from illness, the same tolerance may not be forthcoming when an employee is absent because he is serving a jail term. However, the employee has also an interest that is deserving of protection. An employee's service with the company and a good work record should be entitled to some protection with the result that in each case there must be a balancing of interests in order to determine whether the discharge is for just cause. There is no reason for a board of arbitration to consider absence per se as a basis for discharge. In this type of situation the employer's interest in having production free from disruption must be balanced against the employee's work record, the nature of the offense and the duration of the jail sentence.

In resolving **CROA 1476** the Arbitrator emphasized two considerations. Firstly, he examined the nature of the offence committed by the grievors, which he characterized as a deliberate and calculated course of conduct with serious criminal ramifications. He also noted that neither of the employees, who were themselves drug addicts made any effort to advise the Company of their condition, and even after the laying of the charges against them took no steps towards their own medical rehabilitation. In the circumstances the Arbitrator was not sympathetic to the Union's plea that the grievors should have the benefit of the Company's Employment Assistance Program dedicated to the treatment of drug and alcohol abuse, and dismissed the grievances.

As is implicit from the cases, there can be no automatic presumption that conviction for a serious criminal offense, including subsequent incarceration, are necessarily inimicable to the continuation of an employment relationship. In this, as in any matter of discipline each case must be assessed on its own merits, with close regard to a number of factors, including the nature and circumstances of the offense efforts at rehabilitation, the nature of the work performed by the employee, the length of an employee's service and the quality of his or her disciplinary record and prior criminal record, if any. Obviously, careful consideration must be given to the reinstatement of any employee who is absent without leave due to incarceration for a serious criminal offense, having particular regard to the need of the Company to provide, and appear to provide, a public service consistent with the highest standards of safety and integrity in its employees. Those considerations should not be compromised or placed at risk. On the other hand, great care should be taken not to overreact and unduly sever the career of an employee of long-standing and good service when the evidence establishes, on the balance of probabilities, that there is no real jeopardy to the Company's legitimate interests.

Mr. Bateman is a third generation railroader with 21 years service to the Company. It is not suggested that he was at all times anything but a good employee. At the time of his discharge he had no prior discipline on his record. It is not disputed that his incarceration was entirely the result of his prior medical condition in relation to the abuse of alcohol. Moreover the Company does not take issue with the irrefutable evidence that over the past two and a half years he has made remarkable strides in achieving full rehabilitation from his prior difficulties with alcoholism.

The Company's concerns for the safety and perceived safety of its operations are entirely legitimate. So, however, are the concern of the Union that the grievor be judged as an individual and be carefully assessed in respect of his ability to satisfy those concerns. Mr. Bateman, who made representations on his own behalf during the course of the hearing, impresses the Arbitrator as a sensitive and responsible individual who was deeply affected by the single tragic incident in which he was unfortunately involved. Insofar as any criminal conduct is concerned, he has paid his debt to society, although he continues to carry a deep appreciation and remorse for what occurred. Of equal significance, he has overcome his illness, has maintained on-going participation in the support program of Alcoholics Anonymous and has himself become a respected crisis counsellor in assistance of others. While the Company has a high standard to maintain, and must be responsive to the dictates of public confidence, on the whole of the evidence I must conclude that the return to work of Mr. Bateman, subject to conditions relating to the continuance of his support program for alcoholism, can be implemented in a manner that is consistent, and can be seen to be consistent, with the furtherance of the Company's overall business interests.

For the foregoing reasons, the Arbitrator deems it appropriate to substitute a penalty less than discharge in the instant case. The grievor shall be reinstated, without compensation or benefits and without loss of seniority, into his employment. Mr. Bateman's reinstatement is conditional upon his continuing to participate on a regular basis in a program of Alcoholic Anonymous, or some comparable agency. Confirmation of his participation shall be provided in writing from the agency to the Company on a quarterly basis. Of course, it remains open to the Company to seek further confirmation, whether verbally or in writing, at any time should it have reasonable grounds to do so. Failure by the grievor to adhere to the conditions of this reinstatement will be grounds for his immediate discharge. I remain seized to this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**