CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1829

Heard at Montreal, Thursday, 15 September 1988

Concerning

BULK SYSTEMS
(CP EXPRESS AND TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Employee Raymond Roberts, Bulk Systems, Oakville, Ontario, was assessed 15 demerits for allegedly refusing to report for work as instructed on January 8, 1988, and he was dismissed from the Company due to accumulation of over 60 demerits on January 14, 1988

UNION'S STATEMENT OF ISSUE:

Raymond Roberts was on a leave of absence and to return to work on Monday, January 11, 1988. On Saturday, January 8, 1988, he was instructed to report for work but indicated that he could not do so as he could not get a baby-sitter.

The Union asserts that the demerits were issued without just cause and asserts a violation of Article 17 and any other relevant Article.

The Union requests that the demerits be removed from the record of Raymond Roberts and that he be reinstated with full seniority and full compensation including interest.

The Company declined the grievance.

FOR THE UNION:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN, SYSTEM BOARD OF ADJUSTMENT 517

There appeared on behalf of the Company:

B. F. Weinert	– Counsel, Toronto
B. D. Neill	- Director, Labour Relations, Toronto
R. Seymour	- Area Terminal Manager, Oakville, Witness
C. Rossin	- Dispatch Supervisor, Oakville, Witness
B. Walsh	- Dispatcher, Oakville, Witness

And on behalf of the Union:

L. Chahley	- Counsel
J. Crabb	- Secretary/Treasurer, Toronto
M. Gauthier	- Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

It is not disputed that shortly before the incident giving rise to the grievor's discharge he had attended a meeting with Company management to deal with an ongoing problem which he had experienced with respect to attendance at

work. Mr. Roberts is a single parent, responsible for the care of a ten year old son. Because of the irregular nature of his hours and his absences from home he has, for some time, been required to have the services of a live-in baby-sitter. It is undisputed that in December 1987 and early January of 1988 he experienced considerable difficulty either in obtaining or retaining adequate baby-sitting assistance, as a result of which he was frequently required to decline calls to work.

It is not disputed that the ability of employees to attend regularly is essential to the functioning of the Company's Bulk Systems Transport service, particularly as customer orders come in on an irregular basis, and must be serviced on relatively short notice. The issue of Mr. Roberts' ability to respond to calls to work therefore caused the Company to hold a meeting with him in early January. It is common ground that when he explained his circumstances to his supervisors it was mutually agreed that he would not be held to strict requirements to answer calls to work in the immediate short term, but that as of Monday, January 11, 1988 it would be his strict obligation to have resolved his problems with respect to baby-sitting, and be fully available when requested to work.

On the evening of Saturday, January 9, 1988 the Company found itself with an urgent need for a driver to work from approximately 4:00 p.m. that afternoon until 4:00 a.m. the following morning. On January 8, when the Company's dispatcher, under instructions from the terminal manager, called Mr. Roberts to service the run, the latter responded that he could not do it, citing his problem with respect to obtaining a baby-sitter and his prior understanding with the terminal manager. As a result of that refusal the grievor was assessed fifteen demerits which, when added to his prior record of fifty demerits, caused the Company to discharge him.

The Arbitrator cannot accept the characterization of the Union of Mr. Roberts as being on a "leave of absence" until Monday, January 11, 1988, which it maintains would have justified his refusal. Such a finding, however, is not essential to the Union's case. In this instance it is beyond controversy that the grievor was formally advised that he would enjoy a period of grace, out of a recognition of his problem in establishing a reliable baby-sitting situation, but that as of January 11, 1988 that excuse would not be tolerated. It is difficult to characterize the actions of the Company in attempting to call Mr. Roberts to work on the evening of Saturday, January 9, 1988 on short notice, without accepting his protestation with respect to his baby-sitting problem, as other than a unilateral revoking of the period of grace which he previously had been told was extended to him. I am satisfied that in the circumstances the grievor was entitled to rely on the mutual understanding which he had with the Company's terminal manager, namely that the Company would be tolerant of his inability to respond to calls because of baby-sitting difficulties up to, but not beyond, January 11th.

I must also accept the argument of counsel for the Union that the Company cannot rely, in these circumstances, on the "work now grieve later" rule. It is axiomatic that if an employee is faced with an order, the carrying out of which will place him or her in a position of prejudice in the sense that the harm that he or she may suffer could not subsequently be remedied by the grievance and arbitration procedure, the employee may refuse to carry out that order without incurring liability to discipline. That is manifestly the situation which confronted the grievor. It is not seriously disputed that it would have been unacceptable for him to leave his ten year old son alone for the twelve hour overnight period which the work assignment in question would have necessitated. Nor is the Arbitrator prepared to reject out of hand the suggestion advanced by the Union that, given the relatively short notice to the grievor, it would have been extremely difficult for him to make a reliable baby-sitting arrangement. Most importantly, whether the grievor's judgement in that regard is to be viewed as right or wrong, he was plainly led to believe by the Company that problems with respect to baby-sitting would not be held against him for his inability to respond to calls before January 11, 1988. It would, in my view, be inequitable to sustain the grievor's discipline for relying on the Company's undertaking.

In all of the circumstances the Arbitrator must conclude that the Company did not have just cause for the imposition of any discipline against the grievor. He shall therefore be reinstated into his employment, with full compensation for wages and benefits lost, and without loss of seniority. The Arbitrator remains seized in the event of any dispute between the parties respecting the interpretation or implementation of this decision.

September 16, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR