

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1947

Heard at Montreal, Thursday, 14 September 1989

Concerning

### CANADIAN NATIONAL RAILWAY COMPANY

And

### UNITED TRANSPORTATION UNION

#### **DISPUTE:**

Discipline assessed the record of Trainman M.S. Swindall, Hornepayne, Ontario, resulting in discharge effective December 24, 1987.

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

Following an investigation into an incident occurring on November 5, 1987, Mr. M.S. Swindall's record was assessed with fifteen demerit marks for:

"Failure to properly protect your assignment, while employed as Conductor, Scrap Pickup Work Train, Foleyet."

As a result, effective December 24, 1987, Mr. M.S. Swindall was discharged due to the accumulation of seventy demerit marks.

The Union appealed the discipline on the grounds that the penalty was inappropriate and in any case too severe.

The Company declined the Union's appeal.

#### **FOR THE UNION:**

**(SGD) T. G. HODGES**  
GENERAL CHAIRMAN

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

**(SGD) M. DELGRECO**  
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

S. F. McConville – System Labour Relations Officer, Montreal  
P. D. Morrisey – Manager, Labour Relations, Montreal  
M. Hughes – System Labour Relations Officer, Montreal  
B. Laidlaw – Labour Relations Officer, Toronto

And on behalf of the Union:

G. J. Binsfeld – General Secretary, GCA, St. Catharines  
T. G. Hodges – General Chairman, St. Catharines  
M. S. Swindall – Grievor

## AWARD OF THE ARBITRATOR

The material establishes beyond controversy that on November 5, 1987 the grievor did fail to take the necessary steps to notify the Company, with reasonable advance notice, that he would be unable to attend at work because of illness. According to the grievor while away from his work location at Foleyet, in a hotel in Timmins, he fell so seriously ill that he was not himself able to communicate with the Company, and was forced to rely on Locomotive Engineer Cargill who had accompanied him to Timmins. When he awoke to discover that Cargill had not in fact notified the Company, Mr. Swindall finally placed a call to the Crew Dispatcher at 0815. According to his statement the extent of his illness was such that he was not able to attend at a local hospital in Timmins from that time until approximately noon.

The grievor's candor is substantially undermined to the extent that the precise nature of his physical condition was never disclosed to the Company, nor for that matter to the Arbitrator, to allow an objective assessment of the bald assertion of incapacity which he has made. In other words, Mr. Swindall's lack of candor and full disclosure leaves the Arbitrator at a disadvantage in weighing the merits of his position, and indeed calls into question his fundamental honesty in this matter.

At the time of the culminating incident Mr. Swindall's disciplinary record stood at fifty-five demerits. Bearing in mind the observations made above, I am not satisfied that in the instant case the grievor could not have made reasonable efforts to notify the Company in advance of his absence. Even accepting that the fault lies partly with his workmate, the fact remains that Mr. Swindall delegated his obligation of notification to another individual at his own peril. He cannot shield himself behind the failure of another to perform a duty which he owes to his employer.

The dislocation and cost to the Company as a result of the grievor's actions was considerable. It is not disputed that the work train for which Mr. Swindall was responsible as conductor was delayed in its operations while another conductor was pressed into service from a distance of approximately 150 miles. The cost to the Company of having the work train, with its running crew and engineering work force and heavy equipment sit idle is considerable.

In light of the grievor's prior disciplinary record, which includes some three incidents involving collisions or property damage, and at least one instance of lateness in reporting to work, the Arbitrator cannot conclude that the assessment of fifteen demerits was not within the appropriate range of discipline. Noting that Mr. Swindall was provided two further opportunities to improve his record even after it reached the level of fifty-five demerits by the imposition of two further written reprimands, the Arbitrator must conclude that the grievor has been treated fairly and in conformity with principles of progressive discipline.

For all of the foregoing reasons the grievance must be dismissed.

September 15, 1989

(sgd.) MICHEL G. PICHER  
ARBITRATOR