

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2366

Heard at Montreal, Wednesday, 12 May 1993

concerning

**CANPAR**

and

**TRANSPORTATION COMMUNICATIONS UNION**

**EX PARTE**

### **DISPUTE:**

Employee Jerry Thomas was terminated on September 29th, 1992 for his alleged unauthorized leave of absence on September 21st and 22nd, 1992. As well, he received fifteen (15) demerits for being late on August 26th, 1992.

### **UNION'S STATEMENT OF ISSUE:**

There was some considerable confusion with respect to the holidays and precisely when Mr. Thomas was to return to work. He reported for work on Wednesday, September 23rd having been on holiday in Nova Scotia.

With respect to the lateness, Mr. Thomas was two minutes late on the day in question. Mr. Thomas called in to work on the day in question and explained he was still feeling the effects of the illness he had the day before.

The Union and Mr. Thomas assert that the discipline and discharge are unjust; that Mr. Thomas is being singled out and treated differently from other employees.

The Union relies upon article 6 and any other relevant article of the collective agreement on the fact that the Employer give Mr. Thomas the opportunity to return to work by September 25th, 1992.

Mr. Thomas is seeking reinstatement with full seniority and full compensation or such other remedy as may be appropriate.

### **FOR THE UNION:**

#### **(SGD.) J. CRABB**

**EXECUTIVE VICE-PRESIDENT**

There appeared on behalf of the Company:

|               |                                    |
|---------------|------------------------------------|
| M. D. Failes  | – Counsel, Toronto                 |
| P. D. MacLeod | – Director of Terminal, Toronto    |
| J. Coleman    | – Regional Manager, Mississauga    |
| R. Nowlan     | – Delivery Supervisor, Mississauga |

And on behalf of the Union:

|             |                                   |
|-------------|-----------------------------------|
| M. Church   | – Counsel, Toronto                |
| J. J. Boyce | – National Vice-President, Ottawa |
| J. Marr     | – Vice-President, Saint John      |
| J. Thomas   | – Grievor                         |

### **AWARD OF THE ARBITRATOR**

The material before the Arbitrator establishes that the attendance record of Mr. Thomas has been problematic for a number of years. Between July of 1985 and the culminating incident, he was disciplined some ten times for being absent from work without calling to give any explanation. The degree of discipline assessed against him

ranged from written warnings to the assessment of demerits. In May of 1992 he was assessed twenty-five demerits for being absent without authorization for three days.

A second aspect of the grievor's attendance record is his weak performance in respect of lateness. He was disciplined for that infraction on five separate occasions between July of 1989 and August of 1992, the final occasion involving the assessment of fifteen demerits, which is part of the instant grievance.

The evidence reveals that Mr. Thomas took his annual vacation, plus an additional week of leave without pay between August 31 and September 21, 1992. It appears that Mr. Thomas believed that he was entitled to return after September 21, by reason of the fact that the Company had agreed to give him an additional day in lieu of the Labour Day Holiday. The Company's position, however, is that it was agreed with the grievor that he would have his five days of leave without pay reduced to four, and would report to work on the morning of September 21, 1992. In fact the grievor did not report until September 23rd. He admits that he was absent without notice or excuse on September 22nd, but asserts that he believed that he was entitled to be away on the 21st.

The Company's reaction is understandable. In light of the grievor's apparent inability or unwillingness to give proper notification of his absences, as reflected in his prior record, it treated the events of September 21 and 22 as a culminating incident. The grievor was interviewed, held out of service for two weeks and subsequently discharged.

As a preliminary argument, Counsel for the Union submits that Mr. Thomas was subjected to double jeopardy. He maintains that the fact that the grievor was suspended for two weeks at the conclusion of the disciplinary interview held on September 24, 1992 should be viewed as constituting the full and final discipline against the grievor for the events of August and September of 1992. The Arbitrator cannot agree. While it is true that the notation on the record made by the grievor's supervisor is expressed in terms of a suspension, there is little doubt that the substance of what occurred is that, in keeping with common practice, Mr. Thomas was held out of service pending a final determination of his case. Indeed, on September 29, 1992, well within the two week period, he was advised of his discharge by letter. While the Arbitrator agrees in principle that an employee cannot be subject to double jeopardy, the facts at hand do not disclose the assessment of two separate penalties for the same infraction.

Upon a review of the entirety of the evidence, the Arbitrator is satisfied that there are some mitigating factors to consider. First among them is the grievor's almost nine years of service at the time of his discharge. Over the course of those years, while he did have attendance problems, there were substantial periods during which his performance improved in that regard. As Counsel for the Union notes, although he had a high accumulation of demerits in 1986, he returned to a discipline free record in early 1991. Lastly, it is not disputed that the grievor was advised that his disciplinary record stood at thirty-five demerits prior to the incident of August 26, 1992. The issue then becomes whether the two incidents which are the subject of this grievance justified placing Mr. Thomas in a dismissable position.

In the Arbitrator's view, as noted above, the Company's decision to treat the final absence without notice or explanation as a culminating incident is not surprising. Despite repeated warnings and demerits, Mr. Thomas seemed to fail to appreciate the critical importance of advising his employer when he will not be at work. Notwithstanding that perception, however, the Arbitrator is not persuaded that a measure short of discharge, which protects the interests the Company while giving the grievor a last chance, is not appropriate in the circumstances. Mr. Thomas has been without employment to close to a year. A suspension of that duration, coupled with his reinstatement, without compensation, and on strict conditions with respect to his future attendance should, I think, serve to convey to him the importance of correcting his behaviour.

For the foregoing reasons the grievor is reinstated into his employment, without compensation or benefits, and without loss of seniority, with his disciplinary record to stand at fifty demerits. Mr. Thomas' reinstatement is conditional upon his maintaining a level of absenteeism and lateness which is no greater than the average for the employees in his terminal, for a period of not less than two years, calculated in consecutive periods of three months. If during any period of three consecutive months he should fall below the average, the Company shall be entitled to treat his reinstatement as forfeit. Additionally, should he, on any occasion in the two year period, fail to call the employer in advance, within a reasonable period of time, to advise that he will be absent on any given work day, his reinstatement may likewise be treated as forfeit.

I retain jurisdiction in the event of any dispute between the parties with respect to the interpretation or implementation of this award or of compliance with its conditions.

May 14, 1993

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