

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2373

Heard at Montreal, Wednesday, 9 June 1993

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Assessment of 15 demerits to Mr. Norbert Stevens for an alleged violation of Article 1.24 of CN's Maintenance of Way Rules.

BROTHERHOOD'S STATEMENT OF ISSUE:

On September 1 and 4, 1992, the grievor was absent from work. The 15 demerits that he received for this resulted in his dismissal for accumulation of demerits.

The Union contends that: **1)** On the days in question, the grievor followed established procedure by advising Diane Aumais in Montreal that he would be absent. **2)** A medical condition lay at the root of the grievor's absences. **3)** The discipline assessed the grievor was too severe and unwarranted in the circumstances. **4)** The Company violated all applicable provisions of the collective agreement.

The Union requests that: The discipline received by the grievor in this case be stricken from his record, that he be immediately returned to work without loss of seniority and that he be compensated for all lost wages and benefits.

The Company denies the Union's contentions and declines its requests.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

C. J. McDonnel	- Solicitor, Toronto
N. Dionne	- Manager, Labour Relations, Montreal
M. Hughes	- Labour Relations Officer, Montreal
J. Watt	- Labour Relations Officer, Montreal
R. Baker	- Program Supervisor, Montreal
P. Boisvenue	- Program Coordinator, Production East, Montreal

And on behalf of the Brotherhood:

P. Davidson	- Counsel, Ottawa
R. A. Bowden	- System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

The evidence establishes, to the Arbitrator's satisfaction, that the grievor was in violation of the Company's rules in respect of his failure to attend at work on September 1 and 4, 1992. Even if one accepts that the doctrine of double jeopardy would apply in respect of the September 1 infraction, as argued by the Brotherhood, it is difficult to conclude that all of the discipline against the grievor must be voided. The record still reflects an infraction on his part in respect of September 4, which follows an extensive record of prior discipline and warnings. In that circumstance, the Arbitrator would be inclined to conclude that the grievor's failure to observe the Company's rules in respect of lateness and attendance on September 4, 1992 was such that the assessment of fifteen demerits for that infraction would be within the appropriate range of discipline.

There are, however, mitigating circumstances disclosed in the evidence before the Arbitrator. I accept the submission of the Brotherhood that the grievor suffers emotional and mental problems as a result of head injuries suffered earlier in his life. His condition is confirmed in a letter of Dr. S.V. Manohar, a consultant psychiatrist, dated March 2, 1993. While it is common ground that Dr. Manohar was not treating Mr. Stevens at the time of the incidents resulting in his discharge, the doctor does express the opinion that the grievor's conduct at that time may well have been the result of his head injuries, for which he was apparently under medication.

It is not disputed that the Company was unaware of any neurological problems which the grievor may have been experiencing in September of 1992. Further, to be fair to the opinion of Dr. Manohar, he expresses, at most, that there is reason to believe that Mr. Stevens' conduct was influenced by his condition. While the case is obviously not without some difficulty, the Arbitrator is satisfied that that opinion is sufficient to prompt consideration of a penalty less than discharge and to justify the reinstatement of the grievor on conditions fashioned to protect the Company's interests. Given the apparent failure on the part of the grievor to advise the Company of any possible medical explanation for his behaviour, this is not a case where an order for the payment of compensation is appropriate.

For the foregoing reasons the Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and without compensation or benefits, with his disciplinary record to stand at forty-five demerits. Mr. Stevens' reinstatement is conditioned upon his maintaining an absenteeism record that is at least equal to the average of the employees in his department for a period of not less than two years from the date of his reinstatement, calculated on the basis of any three consecutive months. Similarly, his reinstatement is conditioned upon his advising the appropriate official of the Company, in advance, of any occasion upon which he will be late or absent. Any failure to so advise, during the two year period following his reinstatement, shall also be grounds for the Company to treat Mr. Stevens' reinstatement as at an end.

June 11, 1993

(SGD.) MICHEL G. PICHER
ARBITRATOR