

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2840

Heard in Montreal, Thursday, 13 March 1997

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

### **DISPUTE:**

Appeal of discharge on behalf of Mr. R. Muzyka.

### **EX PARTE STATEMENT OF ISSUE:**

On July 18, 1996, Mr. Muzyka was assessed twenty (20) demerits for his failure to report for duty on time on July 18, 1996. This resulted in the grievor's discharge for accumulation of 80 demerits.

The Union contends that the discipline assessed was too severe and unwarranted in the circumstances.

The Union requests that the discipline assessed be removed from the grievor's record and that the grievor be returned to duty forthwith without loss of seniority and with full compensation for all losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

### **FOR THE BROTHERHOOD:**

**(SGD.) R. F. LIBERTY**  
**SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Officer, Edmonton
S. Michaud	– Assistant Manager, Labour Relations, Edmonton
J. Dixon	– Manager, Labour Relations, Edmonton

And on behalf of the Brotherhood:

D. Brown	– Sr. Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
P. Davidson	– Counsel, Ottawa
L. P. Gladish	– General Chairman & Secretary/Treasurer, Winnipeg
K. M. Deptuck	– Vice-President, Ottawa

### **PRELIMINARY AWARD OF THE ARBITRATOR**

It was agreed that the decision in this matter should await the hearing, in May 1997, of another grievance concerning the same grievor, to provide greater clarity concerning the status of his disciplinary record.

March 14, 1997

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

## **AWARD OF THE ARBITRATOR**

The Joint Statement of Issue indicates that the Company viewed the grievor as having sixty demerits at the time of the incident giving rise to this dispute. The Brotherhood challenged that count, initially asserting that the grievor's record should have stood at forty-five demerits. The issue was somewhat complicated by the fact that at the time of the hearing the grievor had another fifteen demerits outstanding, pending arbitration of another dispute. Consequently, the matter was adjourned to await the arbitration of the outstanding grievance, in order to provide clarity as to the grievor's prior disciplinary record for the purposes of the instant case.

Since the adjournment, the parties have communicated with the Arbitrator by conference telephone call to advise that the outstanding matter has been settled, and that they are agreed that in light of the normal application of the Brown System, Mr. Muzyka's record should be taken as having stood at fifty-five demerits at the time of the assessment of the twenty demerits which is the subject of this grievance.

It is common ground that as Extra Gang Foreman on Gang 721 in July of 1996 Mr. Muzyka was responsible for ensuring that his crew was at work on time. On the morning of July 18, 1996, at approximately 02:55 Supervisors Brian Thibeault and Paul Halikowski proceeded to the hotel in Kakabeka Falls where the members of the extra gang were housed, and were scheduled to meet for departure to the work site at 03:00. The crew members were waiting in a CN vehicle, but Foreman Muzyka was nowhere to be seen. Upon inquiring, the supervisors discovered that Mr. Muzyka was still asleep in his room. The process of waking Mr. Muzyka, who provided no good excuse for not having been awake on time, occasioned a fifteen minute delay to the departure of the crew from the meet point. In light of prior discipline, following an investigation the Company assessed twenty demerits for the grievor's failure to be in charge of his crew at the appointed time. Based on a prior record of fifty-five demerits at the time, the grievor was in a dismissible position, and was therefore terminated.

The Arbitrator agrees that the facts do disclose the basis for the assessment of discipline. Moreover, given the prior assessment of discipline for faulty timekeeping in both May and June of 1996, resulting in the assessment of a total of twenty-five demerits, the Company had reason to treat the incident as serious, calling into play the doctrine of the culminating incident.

There are, however, some mitigating factors which must be considered. Significant among those is the fact that the grievor has been employed by the Company for some thirteen years. While the discipline recorded against the grievor over that period is not exemplary, there does not appear to have been any problem with respect to his timekeeping, at least insofar as the assessment of discipline is concerned, from 1984 to 1996. The grievor's shortcomings with timekeeping were focused in a relatively short period of time between May and July of 1996, encompassing at least three incidents. On these facts, the Arbitrator is satisfied that it is not inappropriate to consider a substitution of penalty which, nevertheless, will involve serious consequences for the grievor's employment, while hopefully protecting the interests of the Company.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. For the period of not less than one year following his reinstatement, at the discretion of the Company the grievor shall be subject to demotion to the rank of Extra Gang Labourer. Additionally, for the period of two years following his reinstatement, should the grievor record rates of lateness or absenteeism in excess of the average for employees in his classification, at his work location, he shall be subject to termination, with access to arbitration only on the issue of the calculation of the applicable rates of absenteeism. For the purposes of the two year period, the grievor's rate of absenteeism may be calculated and compared on the basis of any three consecutive months. Should the parties be in dispute with respect to the interpretation or implementation of this or any aspect of this award, the matter may be spoken to.

April 12, 1997

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