

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3069

Heard in Montreal, Tuesday, 12 October 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The debiting of Ms. Spencer's record with 20 demerits for refusing to report for duty as instructed by a Company officer.

JOINT STATEMENT OF ISSUE:

In June 1996, Ms. Spencer was adversely affected by the closure of the CAR office in Toronto. She elected to displace a clerical position in IMS in Vaughan. Due to the delay in initiating training for positions at IMS, she was placed on temporary employment security. Eventually, Ms. Spencer was afforded three separate opportunities to train and qualify for different clerk's positions at IMS, for which she was unsuccessful. Ms. Spencer then elected to displace to a manual groundsperson's position at IMS.

A precondition to filling this safety sensitive position required Ms. Spencer to undergo a medical evaluation. On April 18, 1998 Ms. Spencer attended for a medical examination with her personal physician. When the information was relayed to the Company physician, he requested further information of Ms. Spencer regarding her fitness for the position. After several requests were made of Ms. Spencer to secure this information, her personal physician advised the Company on June 6, 1998 that she was physically incapable of performing the duties of a manual groundsperson's position.

Given this medical disqualification, Ms. Spencer elected to displace to the position of crew dispatch clerk in the Toronto Diesel Shop, which required typing skills. After performing the typing test unsuccessfully, she was denied the opportunity to displace to this position on October 5, 1998.

Inasmuch as there were positions available to Ms. Spencer given her seniority standing and she could not qualify for any such position, either due to medical restrictions or for a lack of basic skill and ability, the Company terminated her employment security benefits effective October 14, 1998. Based on the special intercession of the Union on October 15 and 16, 1998, the Company agreed to provide Ms. Spencer with a further opportunity to qualify for a safety sensitive position. Ms. Spencer underwent a further medical examination on December 23, 1998. Further information was required by the Company physician before Ms. Spencer was declared fit to fill a crew bus driver's position on February 22, 1999.

As Ms. Spencer was on annual vacation on that date, she was contacted by Mr. A. Ethier on February 25, 1999 and advised to report for training February 26. Ms. Spencer advised Mr. Ethier that she would not report for work. That same day, Ms. Spencer's lawyer contacted the Company's Labour Relations staff and indicated that he viewed the Company's directive to report for duty as inappropriate and indicated that he had instructed her not to report. Company officers indicated that the collective agreement governed Ms. Spencer's employment obligations and urged the lawyer to reconsider the advice provided.

The Company immediately advised the Union of the involvement of Ms. Spencer's lawyer and the ramifications of the advice provided Ms. Spencer. Ultimately, Ms. Spencer failed to report for duty on February 26, nor did she contact anyone at the yard office to advise that she would not report for work.

An investigation was conducted into the actions of Ms. Spencer in failing to report for duty February 26, 1999 and discipline was rendered as a result.

The Union contends that discipline was not warranted in the circumstances and that in any event it was extreme. It has requested that the discipline be removed from the grievor's record.

The Company has declined the Union's request.

FOR THE UNION

(SGD.) R. PAGÉ
EXECUTIVE VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) R. V. HAMPEL
FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

R. V. Hampel – Labour Relations Officer, Calgary
L. S. Wormsbecker – Manager, Labour Relations, Calgary

And on behalf of the Union:

P. J. Conlon – Division Vice-President, Toronto
R. Pagé – Executive Vice-President, Montreal
N. Lapointe – Division Vice-President, Montreal

AWARD OF THE ARBITRATOR

The grievance concerns the assessment of twenty demerits against the grievor for her failure to report for duty as directed, for a single day. The evidence discloses that in June of 1996 Ms. Spencer's position was abolished. There followed an extensive period of time during which the grievor sought to displace into other positions, without success, apparently with the support of temporary employment security benefits for some of that time. It appears that her employment security benefits were terminated as of October 14, 1998 on the basis that medical restrictions or qualifications prevented her from holding available positions which her seniority would otherwise have allowed her to occupy. Eventually, after further Union intervention, the grievor was eventually declared essentially fit to fill a crew bus driver's position as of February 22, 1999.

It appears that during the course of a telephone conversation between the grievor and a Company representative, when Ms. Spencer was advised to report for bus driver training on February 26, she responded that she would not. It does not appear disputed that at that point she had retained her own lawyer, and was instructed by him that she should not report for work on the apparent basis that the work being offered to her was tantamount to constructive dismissal. She subsequently did return to work. In the result she was disciplined at the level of twenty demerits for her failure to appear for work, as instructed, on one day.

The Arbitrator has considerable difficulty with the position of the Company. To be sure, the Company was entitled to discipline Ms. Spencer for failing to appear for work when she did. Intrinsic in the analysis of just cause and the appropriate measure of discipline, however, are a number of factors. The Company was obligated to take into account, as the Arbitrator must, the precise nature and duration of the grievor's actions, their harm or prejudice to the Company's operations, her prior service and disciplinary record, and any other mitigating factors which might have a bearing on the most suitable rehabilitative measure in the circumstances.

Ms. Spencer is an employee who has faithfully rendered twenty-five years' service to the Company. In all of that time she has never once been disciplined, for any reason. It is clear that the events following her job abolishment and difficulty in securing active employment with the Company caused the grievor some difficulty. It is also not disputed, and was known by the Company, that she had secured the advice of an independent legal counsel, Mr. A. Pinto of Toronto. However ill-considered that advice might have been, the fact remains that Ms. Spencer did not act arbitrarily or out of indifference, much less defiance, towards the Company. It appears clear that she was uncertain as to her legal rights and was proceeding on the basis of what she considered to be the best advice available to her at the time. Nor does it appear that her actions caused economic loss or any substantial prejudice to the Company's operations. While these facts do not excuse her failure to appear for work when she had a contractual obligation to do so, they do have a substantial bearing on the appropriate disciplinary response, especially as applied to an exemplary employee of twenty-five years' service with no prior discipline whatsoever.

In my view the assessment of twenty demerits, which is one third of the way to discharge, was wholly inappropriate for a first offence in the circumstances disclosed. A letter of reprimand would, in the Arbitrator's opinion, have been more appropriate to bring home to the grievor the fact that her one day non-attendance at work was, notwithstanding her lawyer's dubious advice, inappropriate and deserving of discipline. I therefore direct that a letter of reprimand be substituted for the demerits assessed against the grievor, with her disciplinary record to be amended accordingly.

October 19, 1999

(signed) MICHEL G. PICHER
ARBITRATOR