

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3074

Heard in Montreal, Tuesday, 9 November 1999

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

### **DISPUTE:**

Appeal the assessment of twenty (20) demerits on behalf of Mr. Wowk; P.I.N. 106310.

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

On December 8, 1997, Mr. Wowk was issued 20 demerits for his alleged absence without leave on August 25, 1997; for failing to show for a formal investigation on October 3, 1997, or to provide medical documentation to support his failure to attend formal statement on October 3, 1997; and for not providing medical evidence in a timely fashion to support his inability to perform his regular or modified duties from September 29, 1997, to date.

The Union contends that: **1.)** His absence on August 25, 1997 was authorized. **2.)** His absence on October 3, 1997, was supported by medical documentation provided to the Company. **3.)** That the Company has stockpiled unsupported allegations to warrant the discipline they have assessed Mr. Wowk. **4.)** The grievor has been unjustly dealt with by the Company. **5.)** The discipline assessed was excessive. **6.)** The discipline is unwarranted. **7.)** That Mr. Wowk, through Mr. Brar, a Union official, advised the Company that due to illness supported by medical documentation, Mr. Work was unable to attend the formal statement October 3, 1997.

The Union requests that the grievor have the twenty demerits expunged from his record.

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

### **FOR THE BROTHERHOOD:**

**(SGD.) R. J. LIBERTY**

**SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Associate, Pacific Division, Edmonton
F. Metcalfe	– Engineering Coordinator, Edmonton
S. Michaud	– Business Partner, Human Resources, Pacific Division, Edmonton
R. MacDougall	– Counsel, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. J. Liberty	– System Federation General Chairman, Winnipeg
J. Dutra	– Federation General Chairman, Edmonton
D. W. Brown	– General Counsel, Ottawa
W. Wowk	– Grievor

### **AWARD OF THE ARBITRATOR**

The grievor was assessed twenty demerits for a number of problems in relation to attendance and proper documentation of the reasons for his absence. In the Arbitrator's view the facts can be separated into two separate segments. First, the Company alleges that the grievor failed to give notice of his absence from work on August 25,

1997. The second part relates to his failure to provide medical evidence to support his inability to perform regular duties from September 29, 1997, as well as his alleged failure to give notice that he would not attend an investigation scheduled for October 3, 1997.

On a review of the evidence the Arbitrator is satisfied that the Company was justified in assessing discipline against the grievor for his failure to appear at work on August 25, 1997 without prior notice or explanation to his supervisor. The record reveals that the grievor gave an earlier indication to his supervisor that he might be obliged to attend a Workers' Compensation appeal hearing on the 25th. This caused his supervisor to instruct him to advise the Company during the course of the weekend in the event that he would not be present at work on the 25th. In fact he failed to do so. Ultimately the reason for his absence was unrelated to the Workers' Compensation Board proceedings. It appears that on the weekend in question Mr. Wowk was moving his residence, an effort which spilled into part of Monday the 25th. It appears that it did not occur to the grievor that he had an obligation to advise his employer specifically that he would not be at work on the day in question when it became clear that that would be the case. It is also far from evident to the Arbitrator that the furthering of the grievor's private affairs in respect of his domestic move is, of itself, justification for his absence, in any event. In the circumstances I can see no merit to the suggestion that his absence on August 25, 1997 was authorized, and he was therefore liable for discipline for that event.

The evidence is less persuasive, however, as regards the other elements of the Company's charges against Mr. Wowk. The documents before the Arbitrator, in particular as reflected in correspondence addressed to the Company by Federation General Chairman John Dutra on May 14, 1998, appear to confirm that, as Mr. Wowk explained during the course of his investigation, he verbally advised his Union General Chairman Jasper Brar that he had a medical appointment on October 3, 1997 and would be unable to attend the disciplinary investigation scheduled for that day. A memo of Mr. Weller's confirms that he had received a call from Mr. Brar on the morning of October 2, 1997 at approximately 08:30, the substance of which concerned the grievor's inability to attend on the 3rd. It would also appear clear that the grievor faxed a copy of a doctor's note obtained on October 3, 1997 to Mr. Brar, and that a copy of it was provided to Mr. Weller. On the whole, the evidence confirms that through his union representative Mr. Wowk did adequately notify the Company that he could not attend the investigation scheduled for October 3, 1997. In my view no discipline can therefore attach to that incident.

Nor is there a firm basis upon which the Arbitrator can sustain the Company's third ground for discipline, namely that the grievor did not provide timely medical documentation for his absences from work from September 29, 1997. The record reflects that on a number of occasions he obtained and provided to the Company medical notes, albeit they were brief and sketchy, which confirmed that he would be absent. The record reflects as common ground the fact that the grievor suffered a work-related back injury on September 25, 1997 for which he received Workers' Compensation benefits. A Workers' Compensation Board form prepared by his physician, dated November 13, 1997, states, in part, that the grievor would be unable to work for an anticipated duration of three weeks. There are, in addition, forms to a similar effect dated October 14, and October 27, likewise recording the grievor's inability to work by reason of his back injury. In addition, a medical form from the Murakami Medical Clinic dated September 29, 1997 addressed to Supervisor Weller specifically states that the grievor would be "unable to work as of Monday, September 29 due back pain." That note was in the possession of the investigating officer at the time of the interview which resulted in the conclusion that Mr. Wowk had failed to provide timely documentation.

In the Arbitrator's view the employer's position on this issue is unduly technical. There is no suggestion that the grievor was malingering or engaging in fraud with respect to the *bona fides* of his back injury. While it may be that documentation in that regard might have been provided to the Company more promptly, and in a more organized fashion, I find it difficult to conclude that the grievor's actions in that regard were such as to attract discipline of any substance.

In the result, the grievance is allowed in part. The grievor's record shall be adjusted to reflect the assessment of ten demerits for his failure to provide notice of his non-attendance at work on August 25, 1997. In the Arbitrator's view that is an appropriate measure of discipline given the grievor's prior disciplinary history in respect of such problems.

November 12, 1999

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