

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3203

Heard in Montreal, Wednesday, 11 July 2001

concerning

ONTARIO NORTHLAND RAILWAY

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976) (TRANSPORTATION COMMUNICATIONS UNION)

DISPUTE:

Discipline assessed Customer Service Sales Agent (C.S.S.A.) Anna Tuohimaa's which resulted in her discharge for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On January 14, 2001 Customer Service Sales Agent (C.S.S.A.) Anna Tuohimaa's record was assessed forty (40) demerit marks and dismissal based on: **a.)** Failure to protect her assignment of Thursday, November 30, 2000. **b.)** Failure to adhere to the terms and conditions of her employment as specified in Form 2000 dated June 30, 1999. **c.)** Accumulation of demerit marks in excess of 60.

The Union contends that two personal crises not fully disclosed to the Company or the Union were mitigating factors which resulted in the accumulation of demerits. The Union further contends that the assessment of forty (40) demerits after seventeen (17) months of demerit free service to be excessive and punitive and is not corrective per Company policy.

The Union, based on the circumstances and her longevity of service, requests that Ms. Tuohimaa be reinstated into her position as a C.S.S.A. without loss of seniority, be remitted any moneys lost as a result of her being out of service and her record made whole.

The Company denied the grievance.

FOR THE UNION:

(SGD.) RON MARLEAU
CHIEF STEWARD

FOR THE COMPANY:

(SGD.) L. K. MARCELLA
DIRECTOR, HUMAN RESOURCES

There appeared on behalf of the Company:

M. J. Restoule – Manager, Labour Relations, North Bay
R. LaPlante – Manager, Passenger Services, North Bay
K. Duquette – Labour Relations Officer, North Bay

And on behalf of the Union:

P. Conlon – Chair, Board of Trustees, Local 1976, Toronto
N. Lapointe – President, Local 1976, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms, beyond meaningful dispute, that the grievor, Customer Service Sales Agent Anna Tuohimaa, has recorded an unfortunate pattern of lateness over the most recent years of her employment with the Company. Following a culminating incident, on November 30, 2000, the Company discharged the grievor, taking the view that its efforts at progressive discipline had not succeeded, and that her continued employment could not be justified.

The Company's concern is understandable. The grievor's record of tardiness dates back to July of 1994 when she was assessed fifteen demerits to failing to protect her shift at New Liskeard. Subsequently, in May of 1998, after a number of verbal warnings, she was assessed ten demerits for a similar infraction at North Bay. Twenty demerits were assessed for the same failing in May of 1999 and again in June of 1999, resulting in the grievor being made subject to what the Company describes as a "last chance arrangement" whereby she was on notice that her employment would be terminated in the event of any further tardiness. Following the culminating incident of November 30, 2000 the grievor was assessed forty demerits following an investigation held on December 20, 2000 and her employment was terminated.

Firstly, the Arbitrator is compelled to agree with the Union that what the Company characterizes as a "last chance arrangement" cannot be fairly be characterized as an agreement made with the grievor or her Union. Neither Ms. Tuohimaa nor her Union representative signed the document setting out the conditions for her continued employment. As a matter of law, it is obviously not open to the Company to negotiate the terms and conditions of employment with any individual employee, without the agreement of her bargaining agent, an agreement which in the Arbitrator's experience is generally reduced into writing (see **Re McGavin Toastmaster Ltd. v. Ainscough et al.** (1975), 54 D.L.R. (3d) 1, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 4, N.R. 618).

In the circumstances the status of the "last chance arrangement" is of little consequence. However, even if the Company's letter to the grievor cannot be given the weight of a last chance agreement, it is clear that, as of June 30, 1999 Ms. Tuohimaa's continuing failure to maintain acceptable standards of timeliness in coming to work would result in her termination. It also appears that during the months following that warning she was subject to still further verbal reminders to the same effect by Mr. Rock LaPointe, the Manager of Passenger Services. In other words, the Company attempted to show leniency towards the grievor when she nevertheless failed, on occasion, to live up to the conditions imposed by the Company as of June 30, 1999.

If the facts described above stood alone, the Arbitrator would be inclined to sustain the grievor's discharge. There are, however, mitigating circumstances which must be considered. The Union's representative advises, without contradiction from the Company, that two personal problems contributed to the attendance difficulties experienced by the grievor over the past two years. The first concerned the break-up of her marriage, an aspect of which involved her living in a remote location for a period of several months, during which a number of incidents of lateness were recorded. Subsequently, and perhaps more seriously, the grievor was diagnosed with an extremely serious and potentially fatal illness, for which she was to undergo surgery at or about the time of the culminating incident. Additionally, Ms. Tuohimaa has some longevity of service with the Company, having been employed for some fifteen years, and had little or no apparent difficulty with respect to tardiness in the first nine years of her service. In all of these circumstances I am satisfied that this is not an appropriate case for compensation, but that the grievor can be reinstated on terms which will protect the Company's interests.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into her employment forthwith, without compensation for wages and benefits lost, and without loss of seniority. As a condition of reinstatement the grievor shall not record any lateness to work on more than two occasions in any three month period for two years following her return to work. Should she fail to meet that condition she shall be subject to discharge, with recourse to arbitration solely on the issue of whether the condition was in fact violated.

July 13, 2001

(signed) MICHEL G. PICHER
ARBITRATOR