

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3412

Heard in Calgary, Tuesday, 9 March 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of Mr. René Rousseau.

JOINT STATEMENT OF ISSUE:

By way of form 780 dated September 4, 2003, the grievor was dismissed from Company service for "Unauthorized leave of absence from August 07 to August 14, 2003." A grievance was filed.

The Union contends that: **(1)** The grievor did not report for duty because of personal financial difficulties. **(2)** The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated without loss of seniority and with full compensation for all financial losses incurred as a result of this matter.

The Company disagrees with the Union's contentions and declines its request.

FOR THE BROTHERHOOD:

(SGD.) R. S. DAWSON
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) K. MORRIS
FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA

There appeared on behalf of the Company:

K. Morris	– Manager, Human Resources,
R. Reny	– Senior Manager, Human Resources, Edmonton
J. Scott	– Program Supervisor, Kamloops
B. Laidlaw	– Manager, Human Resources, Winnipeg

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. S. Dawson	– System Federation General Chairman, Winnipeg

D. Brown – Sr. Counsel, Ottawa
B. Stoyko – General Chairman,
R. Rousseau – Grievor

AWARD OF THE ARBITRATOR

The facts immediately pertinent to the grievor's discharge are not in dispute. The grievor was a Group III Machine Operator of long seasonal service with the Company dating back to 1975. In July of 2001 he sustained a work related back injury which resulted in an extended absence. In July of 2003, by the terms of a written agreement between the Company and the Brotherhood, the grievor was placed into a Group III Machine Operator position on Track Gang 5P42. He worked without incident with his gang at Stony Plain, Alberta, and for a brief time in the Edson-Hinton area after mid-July of 2003. On August 8, 2003 the grievor failed to report to work or to advise the Company of the reason for his absence. On August 15, 2003 he finally contacted the Company indicating that he was absent by reason of being without funds that he was suffering from back pain.

Based on the grievor's history of absenteeism the Company convened a disciplinary investigation on August 25, 2003. Following that investigation he was terminated, effective September 4, 2003 for his unauthorized leave of absence from August 7 to August 14, 2003.

In the Arbitrator's view the position and concern of the Company is readily understandable. The record discloses that between 1984 and 2003 the grievor was

assessed demerits for being off work without notice, absenteeism and unauthorized leaves of absence on some ten occasions, and was also given a written reprimand for absenteeism. The Company invokes the principle of the culminating incident to justify the assessment of termination as the appropriate measure of discipline in light of the events of August of 2003. In that regard reference is made to the grievance between VIA Rail Canada Inc. and the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW- Canada) (**SHP 469**), an award of Arbitrator Hope rendered on July 8, 1998.

The Brotherhood submits that notwithstanding the prior record, the Company effectively lulled the grievor into believing that his absences would be dealt with by little more than penalty assessments in the range of five to fifteen demerits. Its counsel stresses that there was no specific indication given to the grievor that any failure of proper attendance and time keeping after his return to work from his injury in 2003 would necessarily result in his discharge. It may also be noted that the parties appear to be disagreed as to the status of the grievor's accumulation of demerits at the point of discharge. The Company maintains that the grievor stood at forty-five demerits while the Brotherhood is of the view that he may have been entitled to the forgiveness of some demerits by reason of discipline free service. In the Arbitrator's view that issue is immaterial for the substance of the issue at hand which concerns the termination or reinstatement of Mr. Rousseau.

There are a number of factors which the Arbitrator believes should be considered in mitigation. Not the least of them is that the grievor had been in the service of the

Company for some twenty-eight years at the time of his dismissal. Because of the seasonal nature of his work, as well as layoffs, absences and sick leaves, the Company notes that his service would have totalled the equivalent of 12.75 years of active service over the twenty-eight calendar years in question. The fact remains that his attachment to employment with the Company spans almost three decades.

The record would indicate that some of the grievor's past absenteeism is attributable, at least in part, to the recognized disability of alcoholism. It appears that that condition resulted in the grievor undergoing treatment and being placed into employment under the terms of a continuing employment contract dated March 13, 2000. That contract was for a period from two to five years, as determined by CN's Chief Medical Officer, and involved medical monitoring, including drug and alcohol testing. The disciplinary record before the Arbitrator shows no discipline against Mr. Rousseau in relation to absenteeism between March of 2000 and August of 2003, albeit there was an extensive period of work inactivity within that time frame by reason of his back injury. The evidence also indicates that at the time of his return to work in July of 2003 the grievor suffered extreme financial difficulties, to the extent that he had been compelled to accept welfare, and needed an advance from the Company to secure accommodation for himself in the Edson-Hinton area pending receipt of his pay cheque.

In the Arbitrator's view, having regard to all of the facts, and in particular to the grievor's employment record of twenty-eight years, this is an appropriate case for a substitution of penalty, albeit one which is fashioned to protect the Company's legitimate interests. The Arbitrator therefore directs that the grievor be reinstated into his

employment, forthwith, without loss of seniority and without compensation for wages and benefits lost, subject to his accepting the conditions described herein. As a condition of reinstatement, the grievor shall execute another continuing employment contract identical in terms to the contract executed on March 13, 2000. Further, for the period of not less than two years, he shall maintain a rate of absenteeism that does not exceed the average of the employees in his classification, calculated on the basis of any consecutive four month period during the two years in question. Failure to adhere to the average rate of attendance for any four month period shall result in the grievor's immediate termination from employment, at the sole discretion of the Company. The grievor shall also be subject to undergoing a medical examination respecting his fitness to return to work, and any physical restrictions which may apply, such examination to be at the Company's expense. Upon his return to work the grievor's discipline record shall stand in the same position as prior to his termination.

The Arbitrator retains jurisdiction in the event of any dispute between the parties respecting the calculation of his demerit standing, or any other matter in relation to the interpretation or implementation of this award.

March 15, 2004

(signed) MICHEL G. PICHER
ARBITRATOR