

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3492

Heard in Montreal, Wednesday, 15 June 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The assessment of demerit marks, and subsequent discharge for accumulation of demerits in excess of sixty, to Conductor "G".

JOINT STATEMENT OF ISSUE:

Conductor G was required to provide an employee statement on June 7, 2002, regarding his work record between February 1, 2002 and May 31, 2002. Conductor G failed to appear for the June 7 investigation. Investigations were rescheduled and took place on June 17, 2002, including an investigation into the reasons for Conductor G's failure to appear for the investigation scheduled for June 7, 2002. Following his employee statements, Conductor G was assessed with ten (10) demerit marks for failure to appear for the investigation scheduled for June 7, 2002, and forty (40) demerit marks for his unsatisfactory work record between February 1, 2002 and May 31, 2002, resulting in a total of eighty (80) demerit marks on his record, and his dismissal from the Company.

The Union contends that the events leading to the accumulation of demerits in excess of 60 demerits must be attributed to Conductor G's ill health. The Union contends that due to his poor health Conductor G is medically incapable of meeting normal work attendance and requirements and is medically incapable of fully appreciating the adverse consequences his medical condition on his work. The Union requests that the discipline issued to Conductor G be removed. The Union requests that Conductor G be provided with all monies he would have been entitled to but for his unjust discharge, including but not limited to all payments for pensionable service, short term disability benefits, long term disability benefits and medical or disability pension.

FOR THE UNION:

(SGD.) R. A. HACKL
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) D. BRODIE
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Brodie – Manager, Labour Relations, Edmonton
J. Torchia – Director, Labour Relations, Edmonton

M. Becker – Director, Labour Relations, Chicago

And on behalf of the Union:

M. A. Church – Counsel, Toronto
B. Boechler – General Chairman, Edmonton
R. A. Beatty – General Chairman, Sault Ste. Marie
R. A. Hackl – Vice-General Chairman, Edmonton
J. Robbins – Vice-General Chairman, Sarnia

AWARD OF THE ARBITRATOR

The instant case reveals an extremely unfortunate personal circumstance. The grievor, “G”, is an employee of long service, first hired by the Company in April of 1978. The record discloses that in the period between January of 2000 and June of 2002, the grievor, who at all material times occupied the furlough board, repeatedly failed to protect work assignments when called. He was assessed twenty demerits for an unsatisfactory work record on January 14, 2000, thirty demerits for the same offence on July 4, 2001, a ninety day suspension for his unsatisfactory work record on August 29, 2001 and, having failed to appear for an employee statement in respect of still another failure to respond to calls, was assessed ten demerits on June 7, 2002 and forty demerits on the same date for his unsatisfactory work record, resulting in his discharge for the accumulation of eighty demerits.

The material before the Arbitrator establishes, beyond substantial controversy, that during the period of time immediately before, during and after his termination G suffered from a serious mental illness. He was, as is now evident from unchallenged medical opinions, suffering from what his psychiatrist describes as “delusional disorder – persecutory sub-type”. The medical opinion is categorical that that condition would have had an effect on his ability to perform his safety sensitive duties and would explain his absenteeism and reluctance to attend at work. On the evidence before me, it is not disputed that the grievor suffered an extreme

delusional belief that the Company and his co-workers were watching him, held him in ridicule and were colluding against him. According to the medical evidence before the Arbitrator his condition would appear to continue to the present time.

I am satisfied that the Union has established that the grievor did suffer from a disability within the meaning of the **Canadian Human Rights Act** at the time of his termination, that but for that disability he would not have been terminated, and that he was and is owed a duty of accommodation in respect of his disability. With respect to the Company's responsibility, however, it is important to note that there was no clear communication to the employer, in the form of any medical note or medical certificate, to put the Company on notice as to the grievor's mental condition and the reasons for his problematic work record. That evidence only emerged considerably later, through the extensive efforts of the Union.

In the result, the Arbitrator is satisfied that this is a case for the reinstatement of the grievor subject to certain conditions. I am satisfied that he should be reinstated into his employment without loss of seniority, and with every opportunity to recover such pensionable service as may be repurchased. I am also satisfied that from the date which the parties shall determine was the first clear notice to the Company of the grievor's condition or, failing their agreement, as determined by the Arbitrator, the grievor should also be fully compensated for all benefits, including sick leave and short term disability as well as long term disability benefits to which he would otherwise have been entitled as an active employee. The Arbitrator further directs that the parties meet to consider the grievor's present condition and the degree, if any, to which it may be accommodated within the workplace, short of undue hardship. The Arbitrator also notes that the Union has made a request that the Arbitrator make an award of damages under the **Canadian Human Rights Act**. The damages would be in respect of the Company's failure to abide by the **Act** from and after such time as it knew, or reasonably should have

known, of the grievor's disability and its ongoing refusal to reinstate him or otherwise accommodate his condition. The Arbitrator deems it appropriate at this time to reserve on that aspect of the grievance, and to remit the entire matter to the parties for their own discussion and resolution of all remedial issues, as may be appropriate. Should they fail to come to an agreed resolution the matter may be spoken to.

June 20, 2005

(signed) MICHEL G. PICHER
ARBITRATOR