

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

**CASE NO. 3554**

Heard in Montreal, Tuesday, 9 May 2006

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION**

**DISPUTE:**

Dismissal of Conductor K. Joudwa for accumulation of demerits in excess of 60.

**JOINT STATEMENT OF ISSUE:**

Effective September 29, 2005, Conductor Joudwa was assessed 30 demerits for "absent without leave from June 29th, 2005 up to and including August 16th, 2005." Effective August 29th, 2005, Conductor Joudwa was assessed an additional 40 demerits for "failure to follow the instructions of a supervisor by not attending a rules examination on Aug. 29th, 2005 as arranged during your employee statement taken on August 16th, 2005 by Trainmaster Hum." As a result of an accumulation of demerits in excess of 60, Conductor Joudwa was discharged from Company service on October 25th, 2005.

The Union filed a grievance on behalf of Mr. Joudwa grieving the discipline assessed and the resultant dismissal.

It is the Union's position that the discipline assessed was unwarranted or, at the very least, excessive and therefore does not support the resultant dismissal.

The Union requested that Mr. Joudwa be exonerated from any wrongdoing, returned to active service without loss of seniority and compensated for all lost wages and benefits.

The Company deems the assessment of discipline to be both warranted and appropriate in this case.

**FOR THE UNION:**

**(SGD.) R. A. BEATTY**  
GENERAL CHAIRPERSON

**FOR THE COMPANY:**

**(SGD.) J. KRAWEC**  
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

- J. P. Krawec – Manager, Labour Relations, Toronto
- D. Van Cauwenbergh – Sr. Manager, Labour Relations, Toronto
- P. R. Hopper – Sr. Assistant Superintendent, Belleville/Oshawa

And on behalf of the Union:

- R. A. Beatty – General Chairperson, Sault Ste. Marie
- J. Robbins – Vice-General Chairperson, Sarnia
- B. R. Boechler – General Chairperson, Edmonton
- K. Graham –
- C. Little – Local Chairwoman, Belleville
- A. Bovair –
- A. McDavid – Local Chairperson,

### **AWARD OF THE ARBITRATOR**

The first aspect of the grievance is whether the grievor was deserving of thirty demerits for his alleged absence without leave from June 29, 2005 up to and including August 16, 2005. The second issue is whether he was deserving of forty demerits for his failure to attend a rules examination on August 29, 2005, previously arranged by his trainmaster.

The Arbitrator can appreciate the Company's concern for assessing relatively serious levels of discipline against the grievor, regard being had to his overall disciplinary record, which can be fairly characterized as abysmal. In **CROA 1927** this Office reinstated Mr. Joudwa following his discharge after the assessment of forty demerits for a physical altercation with another employee in the baggage compartment of their train. This Arbitrator then determined that it would be appropriate to reinstate the grievor stating, in part:

... it may be noted that Mr. Joudwa is an employee of thirteen years' service with no prior evidence of aggressive or threatening behaviour. In that sense, therefore, the incident of October 7, 1988 may fairly be characterized as an isolated, spur of the moment event, not likely to recur. ...

The Arbitrator's expectations proved very wrong. Subsequently, on some seven occasions between August of 1991 and March of 1998, the grievor was assessed discipline ranging from corrective interviews through substantial demerits up to and including discharge for a number of incidents described as "conduct unbecoming". The last incident, prompting his discharge in March of 1998, was a result of gross misconduct which involved damage to a hotel room and threats to a hotel manager. It appears that on that occasion Mr. Joudwa was nevertheless reinstated by agreement, subject to a nine month suspension and the assessment of twenty demerits. Simply put, Conductor Joudwa's disciplinary record is an aggravating, and not a mitigating factor by any standard.

That said, however, the fact remains that the instant grievance must be judged on its specific merits, regard being had to the facts at hand. The Arbitrator has some difficulty with the first part of the discipline assessed against Mr. Joudwa, namely the thirty demerits for being absent without leave. The record discloses that on or about June 28, 2005 Mr. Joudwa failed a rules exam at Belleville. As a result of that failure he could not be kept in service until such time as he successfully passed the rules exam. It is not disputed that the grievor was then scheduled to commence his vacation, for a period of six weeks, as of July 13, 2005. It would appear that Mr. Joudwa proceeded in the expectation that his vacation would go forward as scheduled. However, on or about

August 4, 2005, he received a registered letter from the Company which reads as follows:

This letter is to inform you that the Company considers you to be absent without authorized leave (AWOL).

Our records indicate that you have been advised that you failed to achieve a passing mark on the required rules and signals exams for QSOC re-certification on June 28th, 2005. You were [sic] to be held out of service until you re-write at MacMillan Yard.

Neither the crew office nor myself have been able to make contact with you. Messages have been left on your answering machine to contact us.

Your vacation was scheduled to start on July 13th, 2005, you will not be able to start your vacation until this issue has been straightened out.

You are required to contact this office at ... immediately.

With respect, the Arbitrator is left in some difficulty with what appears to be the retroactive cancellation of the grievor's vacation on August 4, 2005, by a letter which was, at best, drafted on or about July 21, 2005, well after the commencement of his scheduled vacation. The collective agreement provides, as found in article 78.11, that "... employees must take their vacation at the time allotted." Moreover, article 78.14 provides as follow:

**Rescheduling Vacation**

**78.14** An employee who is entitled to vacation shall take it at the time scheduled. Employees will be provided, upon 72 hours notice by the employee to the Crew Management Centre, the ability to move vacation date(s) by 3 days either way of the date scheduled to begin. However, if the Company re-schedules an employee's scheduled vacation dates other than at request of the employee, by mutual agreement with the employee or where the vacation is re-scheduled under paragraphs 78.12 and 78.13, the employee shall be given at least 3 weeks' advance notice of such scheduling and will be entitled to the following penalty payment.

**(a)** for each calendar day during the originally scheduled vacation period on which the employee performs service or is available for service, one-seventh of

one percent of the gross wages during the preceding calendar year, payable during the period of re-scheduled vacation dates;

**(b)** the re-scheduled vacation with pay to which the employee is entitled will be granted at a mutually agreed upon later date;

**(c)** this paragraph does not apply where re-scheduling is a result of an employee exercising his seniority to a position covered by another vacation schedule.

In light of the foregoing provisions, it is less than clear to the Arbitrator that the Company could unilaterally and *ex post facto*, without proper notice in accordance with article 78.14, advise the grievor that his scheduled vacation was no longer in place, and that he had, in effect, been absent without leave during a period for which he had in fact been scheduled for vacation. The Company has directed the Arbitrator to no provision of the collective agreement which effectively mandates that an employee's vacation is forfeit if he or she is subject to rules re-qualification. In the result, therefore, the Arbitrator cannot sustain the position of the Company to the effect that Mr. Joudwa was absent without leave for the period in question.

That is not to say, however, that the grievor's actions were not without attracting some degree of discipline. The fact remains that for a two-week period before the commencement of his vacation the grievor appears to have made no effort whatsoever to schedule his re-testing on the operating rules. In fact, it appears that during that time and until early August he remained unreachable by his employer. I am satisfied that he did have an obligation to remain available to the Company, at least to the point of the commencement of his vacation period, and to take reasonable efforts to re-schedule his rules certification. His failure to do so constituted a basic violation of his obligation of

availability to the Company, at a minimum for that period of time. In the result I am satisfied that the assessment of fifteen demerits for that incident would be sufficient in the circumstances, and I so direct.

The Arbitrator can find no basis upon which to conclude that the grievor was not deserving of some discipline for his failure to attend at the scheduled rules examination on August 29, 2005. He knew, or reasonably should have known, that that was arranged for him, as communicated to him during the course of a disciplinary investigation on August 16, 2005. The Arbitrator also has some difficulty understanding why the grievor would have dealt with a crew dispatcher concerning that examination date, given that he had no need to book off, as he was not then qualified to undertake any work whatsoever.

It would appear that the Company believed that the grievor was involved in a pattern of cynical and dishonest game playing. It is not necessary for the Arbitrator to go so far, albeit the Company's perspective is relatively understandable. In light of the adjustment of discipline for the events of late June and early July, discussed above, I am satisfied that thirty demerits would be the appropriate measure of discipline for the grievor's failure to appear at the appointed time for his rules exam. I am also satisfied that, notwithstanding the foregoing adjustments in demerits, the effect of which would reinstate the grievor to his employment with forty-five demerits on his record, this is plainly not a case for compensation, given the grievor's failure to be available and fully candid with his employer over an extended period of time.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for benefits or wages lost, and without loss of seniority. His disciplinary record shall stand at forty-five demerits.

May 15, 2006

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