CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3556

Heard in Montreal, Wednesday, 10 May 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Remedy grievance – violation of article 82 and workplace environment provision of the agreement 4.16.

JOINT STATEMENT OF ISSUE:

On January 9, 2006, Conductor Allison Bovair was required to attend a Company investigation in connection with "circumstances surrounding alleged failure to comply with CN's attendance management standards (AMS) by missing a call on January 1, 2006."

It is the Union's position that the Company blatantly violated the provisions of article 82 and the workplace environment provision found in agreement 4.16 with respect to these matters. The Union, as a result of this position, argues that an appropriate remedy be implemented in this case under provisions of Addendum 123 of agreement 4.16.

The Company disagrees.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. A. BEATTY	(SGD.) J. KRAWEC
GENERAL CHAIRPERSON	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

And on behalf of the Union:

R. A. Beatty	– General Chairperson, Sault Ste. Marie
M. A. Church	– Counsel, Toronto
J. Robbins	– Vice-General Chairperson, Sarnia
R. LeBel	– General Chairperson, Quebec
B. R. Boechler	– General Chairperson, Edmonton
C. Little	– Local Chairwoman, Belleville
A. Bovair	– Grievor

AWARD OF THE ARBITRATOR

The issue in the case at hand is whether the Company acted unreasonably, and in contravention of the "workplace environment" provisions of the collective agreement whereby it must exercise its rights reasonably, when it directed the grievor, Ms. Allison Bovair to attend a Company investigation for her "… failure to comply with CN AMS standards by missing a call on January 1st, 2006."

In support of its grievance the Union relies, in part, on observations made by the Arbitrator in **CROA&DR 3444**, including the following:

> The Arbitrator agrees that it is not open to the Company to engage in the harassment of employees by the abusive application of the strict provisions of the collective agreement. It is well established that collective agreements are deemed to have implied terms whereby they are to be interpreted and applied reasonably by both parties. If, for example, it could be shown that the Company dealt with an employee of twenty-five years' service with no prior record of any missed call by summoning that employee to a disciplinary investigation on the strength of a single missed call, it might well be argued that the very act of investigation amounts to an abuse of the Company's prerogatives under the provisions of the collective agreement. … To be sure, any record of such abuse would obviously give substance to a remedy grievance subsequently brought by the Union under the provisions of article 85 and Addendum 123 of the collective agreement. …

The Union maintains that because the grievor is an employee of seventeen years' service who has never previously been disciplined, it was unreasonable to summon her to a disciplinary investigation on the basis of the fact that she admittedly

missed a call on January 1, 2006. It is common ground that her explanation for missing the call was accepted by the Company and no discipline ensued.

The Arbitrator has some difficulty with the Union's position, given the specific circumstances of the case at hand. With respect, I cannot agree that the circumstances of Ms. Bovair would fall within the general example cited by the Arbitrator in **CROA&DR 3444**.

Firstly, the grievor is not an employee of whom it can be said that she has no record of previous missed calls. For the purposes of this hearing, however, that record is relatively slim. It does appear that she did miss a call exactly one year to the day prior to her missed call on January 1, 2006, that is to say on January 1, 2005. More significantly, however, the record discloses, beyond controversy, that the grievor has logged an unusually high level of absenteeism by reason of sickness. Over the past three years she has been absent by reason of illness on thirty-nine separate occasions for a total of eighty-four days. That represents an average of twenty-eight days per year of absenteeism by reason of illness. By any standard, that is a high level of absenteeism in any industrial setting. Indeed, the Arbitrator accepts the documentary evidence of the Company to the effect that Ms. Bovair was counselled in February of 2005 with respect to her high rate of absenteeism in the period between September of 2004 and January of 2005.

It should be stressed that there is no suggestion before the Arbitrator that there is any culpability with respect to the grievor's high rate of absenteeism. However, it is well established in arbitral jurisprudence that it is appropriate for an employer to monitor and deal with rates of absenteeism, including innocent absenteeism, in appropriate circumstances.

What, then, does the evidence disclose? In the first week of January of 2006 the Company was faced with an employee who missed a call on the statutory holiday of January 1st, 2006, in a manner identical to her having missed a call on the same statutory holiday the year previous. More significantly, the grievor has an overall attendance and absenteeism record which legitimately gives rise to a degree of vigilance.

There is no evidence before the Arbitrator to give insight into the precise thinking of the trainmaster or any other supervisors who decided to conduct the investigation which is the subject of this grievance. The fact remains, however, that overall there would be objective justification for conducting an investigation of a person with the grievor's overall attendance record. The evidence does not, in the Arbitrator's view, disclose an obviously arbitrary or unreasonable decision on the part of the Company to conduct the investigation following the grievor's failure to respond to a call on January 1, 2006. Nor, given her high record of innocent absenteeism, does the Arbitrator consider that it was inappropriate for the Company to give Ms. Bovair a written, non-disciplinary, note indicating that her attendance would be regularly monitored. While that message may have had an unfortunate impact on the grievor, it nevertheless falls within the

exercise of the legitimate prerogatives of the Company in dealing with an employee with a high rate of absenteeism.

For all of the foregoing reasons the grievance must be dismissed.

May 15, 2006

(signed) MICHEL G. PICHER
ARBITRATOR