

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

CASE NO. 3610

Heard in Calgary, Tuesday, 13 March 2007

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

The discharge of Mr. Rajinder Bajwa, Crew Dispatcher, for accumulation of demerits.

EX PARTE STATEMENT OF ISSUE:

Mr. Bajwa, a former operating employee, Yard Foreman, was transferred to employment under agreement 5.1 through accommodation as a Crew Dispatcher due to medical restrictions. He commenced employment under agreement 5.1 with on-the-job training on December 8, 2005. Mr. Bajwa's disciplinary record at the time of his transfer stood at 30 active demerits.

Mr. Bajwa booked sick for work shifts on December 10, 22 and 28, 2005. An investigation was conducted on January 3, 2006 with respect to those absences and his record was assessed with twenty demerits for "failure to protect assignments on December 10, 22 and 28, 2005".

Mr. Bajwa was additionally absent from work for the period December 30, 2005 to January 12, 2006. An investigation was conducted on January 12, 2006 concerning that period of absence and his record was assessed with a 14-day suspension without pay for "unauthorized absence since December 30, 2005 and your failure to comply with your supervisor's instructions to protect your assignment". Additionally, Mr. Bajwa was presented with a Continuing Employment Contract.

Mr. Bajwa was again absent from work on January 14 and 15, 2006. An investigation was conducted on January 19, 2006 concerning these absences and his record was assessed with 40 demerits for "failure to fulfill your employment obligations on January 14 and 15, 2006." The results of the discipline assessed for these investigations, when added to his previous disciplinary record, resulted in the grievor being dismissed for an accumulation of demerits, 90 in total, effective January 19, 2006.

The Union contends that the 20 demerit marks imposed on the grievor following the January 3, 2006 investigation is excessive, given the minimum number of absences. Additionally, given the grievor's employment history, the Union does not find this case is indicative of an employee behaviour that cannot or will not improve in the future. Lastly, the Union contends that another mitigating factor that must be considered is the grievor's length of service, almost 21 years and that this disciplinary record is not excessive.

The Union requests that Mr. Bajwa be reinstated under conditions which may include requiring that the grievor maintain an attendance level comparable with the average of his peers within the Crew Management function for a period of one or two years from the date of such reinstatement.

The Company considers the discipline to be warranted and appropriate and has declined the Union's request.

FOR THE COMPANY:**(SGD.) P. PAYNE****DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

P. Payne	Manager, Labour Relations, Edmonton
D. Brodie	Manager, Labour Relations, Edmonton
R. Froment	Manger, Crew Management Centre, Edmonton
S. Blackmore	Manager, Labour Relations, Edmonton

And on behalf of the Union :

D. Olshewski	National Representative, Winnipeg
S. Barwell	Local Chairpeson, Edmonton
R. Baiwa	Grievor

AWARD OF THE ARBITRATOR

A preliminary issue was raised by the Union as to whether the employee had ever filed a grievance for the 30 demerits assessed on January 5, 2005 for attendance irregularities while the grievor was a member of the United Transportation Union. I am satisfied that there is no outstanding grievance. The 30 demerits were assessed over two years ago and there is no information from the Employer's file to indicate a grievance was ever filed.

It is understood that, as of February 14, 2005, the grievor's permanent physical restrictions barred him from performing the essential duties of a Yard Foreman. The Yard Foreman position requires continued walking on ballast and having to climb ladders attached to freight equipment. The Employer tried to accommodate the grievor in an Intermodal Clerk position. The duties of an Intermodal Clerk are primarily sedentary in nature. After one month in an Intermodal Clerk position, however, it was agreed that the grievor was unable to satisfactorily perform the work associated with that position.

In the fall of 2006, the Employer was short of crew dispatchers within their Western Operations Centre necessitating immediate hiring. In a further attempt to accommodate the grievor, he was placed in training for the position of crew dispatcher. The grievor commenced his in-class training for the crew dispatcher position on November 14, 2005. Training for the position takes approximately one month and the grievor successfully concluded all modules of the classroom training on December 5, 2005. Classroom training is followed by approximately two weeks of on-the-job training under a qualified crew dispatcher.

The grievor's first on-the-job training shift took place on December 8, 2005. The grievor reported in sick to the Crew Management Centre on December 10, 2005 at 06:04, stating that he could not be at work that day for his 07:30 training shift. On December 15, 2005, the grievor requested further training. He met with his supervisor on December 20, 2005 to review his progress and it was agreed that the grievor would receive one further week of training. The grievor's seniority only allowed him to place himself in a spareboard position.

The events for the ensuing period are summarized below:

- December 22, 2005: the grievor advised the Company that he was sick and not available to work at his 07:30 training shift that day.
- December 26, 2005: the grievor's last training shift. The grievor selected the spareboard with the following day, December 27, 2005, as his weekly rest day.
- December 27, 2005: the grievor left a message on the Supervisor's phone line inquiring about vacation. Supervisor Rene Gallegos called the grievor back and explained to him that once he placed himself on the spareboard, his vacation would commence following his assigned rest day. At that point the grievor could properly assume that his vacation would begin in a week's time given that December 27, 2005 was his rest day. At 23:59 on December 27, 2005, the grievor called in sick, not booking back on as available for work until 11:20 on December 29, 2005. The Company determined that a formal investigation should be held given that this was the third time the grievor had phoned in sick within a twenty day period.
- December 29, 2005: at approximately 21:30, the grievor was called for a 23:30 assignment. At that time, he advised the caller that he needed to book off work on bereavement leave.

- December 30, 2005: at approximately 09:15, the grievor was advised that the relationship of the deceased (his mother-in-law's brother) did not qualify for bereavement leave. He was advised to contact Supervisor Ken Toews. The grievor contacted Mr. Toews and was advised that he was required to attend a formal investigation on January 3, 2006 for attendance management. He was also advised that no vacation or leave of absence could be granted as he was required to work.
- January 3, 2006: the grievor was assessed 20 demerits for failing to protect his assignments on three occasions: December 10, 22, and 28, 2005. Following the investigation, the grievor attended at the offices of Mr. Froment requesting two weeks vacation starting January 4, 2006. Despite the earlier advice from Supervisor Gallegos, Mr. Froment advised the grievor that he required time to consider the grievor's request given his absence since December 29, 2004 and the need to review as well his operational requirements.
- January 3, 2006: at approximately 12:50, Mr. Froment advised the grievor that his vacation was declined and to book back on to protect work no later than 07:30 on January 4. The grievor did not book back on for January 4. In a conversation with Mr. Froment later that day, the grievor stated that he had issues with the Company and considered that he was being harassed and bullied by the Company.
- January 9, 2006: the grievor, having accumulated 50 demerits, was given a Notice to Appear for an investigation on January 12, 2006 for his unauthorized absences since December 30, 2005. The grievor attended the investigation and was assessed a 14 day suspension without pay with time served from December 30, 2005 to January 12, 2006. He was also provided with a Continuing Employment Contract. The grievor met with the Company again on January 13, 2006 but declined to sign the contract at that time on the advice of his Union representative. The grievor was advised by the Company that he was expected to report for two retraining shifts on January 14th and 15th, 2006. He did not. The grievor received a Notice to Appear to attend for an investigation on January 19, 2006 for his latest two day absence.

On January 15, 2006: the grievor was issued 40 demerits for failing to protect his assignment on January 14 and 15, 2006. Having reached 90 demerits, the grievor's employment was terminated on January 19, 2006.

The grievor, a 21 year employee, does have a lengthy record of absenteeism with a combination of both booked sick time and WCB related injuries. As the Union noted, it is common ground that the grievor owns a driving school. The business is managed by a full-time person and his wife. The grievor's presence is not required, according to the Union, but he does partake in the business during his spare time, a fact not substantially disputed by the Company.

The Company's position is that it took on the grievor, despite his unenviable previous attendance record, as a crew dispatcher in an effort to accommodate his medical disabilities. The expectation was that the grievor would be present to perform his duties as and when required. The grievor's display of absenteeism failed to meet this expectation.

The Union submitted two objections claiming that the investigative hearings of January 3 and January 12, 2006 were not fair and impartial. Article 24.2 requires written notice stating that the time, place and subject matter of the investigation be provided to the Union and the employee 48 hours in advance of the investigation. The Union submits that no written notice was provided to the grievor or the Union of the January 3, 2006 investigation. The grievor was only advised by telephone on December 29, 2005 that he was required to attend an investigation on January 3, 2006. The Company's response is that the investigation was fair and impartial. In that regard, the Company submits that, although the grievor is entitled to written notice under article 24.2, there was no request made for an adjournment when the grievor and his Union representative, Ms. Barwell, appeared for the investigation on January 3, 2006.

The grievor's comments at the outset of the investigative hearing with respect to the notice are as follows:

Q.04 Have you been properly notified of this investigation and are you prepared to proceed?

A.04 No, I have not been properly notified but ready to proceed.

Let the record show that Mr. Bajwa was notified by Telephone on December 29, 2005.

Ms. Barwell did not make any comment or raise any objections at this point in the investigative hearing. The issue of notice arose again at the conclusion of the investigation, as noted below:

Q. 14 L/C Barwell, do you have anything further you wish to add to this investigation?

A. 14 Yes, the Union finds the Company handling of this matter including the handling of the notice to appear deplorable.

- Q 15 Mr. Bajwa, are you satisfied that this investigation has been conducted in a fair and impartial manner?
- A. 15 No.
- Q. 16 if no, why not?
- A. 16 I wasn't given proper notice to appear.
- Q. 17 L/C Barwell, are you satisfied that this investigation has been conducted in a fair and impartial manner?
- A. 17 Let the record speak for itself.

The verbal notice provided to the grievor by Mr. Toews on December 30, 2005 about the January 3, 2006 investigation was not in writing nor communicated to the Union as required under article 24.2. Given the clear and mandatory language set out in the collective agreement, the discipline of January 3, 2006 would normally be considered as void *ab initio*. The grievor, however, was asked directly if he was properly notified of the investigation and replied that he was not but that he was "ready to proceed". The grievor's unambiguous response that he was "ready to proceed", coupled with the Union representative's silence at that point, was a clear signal to the Employer that the investigation could continue. This Office has reviewed the question of the impact of a failure to object to a procedural lapse in the past (see, generally **CROA 2036, 2492 and 2911**). As noted in **CROA 2911**, the Union must register its objection in a timely manner or suffer the consequences of its inaction:

There is, however, a factor which would lead to a contrary result. It is not disputed that in the case at hand neither the grievor nor his Union representative made any clear and formal objection to the lack of meaningful notice at the time of the disciplinary interview. In the circumstances, I am compelled to conclude that by failing to put the Company on notice of its intention to challenge the validity of the proceedings, the Union must now be taken to have waived its right to do so. There is obvious prejudice to the Employer if a procedural objection of this kind is first raised at the arbitration stage, months after the assessment of discipline. On that basis the Union's objection cannot succeed. Hopefully, however, the Company will appreciate the need to give proper notice of the reasons for a disciplinary interview in future, particularly where the precise facts which prompt the interview are well known to the Employer.

The Union forfeited the opportunity to protest the lack of notice under article 24.2 when the grievor agreed, right at the beginning of the investigation, without any objection from his Union representative, that the hearing could proceed. Ms. Barwell's comment that the record could "speak for itself" at the end of the investigation was insufficient to put the Company on notice that the Union objected to the hearing taking place because of a lack of written notice of the investigation. Further, if there was any real concern on the part of the Union over the lack of notice, the Company would have been notified when the Step 3 grievance was filed on February 28, 2006. There is no concern expressed in the Step 3 grievance over any procedural irregularities, including any breach of the notice requirements set out under article 24.2. It is simply too late for the Union to raise this kind of procedural objection at arbitration having not raised it in a timely fashion at either the investigation or when the grievance was filed. The Union's objection that the January 3, 2006 discipline should be declared void *ab initio* is therefore rejected.

The Arbitrator also disagrees with the Union's assertion that the tapes of the interview should have been provided to the Company for the January 12, 2006 interview. The transcribed telephone conversation tapes were always ready and available to the Union should it have wished to access those materials. Indeed, the transcript of the investigation indicates that the proceedings were adjourned after the transcripts of the telephone discussions were provided to the grievor and Ms. Barwell for review. Ms. Barwell did not return from the adjournment and request the actual tapes of the telephone conversations in order to verify the accuracy of the transcripts. That request was not made until the end of the investigation when she was asked if she had anything to add which was relevant to the investigation:

At Q&A 32 the Union's representative stated, in part:

"... I want it noted for the record that the evidence presented, meaning the transcribed telephone conversations, that there was no way to validate the content and accuracy due to the actual conversations not being made available. ..."

It was incumbent, in the view of the Arbitrator, for Ms. Barwell to have come forward immediately after the adjournment to request the back-up tapes if she had concerns over the accuracy of the transcripts. It was too late to raise the objection at the end of the investigation after the grievor had already been questioned about those same telephone

discussions. Accordingly, the Arbitrator finds that the investigation conducted on January 12, 2006 was also fair and impartial.

The Company went out of its way to accommodate the grievor by assigning him to a new position as a crew dispatcher when the first accommodation position did not work out. Rather than try to co-operate with the Company, the grievor continued to be obstinate with a series of excuses for his non-attendance. The only mitigating factor in favour of the grievor throughout the whole retraining period concerns the mixed signals he received over his vacation entitlement. In that regard, the grievor was told by Supervisor Gallegos on December 27, 2005 that he could take his vacation following his assigned rest day once he had placed himself in a spare board position. Mr. Froment then turned down the grievor's request for operational reasons on January 3, 2006. Although the arbitrator does not wish to second-guess the company's decision to deny the grievor's vacation request on January 3, 2006, it remains that the grievor was told a week earlier by a supervisor that he would qualify for vacation leave after his assigned rest day.

Overall, the Arbitrator finds that the grievor displayed insubordinate behaviour from the time he began his training on December 8, 2006 through to his termination on January 19, 2006. The Arbitrator therefore finds that the Company had just cause to impose discipline effective January 3, 2006 (20 demerits), January 12, 2006 (14 day suspension) and January 15, 2006 (40 demerits which resulted in his termination on January 19, 2006 for accumulation of demerits).

The grievor's record stood at 30 demerits prior to these events. The discipline imposed effective January 3, 2006 of 20 demerits will remain for his failure to protect his assignment on December 10, 22 and 28, 2005 as will his suspension for 14 days (time served) for his unauthorized absence from December 30, 2005 and his failure to comply with his supervisor's instructions. The 40 demerits imposed on January 15, 2006 for his failure to report to work on January 14 and 15, 2006 will be substituted with a period of suspension from the date of his dismissal on January 19, 2006. The grievor's record therefore stands at 50 demerits as at the date of his reinstatement. In addition, the Arbitrator directs, as a condition of reinstatement, that the grievor maintain an attendance level comparable with the average of his peers within the Crew Management Centre for a period of two years from the date of his reinstatement.

March 28, 2007

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR