

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

CASE NO. 3761

Heard in Montreal, Wednesday, 13 May 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Discharge of Switchman Don Miller.

UNION'S STATEMENT OF ISSUE:

On November 23, 2007, the Grievor, Don Miller, was required to attend a Company investigation in connection with circumstances surrounding his; "failure to report on time for the start of your assignment, L55031 on November 14th 2007"

Subsequent to the investigation Mr. Miller was issued 30 demerits for the noted alleged failure and was thereafter advised, effective December 12th, 2007, that he was being discharged for accumulation of demerits under the Brown System of Discipline (Mr. Miller had accumulated 80 demerits). The accumulation of demerits, in addition to the 30 demerits as noted above, are as follows: 15 demerits – incident of June 23, 2006; 15 demerits – incident of July 14, 2006; and 20 demerits – incident of August 10, 2007.

The Company argues that other than the 30 demerits issued, they considered all other grievances untimely and abandoned by the Union.

On this point, the Union disagrees but in any event argues that the Arbitrator has the authority to extend time limits and the Union requests that the Arbitrator exercise such authority in these matters. The Union requests that the Arbitrator hear argument on the merits of all or any of the discipline assessed.

With respect to the issue of 30 Demerits, the Union submits that the Company blatantly violated; (1.) Article 82 of the Collective Agreement 4.16 (2.) The "Workplace Environment" provision of the 4.16 Collective Agreement. Given the blatant violations of the Collective Agreement, in addition to other relief requested, the Union submits that a Remedy, in the application of Addendum 123 of Agreement 4.16, is appropriate in the circumstances. The Union requests that the Arbitrator issue an appropriate Remedy. In the alternative, remit such matters back to the parties for purposes of reaching an agreement on an appropriate Remedy with a 30 day time period or as otherwise determined by the Arbitrator. That the Arbitrator retain jurisdiction to resolve such matters with respect to the appropriate Remedy to apply should the parties fail to reach agreement.

Further, the Union requests that; (1.) The Grievor be exonerated of any wrongdoing and the discipline assessed to be removed from his work record. (2.) The Grievor be returned to service without loss of seniority and compensated all lost wages and benefits. (3.) The Company to be found in violation of Article 82. (4.) The Company to be found in violation of the Workplace

Environment Provision of Agreement 4.16. (5.) The Company to be found to have harassed and intimidated the employee. (6.) The Grievor to be made whole as a result of such discharge. (7.) The Arbitrator to issue "cease and desist directives to the Company with respect to the violations of the Collective Agreement. (8.) Damages to be awarded to the Grievor as may be determined appropriate by the Arbitrator. (9.) Any other relief or alternative relief, in favour of the Union, as deemed appropriate in the circumstances.

The Company disagrees with the Union. [sic]

FOR THE UNION:

(SGD.) J. ROBBINS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Hogan – Manager, Labour Relations, Toronto
D. VanCauwenbergh – Director, Labour Relations, Toronto

And on behalf of the Union:

R. A. Beatty – Transition Director, Sault Ste-Marie
G. Gower – Vice-General Chairman, Belleville

PRELIMINARY AWARD OF THE ARBITRATOR

The Company raises a preliminary objection to the arbitrability, by reason of timeliness, of three grievances filed on behalf of employee Don Miller. The grievances in question concern the assessment of fifteen demerits for an incident on June 23, 2006, fifteen demerits for an incident on July 14, 2006 and twenty demerits for another incident on August 10, 2007. It is common ground that a further measure of discipline, totalling thirty demerits, was later assessed against the grievor by reason of which he was dismissed. The Company does not dispute the arbitrability of the fourth measure of discipline, the thirty demerits and resulting discharge, being arbitrated.

The Union does not dispute that the three grievances were progressed out of time. It maintains, however, that unique circumstances justify the extension of time limits by the operation of the Arbitrator's discretion in accordance with section 60(1.1) of the **Canada Labour Code**. That provision allows the Arbitrator to extend time limits, notwithstanding the provisions of a collective agreement

... if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

As the record discloses, all of the grievances were progressed in a timely fashion by the general chairperson responsible for them. That was the state of these grievances on February 14, 2007 when all of the Union's general chairpersons were removed from office during bargaining for the renewal of their collective agreement, at the instance of the international head office of the United Transportation Union. Following that removal, by correspondence dated April 16, 2007 the Company provided its responses to the Step 3 grievances, thereby triggering the time limits provided in article 84 of the collective agreement. It should be noted that it did so at a time when the newly installed executive authority of Union had executed a letter of understanding with the Company dated February 28, 2007 which allowed for an extension of sixty days from the date of the ratification of the terms of the new collective agreement for the progression of grievances to the Step 3 level and that for steps beyond that the period between

February 10, 2007 and the ratification of the memorandum of agreement would be excluded in the calculation of time limits. However, the fulfillment of that agreement became frustrated by the fact that there was no ratification of the memorandum of agreement. In fact the Union and Company were eventually legislated into a form of mandatory interest arbitration which eventually resulted in the handing down of the terms of their collective agreement. It should also be noted that following these events there was an eventual termination of the bargaining rights of the United Transportation Union and the certification of the current union.

In the Arbitrator's view these facts, particularly as regards the accumulation of demerits leading to the discharge of an employee, do provide a reasonable basis for an extension of the time limits. While the Company may argue that internal political struggles within a union should not be seen as a reasonable basis for an extension of time limits, the converse of that proposition is that the progressive discipline and eventual discharge of an employee should not lightly be placed beyond access to arbitration by reason of such "political" events beyond his or her control, particularly when there is no specific prejudice to the employer made evident in the material before the Arbitrator.

For the foregoing reasons the Arbitrator is satisfied that it is appropriate to allow an extension of time limits for the purposes of hearing, in full, the progressive discipline assessed against the grievor as relates to the three grievances in question. The preliminary objection of the Company is therefore dismissed. The case will be docketed for hearing of the grievances filed against the eighty demerits assessed for the incidents of June and July 2006 and August and November 2007,

May 19, 2009

(signed) MICHEL G. PICHER
ARBITRATOR

The dispute was ultimate resolved between the parties and no further award was issued.