

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

**CASE NO. 3778**

Heard in Edmonton, Wednesday, 10 June 2009

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The assessment of 20 demerits to Locomotive Engineer A. Mason October 03, 2008, for failure to protect assignment by missing a call and her subsequent discharge for accumulation of demerits in excess of sixty (60).

**JOINT STATEMENT OF ISSUE:**

On October 03, 2008, Locomotive Engineer Mason was called for train 874341-01 at 05:30 hrs however the Crew Management Centre did not receive a response and reported the grievor as missing a call for train.

The Company conducted an investigation of the incident and determined the grievor had failed to protect her assignment and was therefore subsequently assessed 20 demerits for her failure to protect assignment on October 03, 2008. The assessment of 20 demerits in this case resulted in Ms Mason accumulating a total of seventy (70) demerits on her discipline record. The Company issued a second form 780 discharging the grievor for accumulation of demerits.

The Union contends the grievor slept through the call, which was a completely acceptable reason after being absent from work for fourteen (14) months.

The Union also contends the grievor was not properly served discipline for an incident that occurred in August 2007 and therefore such discipline cannot exist on the grievor's record.

The Union requested the Company reconsider the discipline assessed and resulting discharge and expunge or drastically reduce the discipline. Ms. Mason should be compensated for all loss of wages or benefits.

The Company disagrees with the Union's contentions denied the Union's request.

**FOR THE UNION:**

**(SGD.) T. MARKEWICH**  
**FOR: GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) K. MORRIS**  
**FOR: DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. Crossan – Manager, Labour Relations, Prince George  
K. Morris – Manager, Labour Relations, Edmonton  
L. Cooper – Transportation Assistant, Winnipeg

P. Payne – Manager, Labour Relations, Edmonton

And on behalf of the Union:

M. A. Church – Counsel, Toronto

T. Markewich – Vice-General Chairman, Edmonton

A. Mason – Grievor

### **AWARD OF THE ARBITRATOR**

The procedural issue arising in this matter concerns the Union's objection to the twenty demerits assessed on October 11, 2008 for the grievor's failure to protect her assignment from April 13, 2007 to August 12, 2007. The investigation into this incident was held on August 17, 2007 and twenty demerits were assessed by the Company subsequent to the investigation. The evidence is that the Form 780 assessing the twenty demerits was actually prepared in the Company's system on August 21, 2007. The grievor, however, was off work due to illness from August 24, 2007 through to March 6, 2008 and, as a result, she was not served with the Form 780 discipline within the 28 days set out in article 86.1. After several options were discussed, including service by registered mail, an agreement was struck between Transportation Assistant Cooper and Local Representative Dance, prior to the expiry of the time limits, to extend the time limits for service until the grievor returned to work from her illness leave.

The grievor remained off work through the Fall of 2007. The grievor's continued absence from work through the Fall of 2007 caused the Company to decide that the Form 780 should be served by registered mail and an attempt was made to do so on November 22, 2007. The registered letter was returned "unclaimed" from the grievor's

last known address. The grievor, in that regard, never provided a change of address form to the Company until November 9, 2008.

The grievor returned to work on March 7, 2008 and was assigned modified duties training new employees. The grievor was on vacation from April 12, 2008 to April 24, 2008. She returned to work until April 26, 2008 when she had to undergo surgery in order to repair her earlier injuries. She remained off work on illness leave until September 28, 2008. The grievor, upon her return, worked one extended run and then missed a call on October 3, 2008 for which she was assessed the most recent discipline of twenty demerits. It was not until October 4, 2008 that Ms. Cooper was made aware of the grievor's return to work through a report in the CATS system of her missed call the previous day. Ms. Cooper then made arrangements to serve the grievor with the outstanding August 2007 Form 780 on October 11, 2008

The Union submits that the Company had numerous opportunities to serve the grievor during the six week interval between March 7, 2008 and April 26, 2008 with the August 2007 Form 780 but failed to do so. The Company asserts that the underlying facts disclose the Company's genuine attempts to deliver the Form 780 and that, despite the late service of the discipline, the Company complied with the requirements of article 86.1 as a result of the agreement with the Union to serve the grievor after she returned from illness leave.

As noted in **CROA 1696**, the language of article 86.1 has been construed as being directory only given the absence of an express penalty clause setting out the consequences of a failure to abide by the time limits. The arbitrator notes:

... In the arbitrator's view it would require clear and specific language to conclude that in this context the parties intended a strict application of the time limits, failing which the Company would forfeit its ability impose discipline for misconduct, however serious. **Moreover, although this aspect of the case was not argued, the Arbitrator would seriously doubt that the Union could refuse to agree to an extension of the time limits for other than reasonable and defensible motives. It is at least arguable that that much may be implied from the terms of article 86.1. ...**

In this case, the grievor was off work from August 24, 2007 through to March 6, 2008, some eight months, due to illness. The parties had, in light of the grievor's circumstances, entered into an agreement to extend the time limits and serve the grievor when she returned to work. Although the grievor returned to the workplace on March 7, 2008, it was not to her previous assignment but rather to modified duties. It was not unreasonable in my view for Ms. Cooper to be unaware of the grievor's return to the workplace given that she had not returned to her previous assignment. The grievor was also away for 12 days during that same time on vacation. Indeed, the grievor herself acknowledged her extended absence during her employee statement at Q & A 7 when asked the reason for her missed called on October 3, 2008. She replied: "I had been off work for 14 months and just returned on September 29, 2008". The Company in my view fulfilled the bargain struck with the Union concerning the extension of time limits on the August 2007 discipline by acting appropriately to serve the grievor with the Form 780 once Ms. Cooper became aware that the grievor had returned from illness leave through the CATS notice. The assessment of twenty demerits for the

grievor's failure to protect her assignment from April 13, 2007 to August 12, 2007 therefore stands as recorded discipline on the grievor's record.

In terms of the grievor's failure to protect her assignment by sleeping through her call on October 3, 2008, I accept the position of the Company that it was incumbent on the grievor to report to work and that her personal circumstances, including the fact that she was just away on illness leave for some 14 months, is insufficient reason to justify her absence. On that basis, there is cause for discipline. In terms of penalty, I note that the grievor has lived through a difficult time with many personal challenges in more recent years. She has twenty years of service with the Company and it is my view that she should be granted another opportunity to demonstrate that she can again provide valuable service to the Company as a locomotive engineer. Accordingly, the grievance is allowed, in part. The grievor shall be reinstated into her employment without compensation and without loss of seniority.

June 25, 2009

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