

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

CASE NO. 3798

Heard in Montreal, Wednesday 9 September 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

UNITED STEEL WORKERS (LOCAL 1976)

DISPUTE:

Appeal of the assessment of 30 demerit marks to Employee "A".

JOINT STATEMENT OF ISSUE:

On January 7, Employee A attended an investigation in connection with the information she provided to the Company during investigations that took place on June 13 and December 29, 2008. Following this investigation, the Company assessed Employee A's record with 30 demerit marks for providing untruthful and misleading information regarding her employment relationship with Air Canada while being employed by Canadian Pacific.

It is the Union's position that the assessment of discipline was unjust as there was no evidence that Employee A ever missed work at Canadian Pacific to work at Air Canada.

The Union requests the removal of the 30 demerit marks from Employee A's file.

The Company disagrees and denies the Union's request.

FOR THE UNION:

(SGD.) R. PAGÉ
STAFF REPRESENTATIVE

FOR THE COMPANY:

(SGD.) J. DORAIS
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

V. Anderson	– Assistant Labour Relations Officer, Calgary
D. J. Corrigan	– Labour Relations Officer, Calgary
J. Dorais	– Manager, Labour Relations, Calgary
M. Clayton	– Manager, Appointments & Dispatch,
M. Thompson	– Labour Relations Officer, Calgary

And on behalf of the Union:

S. Hadden	– Chairman of the Board of Trustees, Montreal
M. Raïche	– Projects and Group Insurance Executive, Montreal
Employee A	– Grievor

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that the Company had reasonable concerns for what appears to have been a long-standing and chronic problem of absenteeism and tardiness on the part of the grievor, who was employed on a part-time basis as an Intermodal operations representative at the Toronto Central Parkway. On June 13, 2008, the Company conducted a formal investigation into her unsatisfactory rate of attendance at work. During the course of the investigation she was asked whether she was employed by any company other than Canadian Pacific to which she replied "No". In fact the grievor had part time employment with Air Canada as a ticket agent, albeit she was on a one-day leave of absence on the day of the Company's investigation, and was facing a likely layoff by reason of impending layoffs at Air Canada at the time.

The record discloses that at the time she was hired by the Company did indicate that she was employed at Air Canada. The Union's representative suggests that the fact that she continued to work at Air Canada was known to her supervisors. Indeed, sometime later in the year, on or about November 28, 2008, Employee A requested Company administrators to release her H.R. time records to a Union official who represented her as an employee of Air Canada. Based on the inconsistency between that request and the answer given in the investigation of June 13, 2008, the Company reconvened an investigation during which the grievor confirmed that in fact she did work for Air Canada, albeit she did not feel that she had been dishonest in her earlier answer to the Company.

The Company obviously did not agree and assessed thirty demerits against Employee A, an amount which, coupled with the forty-nine demerits then on her record placed her in a dismissible position. It also assessed twenty demerits against her for her continued absenteeism, a matter that is the subject of another award (**CROA&DR 3799**).

Having reviewed the facts the Arbitrator can readily understand the Company's concern. I cannot agree with the suggestion of the Union's representative that the question concerning whether the grievor held outside employment was improper or irrelevant to the Company's investigation. It would seem to the Arbitrator that it was entirely correct for the Company to attempt to determine whether there was some dimension of the grievor's life external to the workplace which was contributing to an obviously unacceptable rate of absenteeism and tardiness.

The Arbitrator has greater difficulty, however, with the Company's characterization of the grievor's answer to the question as an outright lie in an attempt to mislead the Company. On the date of the investigation the grievor was in fact on leave from her employment, and was facing the possibility of an imminent layoff. While the brevity of her one-word answer may not have been sufficiently responsive, by the same token the Company made no specific follow-up and did not mention her employment with Air Canada, in particular. However the grievor may have conceived of her part time endeavours at Air Canada, the Arbitrator is not persuaded that the Company has discharged its burden of proving that her response to the employer was intended to be deliberately deceptive. Indeed, that is highly doubtful given her open request, some time later, to have some of her employment information forwarded to her Union representative at Air Canada.

With respect to the issue of discipline, however, I am satisfied that the Company was justified in viewing the grievor's answer as unresponsive to the point of meriting a disciplinary response. The assessment of thirty demerits, resulting in the grievor's discharge is, however, excessive in my view, given all of the circumstances, some of which are explored in **CROA&DR 3799**, heard in tandem with this grievance. For reasons further elaborated within that award, the Arbitrator determines that the thirty demerits in the instance case should be removed from the grievor's record, with a substitution of a suspension extending from the date of her termination to the date of her reinstatement by the order of this Office, such suspension to be attributable in equal part to her failure to respond fully and clearly to the question put to her during the investigation of June 13, 2008 as well as her absenteeism record, the subject of **CROA&DR 3799**, and subject to the conditions described within that award.

14 September 2009

(signed) MICHEL G. PICHER
ARBITRATOR