

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

CASE NO. 3804

Heard in Montreal, 10 September 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The discipline and subsequent dismissal of Daniel Brunet effective January 14, 2008.

COMPANY'S STATEMENT OF ISSUE:

On July 26, 2007, Mr. Brunet was assessed 25 demerits for his absenteeism between April 19 and July 26, 2007.

Effective August 7, 2007, Mr. Brunet was assessed 20 demerits for booking, without authorization, a bereavement leave not covered by his collective agreement.

Effective September 11, 2007, Mr. Brunet was assessed a written reprimand for his absenteeism since September 11, 2007. [sic]

Effective December 21, 2007, Mr. Brunet was investigated on the circumstances surrounding his failure to attend two investigations on November 28. In his formal statement the grievor explained that he was under medical treatment as the reason for not attending the two scheduled investigations. The grievor further explained that he was under the care of his doctor but was not prepared to provide medical certificates claiming his right to do so under PIPEDA. As a result of this hearing, Mr. Brunet was assessed 25 demerits effective November 28, 2007.

The above discipline led to the employee's dismissal effective January 14, 2008, for accumulation of 70 demerits.

The Union contends that the discipline assessed in each case is excessive and unwarranted and requests that the grievor be reinstated with full seniority and compensation for all time lost.

Given the grievor's extensive discipline history, it is the Company's position that the discipline was warranted and in line with the Brown system of discipline and so the Company has rejected the Union's appeal.

FOR THE COMPANY:

(SGD.) A. DAIGLE
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

A. Daigle	– Manager, Labour Relations, Montreal
D. Gagné	– Manager, Labour Relations, Montreal
R. Decarufel	– Superintendent, Quebec City

There appeared on behalf of the Union:

J. Robbins	– General Chairman, Sarnia
S. Pomet	– Local Chairman, Montreal
B. Boechler	– General Chairman, Edmonton
P. Vickers	– General Chairman, Sarnia
R. Calowell	– Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The reasons in this award relate to four separate heads of discipline registered against the grievor, three of which fall under previous files of this Office (**CROA&DR 3801, 3802 and 3803**). The first grievance concerns the assessment of twenty-five demerits for the absenteeism of Conductor Daniel Brunet between April 19 and July 26, 2007. The second concerns the assessment of twenty demerits for booking a bereavement leave without proper authorization, as assessed on August 7, 2007. The third relates to a written reprimand for the grievor's absenteeism on September 11, 2007. Lastly, Mr. Brunet was assessed twenty-five demerits effective November 28, 2007 for his failure to attend two investigations which were scheduled on November 28, 2007. As a result of the accumulation of seventy demerits the grievor was dismissed from service.

For the purposes of this award it is common ground that the grievor's record should be viewed as having been clear at the time of the first discipline assessed against him, namely the twenty-five demerits for absenteeism registered on July 26, 2007.

The grievor is an employee of some twenty-four years' service. As his disciplinary record reflects, he has a long record of recidivism with respect to problems of absenteeism, dating back as far as 1988. However, there were periods of time during which he seems to have overcome problems at work and registered discipline free years of service. It emerged from the material before the Arbitrator that in the period 2006 and 2007 the grievor had substantial personal problems as well as serious medical issues. It does not appear disputed that he was separated from his wife, by reason of which he was left with the custody of his daughter. He also suffered an extensive period of clinical depression for which he received medical attention and both short term and long term disability benefits. The unchallenged representation of the Union is that those difficulties are now behind him and that he is physically fit to work without restriction. Its representative submits that his problems of absenteeism should not recur.

Upon a review of the files before me, I am satisfied that in each of them the Company did have just cause for the assessment of some discipline. The record reveals that the grievor did absent himself, frequently without proper notice to the Company, for extensive periods of time. It is also clear that he booked himself on a bereavement

leave to which he had no entitlement, upon the death of his aunt, albeit he made no attempt to explain the circumstances or obtain a compassionate leave from the appropriate supervisor. The fact that he did not claim payment for the leave in question is of little consequence, it being clear that he obviously arrogated to himself the decision to take the leave which he did, without authorization. It is also clear to the Arbitrator that the grievor did fail to properly notify the Company reasonably in advance of the investigations of November 28 that he would not be in attendance. Indeed, while he maintained that he was physically unfit for those investigations, he produced no medical note or certificate to substantiate that claim. While he may have been on a medical leave of absence at the time, that of itself would not render him unable to attend an investigation as scheduled, much less would it give him the right to give no prior notice to his employer that he would not be appearing as scheduled, or to assert a claim of medical incapacity without some documentary support.

For the reasons related above, I am satisfied that in all instances of the four heads of discipline, the Company did have just cause for the imposition of some discipline.

There are mitigating factors, however, that can be taken into account. There appears to be no challenge to the Union's representation, and indeed certain medical evidence presented at the hearing, that the grievor did suffer medical disabilities for which he received extensive care and medication. As indicated above, the Union's

representations are that the grievor is now well and able to fully return to work, no longer being under medical care for depression.

The Union raised challenges to the fairness of the disciplinary investigations which were conducted by the Company into the grievor's problems of absenteeism. Among other things, it submits that too great a time period elapsed before the investigations were conducted. The Arbitrator cannot agree. I am satisfied that in each case it was appropriate for the Company to examine a relatively extensive period of time during which absences occurred, there being no other realistic basis upon which it could deal with what was essentially an unacceptable pattern of absenteeism. Nor is there any real indication that the grievor was unable to respond appropriately or deal with the questions put to him in the various investigations with respect to each of his periods of absence. Nor, in my view, does the involvement of the grievor's supervisor in the events of his booked bereavement leave, as the officer who conducted the subsequent investigation, particularly problematic. There was, very simply, no conflict on the facts and no meaningful basis for an allegation that there was a failure of a fair and impartial investigation. Nor can the Arbitrator accept, as suggested by the Union, that the grievor was told that if he produced documentation in respect of his aunt's funeral that he would be relieved of any further disciplinary investigation. That is simply not made out on the documentation before me.

What, then, is the appropriate result? Clearly, in my view, the grievor's twenty-four years of service and the accommodation to which he was entitled by reason of his

medical condition of clinical depression must be viewed as substantial mitigating factors. By the same token, the Company has endured an employee who, in the last seven years of his employment has registered a rate of absenteeism of some 57%. That is obviously unacceptable and the Company need not be required to tolerate any such absenteeism in the future. However, I am satisfied that an order of reinstatement on conditions fashioned to protect the Company can be made in the case at hand, giving the grievor a final opportunity to demonstrate that he can be faithful in his attendance at work.

For the foregoing reasons the Arbitrator determines that for the discipline assessed July 26, 2007 the Company shall amend the grievor's record to reflect five demerits. It shall likewise amend the grievor's record to reflect the assessment of ten demerits for the discipline imposed on August 7, 2007. The written reprimand shall remain on the grievor's record. Finally, fifteen demerits shall be substituted for the demerits assessed on November 28, 2007 for having failed to attend the two scheduled investigations. In addition, the period between the grievor's termination and his reinstatement by this award shall be recorded upon his record as a suspension for the cumulative impact of all of the foregoing heads of discipline. Mr. Brunet shall therefore be reinstated into his employment forthwith, without compensation for wages and benefits lost and subject to his accepting the following conditions: firstly he shall be reinstated into active service only after he has successfully passed such medical examination as the Company may determine is appropriate. Secondly, for the first two years following the grievor's reinstatement he shall register a rate of attendance at work

which is no less than that of the average of his peers. Should he fail, during any quarter during that two year period calculated, on a rolling basis, to register a rate of attendance equal to or better than his peers, he shall be subject to immediate dismissal, with recourse to arbitration only for the purposes of determining the grievor's attendance and the average attendance of the other employees.

September 18, 2009

(signed) MICHEL G. PICHER
ARBITRATOR