

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

CASE NO. 3817

Heard in Calgary, Tuesday, 10 November 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of fifteen demerits and resulting discharge for accumulation of demerits in excess of sixty to Conductor Mark Gibson of Edmonton, AB.

UNION'S STATEMENT OF ISSUE:

The grievor, Mark Gibson, was required to provide an employee statement with respect to alleged attendance irregularities November 1st to November 16th, 2008. During the investigation the Company produced evidence with respect to the grievor booking sick on one occasion and missing a call on another. The grievor provided medical information with respect to booking sick and mitigating circumstances regarding the missed call.

The Union submits that there was no cause for discipline with respect to booking sick and that the Company failed to consider the mitigating factors surrounding the missed call in the assessment of discipline.

Accordingly, the Union requests that the discipline be expunged or otherwise reduced to a level which would not result in the discharge of the grievor, and that he be made whole. In any event, the Union submits that discharge is not warranted in all of the circumstances.

The Company disagrees with the Union's position and has declined the grievance.

FOR THE UNION:

(SGD.) R. A. HACKL

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Prince George

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
R. Thompson	– Vice-General Chairman, Edmonton
W. MacLeod	– Local Chairman, Kamloops
J. Dwyer	– Local Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied that the grievor did improperly miss a call on November 15, 2008, apparently by reason of some malfunction in his home telephone system. As it is obviously the employee's responsibility to remain available and reachable for the purposes of any call, the Company was justified in considering that discipline was deserved for that incident. As Mr. Gibson's disciplinary record then stood at fifty-nine demerits, the assessment of fifteen demerits led to his dismissal from the Company for the accumulation of demerits in excess of sixty.

There is, however, some question as to the notice of discipline which was ultimately issued by the Company. As indicated in the statement of issue he was disciplined for "... attendance irregularities November 1st to November 16th, 2008 ...". In fact it emerged before the Arbitrator, the grievor missed his tour of duty on November 3, by reason of illness. It does not appear disputed that he was in fact ill and obtained a doctor's certificate in respect of that absence, following which he properly booked back on effective November 4. In the result, the Arbitrator is compelled to conclude that part of the reason stated for the grievor's discharge in the form 780 notice of termination which was communicated to him was entirely without merit.

What remains, therefore, is the discharge of an employee of some twenty-five years' service for having missed a single call. Further, it is not disputed that the grievor himself noticed a call waiting light on his telephone shortly after the missed call, apparently caused by his telephone ringer having been silenced, and that he called the crew dispatcher within minutes of the missed call to confirm his availability, although it was then too late as another employee had been reached and assigned.

The Company stresses that the grievor has had an extensive disciplinary record, and that that record stood at fifty-nine demerits at the time of incident in question. Mr. Gibson's record includes his prior termination and reinstatement by this Office in **CROA 3438**.

While the Arbitrator can appreciate the Union's concern given what appears to be a relatively minor error of having missed a call, a close review of the material causes substantial concern with respect to the grievor's ongoing employability. It should be noticed that in addition to the discharge referred to above, Mr. Gibson suffered an earlier discharge from which he was reinstated by virtue of an ongoing employment agreement negotiated with the Union. For some seven years, since at least 2002, his employment record appears to have stood at fifty-nine demerits. If he had maintained a clear disciplinary record from that time to the present there might be compelling reasons to relieve against the harshness of the consequences of the culminating incident. However, as appears clear from the record, the Company took great pains to tolerate the grievor's continuing work performance failures between 2002 and 2008, when he was discharged. Notably, during that period he suffered four suspensions, including the discharge reduced to a suspension by the Arbitrator, six written reprimands and a demotion which restricted him from working as a conductor for a period of one year. His work record during that critical period includes several rules violations, unsafe work practices, occasioning a delay to his train, submitting an irregular time claim and repeated problems with respect to attendance and the violation of attendance management standards.

It goes without saying that the Brown system of discipline is intended to communicate to an employee, by the imposition of graduated degrees of discipline in a progressive fashion, the need for him or her to correct any failings in work performance or attendance issues. The material before the Arbitrator confirms that the Company has adhered to principles of progressive discipline, apparently to no avail, over a substantial period of years. When the administration of demerits apparently failed to convey to the grievor the seriousness of his situation, to the point of his arriving at a total of fifty-nine demerits, the Company repeatedly issued further discipline in such a way as to avoid his termination, using repeated reprimands over a period of some six years, still without ultimate success. In the face of such an unenviable record, and the unavoidable conclusion that the missed call was deserving of discipline, the Arbitrator can see no responsible basis upon which to reverse the Company's decision.

For all of the foregoing reasons the grievance must be dismissed.

November 18, 2009

(signed) MICHEL G. PICHER
ARBITRATOR