

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

CASE NO. 3863

Heard in Montreal, Wednesday, 10 February 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal the assessment of a 43 day suspension to Locomotive Engineer B. Irving for: "attendance irregularities July 14th through September 16th, 2008" and a written reprimand for "failure to appear for a Company initiated statement on September 22 or September 24, 2008".

UNION'S STATEMENT OF ISSUE:

On September 25, 2008, Mr. Irving was required to attend an investigation into his work record for the period from July 14, 2008 to September 16, 2008. As a result of the investigation Mr. Irving was initially assessed 15 demerits on October 2, 2008. As a result of the assessment of 15 demerits Mr. Irving also received notification of a discharge for an accumulation of demerits, also on October 2, 2008. On November 5, 2008, Mr. Irving's discharge was modified to reflect a 43 day suspension fro September 22, 2008 to November 5, 2008.

In this matter the Union contends that the Company did not take into account mitigating circumstances surrounding Mr. Irving's requirement to be unavailable including illness and being under a doctor's care.

On September 29, 2008, Mr. Irving was required to attend an investigation into his alleged failure to attend a company initiated statement on September 22 or 24, 2008. As a result of the investigation Mr Irving was assessed a further 15 demerits on October 2, 2008. On November 5, 2008, Mr. Irving's discipline was modified to reflect a written reprimand for the alleged failure to attend a company initiated statement.

In this matter the Union contends that the Company did not take into account mitigating circumstances and that the Company was aware of the reasons prior to the actual investigation taking place.

The Union requested that the Company reconsider the discipline assessed and expunge or, in the alternative reduce, the discipline and compensate Mr. Irving for all loss of wages and benefits.

The Company disagrees with the Union.

FOR THE UNION:

(SGD.) T. MARKEWICH

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

- P. Payne – Manager, Labour Relations, Edmonton
- D. Brodie – Manager, Labour Relations, Edmonton
- K. Morris – Sr. Manager, Labour Relations, Edmonton

And on behalf of the Union:

- M. Church – Counsel, Toronto
- B. Willows – General Chairman, Edmonton
- T. Markewich – Sr. Vice-General Chairman, Edmonton
- R. Leclerc – General Chairman, CN Lines East, Grand-Mère
- R. Irving – Grievor

AWARD OF THE ARBITRATOR

The instant grievance concerns two heads of discipline: a 43-day suspension assessed against Locomotive Engineer R. Irving for his attendance problems in the period July 14 through September 16, 2008 and, secondly, a written reprimand for his failure to have appeared for Company investigations scheduled for September 22 and September 24, 2008. As reflected in the Union's *ex parte* statement of issue, in fact the grievor was initially discharged by the Company for his attendance performance and assessed 15 demerits for failing to appear at the disciplinary investigations of September 22 and September 24, 2008. Those penalties were reduced to a 43-day suspension, allowing the grievor to return to his employment, with his failure to appear at the investigations resulting in a reprimand, rather than fifteen demerits. Those reduced amounts of discipline are challenged in the instant grievance.

Having reviewed the evidence the Arbitrator is satisfied that while the grievor did have a high rate of absenteeism in the period reviewed, his attendance problems were occasioned by a physical disability and related illness for which he did seek medical

attention on a regular basis. The record discloses that the grievor suffers from sleep apnea, a condition which was at all times fully disclosed to the Company's medical department. That condition required him to make use, while sleeping, of a CPAP machine and facial mask. By the grievor's own admission, his machine had mechanical problems and should have been repaired. A number of his absences were, it appears, attributable to that fact. There were also other medical issues. At one point in time, apparently in August of the period under review, he suffered hernia problems, a condition which was ultimately resolved by surgery.

As relates to the grievor's failure to appear at the investigations, the evidence would indicate that he initially asked for a rescheduling of the investigation scheduled for September 24, 2008 because he had a medical appointment on that date. That was agreed to, with his hearing being rescheduled to September 22. However, by reason of the fact that he worked to an extremely late hour in early morning of that day, he decided that he was too tired to attend the investigation. When he did not in fact do so, according to the Company's representatives, an arrangement was made for him to in fact attend on the 24th, as originally scheduled, but only after the completion of his medical appointment. It appears that he did not carry out that understanding, and that his investigation was in fact ultimately held on September 25, 2008.

In reviewing the above, the Arbitrator has some difficulty with the Company's position as regards the grievor's record of attendance. To put it simply, employees cannot be disciplined or punished for being ill or physically unfit to work. If it could be shown that the grievor's claims of illness or unfitness for safety sensitive work were false, the position of the employer would obviously be more compelling. On the material

before me, however, I am satisfied that the grievor's absences from work were, as he claims, due to his physical condition, for the most part relating to his problem of sleep apnea. That, it seems, was somewhat aggravated by the fact that he allowed his corrective breathing equipment to fall into disrepair.

Would that situation justify a 43-day suspension of a person earning the wages of a locomotive engineer? I think not. In the Arbitrator's view the appropriate reaction of the Company should have been to provide to the grievor a written reprimand, to the extent that his own apparent negligence in not maintaining his CPAP pump in good condition did contribute to his attendance problems and must be immediately corrected. Beyond that, however, I have considerable difficulty in seeing how a suspension in excess of forty days can be justified for an employee who, to that point, had thirty-three years of service with no discipline for any rules infractions and demerits previously awarded on only five occasions, apparently for attendance issues. I am satisfied that the suspension of the grievor was disproportionate, particularly having regard to the fact that his absences were due to illness and *bona fide* unfitness to work. Whether his inability to work on a consistent and regular basis is so serious as to merit the termination of his services for innocent absenteeism is a question which the Company has simply not brought forward, having chosen to deal with the grievor on a disciplinary basis. Given that the grievor's absences are due to illness, I am satisfied that, at most, a reprimand might have been appropriate to remind the grievor of the importance of maintaining his CPAP machine in good condition, so as to control his problem of sleep apnea. Beyond that I can see no misconduct deserving of discipline.

The Arbitrator comes to a different conclusion as regards the written reprimand assessed against Locomotive Engineer Irving for having failed to attend the disciplinary investigations which were scheduled. While he may have had a valid excuse, as it is clear that he would be entitled to adequate rest before being required to be at an investigation, the record is devoid of any attempt on the part of the grievor to so advise his employer in advance of his failure to appear. It goes without saying that it is the first obligation of an employee to keep his or her employer apprised on any circumstance which might cause the employee to miss an appointment of some importance with his or her employer. On that basis I am satisfied that a written reprimand is appropriate.

The grievance is therefore allowed, in part. The Arbitrator directs that the 43-day suspension assessed against the grievor be removed from his record forthwith, to be substituted by a written reprimand. Mr. Irving shall be compensated for all wages and benefits lost. Additionally, for the reasons expressed above, the written reprimand for his failure to attend investigations on September 22 and September 24, 2008, shall stand.

February 19, 2010

(signed) MICHEL G. PICHER
ARBITRATOR