

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4201

Heard in Montreal, April 11, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

**TEAMSTERS CANADA RAIL CONFERENCE
CONDUCTORS, TRAINPERSONS, YARDBPERSONS**

DISPUTE:

Appeal of the assessment of 30 demerit marks to Conductor Robert Jansen of Winnipeg, Manitoba, assessed on account of his work record between October 27, 2010, and February 16, 2011, and his resulting discharge for accumulation of 60 demerit marks.

COMPANY ExPARTE STATEMENT OF ISSUE:

On April 28, 2010, Mr. Jansen returned to active service following his discharge, subsequently converted to a lengthy suspension. On February 11, 2011, Mr. Jansen was notified to appear at an investigation into his work record between October 27, 2010, and February 16, 2011. Following the investigation the Company determined that Conductor Jansen was deserving of discipline, and the Company subsequently assessed him with 30 demerit marks for his work record between October 27, 2010, and February 16, 2011, and discharged him for having accumulated 60 demerit marks. The Union disagrees with the discipline/discharge assessed to Mr. Jansen and has requested that he be reinstated and made whole. The Company rejected the Union's grievance as untimely and, therefore, improper pursuant to Article 121.1 of Agreement 4.3. The Company also disagrees with the Union's contentions.

**FOR THE UNION:
(SGD.)**

**FOR THE COMPANY:
(SGD.)D. Brodie
For K. Madigan
VP Human Resources**

There appeared on behalf of the Company:

D. Brodie	– Manager Labour Relations, Edmonton
K. Morris	– Senior Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
R. Hackl	– General Chairman, Saskatoon
R. Thompson	– Vice General Chairman, Saskatoon
R. Donegan	– Vice General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The Company raises a preliminary issue with respect to the arbitrability of the grievance. Its representative submits that the grievance was in fact submitted some three weeks late, beyond the time limits contemplated within the grievance procedure, as outline in Article 121 of Collective agreement 4.3. In the Arbitrator's view this is an appropriate case for the exercise of my discretion to extend the time limits, as contemplated under Section 60 (1.1) of the **Canada Labour Code**. As reflected in the award of this office and CROA 4017, where reasonable grounds are demonstrated for an extension of time limits, and no undue prejudice will result to the other party, an Arbitrator should exercise the discretion to allow that extension. The case at hand concerns a discharge. The consequences are obviously of the most serious kind for the grievor. Conversely, the delay of three weeks beyond the time limits contemplated under the Collective agreement does not, in my view, work any substantial prejudice to the Company, if the matter of the grievor's very job security is to be reviewed at arbitration. Any significant prejudice to the Company can be avoided by ensuring that an order of compensation, if any is made, should exclude the period of delay attributable to the Union's action. For these reasons I consider it appropriate to extend the time limits and treat the matter as being arbitrable.

The grievor is an employee of some five years of service. During that time he has attracted discipline for attendance issues and missed calls. In October of 2007 he was assessed fifteen demerits for an attendance management problem, including two

missed calls. Subsequently, he was again assessed fifteen demerits for attendance issues, including missed calls, in June and July of 2010.

Notwithstanding the above record, the grievor did continue to record problems with respect to missed calls. A review of his record between October 27, 2010 and February 16, 2011 confirms that during that period he recorded five missed calls. Although it appears that he was also absent on some three occasions by reason of illness, I am satisfied that there was no basis for the assessment of any discipline against him for that, nor is it clear from the documents before me that his illnesses were held against him by the Company. I am inclined to conclude that the instant case goes forward on the basis of the employer having assessed thirty demerits against the grievor for his five missed calls.

The Arbitrator can understand the Company's concern. In fact, given the grievor's absence by reason of a previous discharge which was eventually commuted to a suspension, he had little more than two years and nine months of active service at the time of his termination.

I am nevertheless satisfied that it is appropriate to give this young employee a last chance to demonstrate that he can be responsible in his attendance at work and his obligation to respond to calls. That, in my view, can be done consistent with a formula fashioned to protect the Company's legitimate interests.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost and without loss of seniority, subject to his accepting the following conditions. For the period of two years following his reinstatement the grievor shall maintain a rate of attendance and responses to calls which shall be no less than the average for his fellow employees at his home terminal. Should the grievor fail to attain that standard during any given quarter of the two year period, he shall be subject to termination, with access to arbitration only for the purposes of confirming the accuracy of the data respecting his attendance and the attendance of his peers.

April 15, 2013

MICHEL G. PICHER
ARBITRATOR