

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

**CASE NO. 4625**

Heard in Montreal, April 10, 2018

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**UNIFOR NATIONAL COUNCIL 4000**

**DISPUTE:**

The assessment of 30 demerit marks and subsequent discharge of Equipment Operator M. Byrne of the Brampton Intermodal Terminal for; "...violation of the Attendance Management Standards and Booking Off Policy on the following dates March 9, March 10, March 16, March 28, April 13, April 29, May 10, May 13, May 25, and June 3, 2017."

**JOINT STATEMENT OF ISSUE:**

The Union contends that the imposition of 30 demerits, which caused the grievor to be discharged from his employment with the Company, is excessive and unwarranted given the mitigating circumstances associated with some of the grievor's absences.

The Union requests that the demerits be expunged from the grievor's record, and that he is reinstated to service with full seniority and compensation for all lost wages and benefits, thus making him whole.

The Company denies the Union's contention and has declined the grievance.

**FOR THE UNION:**  
**(SGD.) B. W. Kennedy**  
National Representative

**FOR THE COMPANY:**  
**(SGD.) J. Darby**  
Manager Labour Relations

There appeared on behalf of the Company:

- J. Darby – Manager, Labour Relations, Toronto
- S. Blackmore – Senior Manager, Labour Relations, Edmonton
- S. Mayea – Senior Manager, Intermodal Operations, Brampton

And on behalf of the Union:

- B. Kennedy – National Representative, Edmonton
- M. Robinson – Regional Representative, Mississauga
- D. Kissack – President, Winnipeg
- D. Andru – Secretary Treasurer, Toronto
- M. Byrne – Grievor, Mississauga

## **AWARD OF THE ARBITRATOR**

### **Nature of the Case**

1. On June 22, 2017, CN imposed thirty (30) demerit points and terminated Mr. Michael Byrne's employment for an accumulation of eighty (80) demerit points. Mr. Byrne worked mostly as an equipment operator at the Brampton Intermodal Terminal. Unifor contested the 30 demerit points and termination on the basis that both were excessive and unwarranted given the mitigating circumstances for some of the absences.

2. CN satisfied the arbitrator that it had cause to impose demerit points due to Mr. Byrne's continuing culpable absenteeism. The resulting termination occurred due mainly to Mr. Byrne's existing 50 demerit points in his disciplinary record. Even reducing the demerit point to 20 or even 10 would still have put Mr. Byrne at or over the critical 60 demerit point level.

3. The arbitrator must therefore dismiss the grievance.

### **Analysis and Decision**

4. This is a culpable, rather than innocent, absenteeism case. The analysis used for innocent absenteeism cases, such as the one to which Unifor referred in [CROA&DR](#)

[4337](#), does not apply to culpable absences. Progressive discipline applies to continuing culpable absenteeism situations: [CROA&DR 3314](#).

5. CN satisfied the arbitrator that Mr. Byrne, for the period of question, failed to protect his assignment on multiple occasions. There were 10 separate instances which occurred between March and June 2017. One of those occasions involved Mr. Byrne's alarm clock not working due to a power failure. For all 10 instances, CN noted that Mr. Byrne had failed to provide the required 3-hour notice.

6. There was no dispute that, even if one were to accept Unifor's position, at least 5 of the recent incidents were "culpable" (U-1; Unifor Brief; Paragraph 19). The other 5 might have fallen within the non-culpable category, except that Mr. Byrne never described them as such until the investigation or provided any evidence in support. It is up to an employee to respect the call-in procedure and to explain why he/she cannot attend work. Raising alleged mitigating circumstances only during the investigation, without any supporting evidence, does not meet this standard.

7. CN imposed 30 demerit points which, when added to Mr. Byrne's already existing total of 50, brought his total to 80. CN terminated Mr. Byrne due to his passing the Brown System's 60 demerit point threshold. The only issue for the arbitrator is whether to exercise the discretion to reduce the demerits to 9 or less and reinstate Mr. Byrne in his employment.

8. The arbitrator notes in passing that an employee's discipline record speaks for itself. The arbitrator cannot discount the discipline already imposed where it has not been contested at arbitration. Mr. Byrne had 50 demerit points at the material times for this decision.

9. Despite Unifor's helpful representations, the facts do not justify reducing the demerit points to the point where it would be necessary to reinstate Mr. Byrne. There are several reasons for this conclusion.

10. CN had disciplined Mr. Byrne on numerous occasions for attendance issues (E-1; CN Brief; Tab 7). This was not a momentary aberration resulting from a short-term upheaval in his personal life. Ever since his hiring in 2008, Mr. Byrne has struggled to respect the fundamental requirement of showing up for work.

11. The arbitrator notes as well, for balance, that during his career, Mr. Byrne did have his overall demerit points reduced on 3 separate occasions after going discipline free for 3 separate 12-month periods.

12. In 2016, CN, rather than imposing further demerits which would have put Mr. Byrne over the 60-point threshold, imposed a 3-day suspension instead. This is sometimes done in the Brown System to give the employee a "last chance". Despite CN's efforts, Mr. Byrne failed to attend his regularly scheduled employment on at least 5 further occasions.

13. This Office's case law requires the use of progressive discipline under the Brown System. However, when progressive discipline has been followed repeatedly, but without obtaining the desired results, then the consequences flowing from passing the 60-point threshold will be applied.

14. For example, in a situation comparable to that of Mr. Byrne, Arbitrator Picher in [CROA&DR 2730](#) upheld the progressive discipline process. He noted that 20 demerits fell within the ballpark for a single culpable absence, given the employee's overall attendance record. Moreover, even 10 demerits for that single incident would have still placed the employee over the threshold:

Regrettably, this is a case which the Company is entitled to treat as a culminating incident. While the failure to appear at work on a single day may seem a minor infraction, not in itself deserving of discharge, the instant case involves much more. The Company has a long history of having patiently endured repeated failures on the part of Mr. Shannon to respect his obligations in relation to faithful attendance at work, good timekeeping and communication with his employer in respect of his availability. He has twice been reinstated from prior terminations and can now plead little, if anything, in the way of mitigating factors or circumstances. In the circumstances, the Arbitrator is compelled to conclude that the assessment of twenty demerits was within the appropriate range of discipline for the grievor's infraction on September 10, 1995. Indeed, an assessment of ten demerits would have placed him in a dismissible position. The grievance must therefore be dismissed.

15. Those principles apply similarly to this case. Attendance has been an issue throughout Mr. Byrne's employment. While he did have some good employment periods, which resulted in demerit point reductions, attendance problems have plagued his career.

16. In this situation, CN has consistently applied progressive discipline, including a last chance suspension. As Arbitrator Picher once noted, “If employees are to have the advantage of a system of progressive discipline, so must employers”: [CROA&DR 3314](#). That conclusion applies equally to this case.

17. The arbitrator dismisses the grievance.

April 23, 2018



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**GRAHAM J. CLARKE**  
**ARBITRATOR**