CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 649

Heard at Montreal, Tuesday, January 10, 1978

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

20 demerit marks assessed to Warehouseman I.T. Green for being on unauthorized leave of absence from June 24 to July 12, 1976.

JOINT STATEMENT OF ISSUE:

On June 15, 1976, Mr. Green made a written application for leave from 24 June to 12 July 1976. On the afternoon of June 24 he approached the General Supervisor – Operations, to appeal the decision that his application for leave had been declined. He was therefore aware before his departure that his request was not granted. Mr. Green chose to absent himself without authorization. Upon his return he was accorded an investigation on July 13, 1976, and subsequently assessed 20 demerit marks and one day held out of service.

The Brotherhood has appealed the discipline on the basis that it was unwarranted, severe and unjust.

The Company declined the appeal.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) J. A. PELLETIER	(SGD.) S. T. COOKE
NATIONAL VICE PRESIDENT	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

C. L. LaRoche	– System Labour Relations Officer, Montreal
T. E. Allison	– Labour Relations Officer-Express Division, Montreal
W. W. Wilson	– Labour Relations Assistant, Toronto
H. W. Herget	– General Supervisor Operations, Express Division, Toronto

And on behalf of the Brotherhood:

J. D. Hunter	– Regional Vice President, Toronto
R. Fitzgerald	– Local Chairman, Toronto
D. Ross	– Witness
R. Cleland	– Witness
L. T. Green	– Grievor

AWARD OF THE ARBITRATOR

The issue in the present case is the propriety of the assessment of 20 demerits against the grievor's record, and what was, in effect, a one-day suspension.

As is clear from the Joint Statement, the grievor was absent without leave from 24 June to 12 July 1976. He was aware, when he left, that his request for leave of absence had been denied. The circumstances relating to the request for leave of absence and its denial are as follows:

On June 10, 1976, the grievor was called by the Chairman of the Trampoline Technical Committee for Canada and was requested to represent Canada, in partnership with a fellow competitor, at the World Trampoline Championships to be held in Tulsa, Oklahoma, U.S.A., during the period for which leave was requested. The grievor accepted without hesitation, believing as he testified, that there would be no difficulty in obtaining leave of absence. The invitation to compete came late in the day because a member of the Canadian Championship team had just been injured. The grievor and his partner had been runners-up in the Canadian Championships. Although trampoline gymnastics are not recognized as constituting an Olympic sport, the activity is officially sponsored, and there is no doubt that the grievor's request for leave of absence was a *bona fide* one and that his participation in the World competition was an activity generally deserving of support. He had been granted leave of absence to participate in the sport in the past, and it is clear that the Company, in refusing leave, was not motivated by any desire to discriminate unfairly against the grievor.

The grievor appears to have delayed making his application for leave of absence for several days. There is no explanation for this, but that appears not to have affected the outcome of the matter in any way. The Company, in turn, did not respond with any alacrity to what was clearly a fairly urgent request. Again, there is no explanation for this. It was of course, up to the grievor to ensure that he had leave of absence before leaving, but he seems to have made no enquiry with respect to his application until the last minute, when he was made aware that it had been denied. He left, knowing that he did not have leave of absence. No special plea had been made to the Company by the Trampoline Technical Committee for Canada or by the Union, for it seems that the grievor himself did not advise the Committee, as he ought to have done, that he would require a leave of absence.

Article 17.5 of the collective agreement is as follows:

> **17.5** Employees, at the discretion of the Company, may be granted leave of absence of up to three months, permission to be obtained in writing. Leave of absence may be extended by application in writing to the proper officer in ample time to receive permission or return to duty at the expiration of such leave. Unless such extension of leave of absence is granted or absolute proof is furnished of bona fide sickness preventing such return, employees failing to report for duty, on or before the expiration of their leave of absence, shall forfeit their seniority and their names shall be removed from the seniority list.

It is clear that under that provision, the granting of leaves of absence is at the discretion of the Company. It is noteworthy that where an employee overstays a leave which has been granted, then unless he has "absolute proof" of *bona fide* illness, he forfeits seniority and his name is removed from the seniority list. The grievor here was absent without any leave, and was not ill. He did not have a right, under this provision, to leave of absence.

I think there can be no doubt that as far as his relationship with his employer is concerned, the grievor was guilty of a serious offence. The substantial issue is not so much whether the grievor was subject to discipline (I find, in the circumstances, that he was), as whether the degree of discipline imposed was justified.

What the grievor did was equivalent to disobeying a Company order. It was implicitly required of him, in the circumstances, that he attend at work in the regular way. The general principle which has been enunciated in the arbitration cases dealing with this problem is that an employee is not entitled to disobey an order, even if he cannot obtain adequate redress, unless the harm to be avoided is quite substantial and is more important than maintaining Company discipline and symbolic authority in the situation: **Stancor Central Ltd.** 22 L.A.C. 184 (Weiler) at p.187. While "symbolic authority" is not directly in issue here, the general notion behind was as is enunciated in that case is that the importance of the offence must be judged in the light of the relative importance of the grievor's and of the Company's needs, as reasonably perceived in the circumstances.

In the instant case while the interests of third parties such as the Trampoline Technical Committee for Canada, or indeed the general interests of Canadians concerned with sport, or with the Country's international reputation in sports matters are not ones which the Company, which has a set of particular jobs to attend to, must be expected to weigh with delicacy, such interests may be taken together with the grievor's own personal concern and found to be, as I find in this case, deserving of serious concern.

The Company did indeed consider the grievor's application, but it did so, it seems clear, in a mechanical fashion, and against the background of its policy that leave of absence would not be granted except in certain exceptional cases involving death in the immediate family, during the vacation period. As is said in the **Canada Valve Ltd.** case, 9 L.A.C. (2nd) 414 (Shime), it is undoubtedly a valid consideration for the Company when granting leaves of absence to consider its production requirements. The holiday season is one when, in the nature of things, many employees are away, and it would be legitimate to impose stricter requirements with respect to leaves of absence. I would go further and say that, under a clause giving the Company wide discretion, as does Article 17.5, fine distinctions are not necessary, and any reasonable judgment by the Company that it might need the services of an employee would have to be supported. The evidence is, however, that there is a large number of employees at the grievor's place of work, and that while a number were absent on vacation, more than enough summer replacements had been hired. Further, there was no immediate replacement of absent employees at least in the grievor's classification. The clear conclusion is that the grievor, who appears not to have held any particularly sensitive post, would not seriously have been missed. This, I repeat, does not excuse his absence, but it does reflect on the seriousness of his offence in the circumstances of this case.

It was not for personal pleasure or even family obligations that the grievor sought leave of absence – although of course the personal importance to the grievor of the event in question was very great. The case is, in its nature, an isolated one, and could not easily be relied on by those seeking to abuse the possibilities of leave of absence. Having regard to all of the circumstances, it is my view that, while in most cases of this type twenty demerits would not be unreasonable, the penalty imposed in this case was excessive. I find, therefore, that there was not just cause for the imposition of twenty demerits, but that a penalty of five demerits would be appropriate and may be substituted therefor. I would not award any reimbursement to the grievor for the day held out of service and I make no other award of compensation.

(signed) J. F. W. WEATHERILL
ARBITRATOR