CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1855

Heard at Montreal, Tuesday, 13 December 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Discipline assessed Mr. B. Tasker which resulted in his dismissal for accumulation of demerits.

BROTHERHOOD'S STATEMENT OF ISSUE:

By Form 780B dated November 26, 1987, Mr. B. Tasker was assessed 20 demerits for a violation of Maintenance of Way Rule 1.24 (Absent without authority), on October 26, 1987 which resulted in his being discharged for accumulation of demerits.

The Union contends that the assessment of discipline was unjust in that Mr. Tasker was ill on October 26, 1987 and attempted to contact the Company but was unsuccessful.

The Union requests the grievor be reinstated to his former employment position with no loss of wages, seniority, benefits or other amenities of employment.

The Company denies the Union's contentions.

FOR THE BROTHERHOOD:

(SGD.) R. A BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. Luciani	– Counsel, Montreal
G. C. Blundell	– Labour Relations Officer, Montreal
A. Watson	– System Labour Relations Assistant, Montreal
R. Olbrycht	– Maintenance Engineer, Toronto

And on behalf of the Brotherhood:

M. Gottheil	– Counsel, Assistant to Vice-President, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

The material establishes to the arbitrator's satisfaction that the grievor did fail in his obligation to notify his employer of his absence due to illness on October 26, 1987. By his own admission, Mr. Tasker was aware that it was his obligation to do so, although it appears that he did not attempt to telephone anyone in authority until approximately the middle of the shift, during which he was scheduled to be at a training course. The issue then becomes the measure of discipline appropriate in the circumstances.

The Arbitrator has some concern with the case advanced on the part of the Company. The position which the Company took with respect to the grievor's actions was first expressed in a letter dated December 9, 1987, at Step 2, and remained unchanged to the point of the arbitration hearing. In that letter District Engineer Meleskie stated, in part:

> "The investigation of this incident reveals that Mr. Tasker was scheduled to attend the Welders Training School at MacMillan Yard commencing on Monday, 26 October 1987. Mr. Tasker was absent that day and failed to contact anyone regarding his absence. During the formal investigation, Mr. Tasker claims that he attempted to call the training school but did not get a response. ... The Company does not question Mr. Tasker's explanation on 26 October 1987 and supports its decisions as outlined herein."

At the hearing, however, the Company took a different position. Its brief states, in part: "It is the Company's position that the grievor's alleged illness was not supported and therefore, there was no *bona fide* reason for his absence." Counsel for the Brotherhood objected, in the Arbitrator's view quite properly, to the position so expressed. Counsel for the Brotherhood related, by way of example, that it did not bring formal medical evidence or require the grievor's doctor to attend at the hearing because of the Brotherhood's understanding that the *bona fides* of the grievor's illness would not be an issue. In the Arbitrator's view it would be clearly prejudicial to the Brotherhood to allow the Company to effectively enlarge the grounds of discipline at this late stage of the proceedings. It would, moreover, be plainly inconsistent with the spirit of communication and mutual disclosure that is essential to the operation of the grievance and arbitration system administered by this Office.

The Company's actions in this case give pause to question the employer's own view of the severity of the grievor's conduct. The concern which arbitrators have generally with attempts to alter the grounds of discipline was well expressed in **Re United Textile Workers of America and Long Sault Yarns Ltd**. (1968), 19 L.A.C. 257 (Curtis). In that case the arbitrator made the following observation:

> The integrity of a Company's actions is clearly thrown into question when it seeks to change the grounds upon which it initially disciplined an employee and it is just such nuances that distinguish the grounds necessary to establish just cause for discharge under collective bargaining agreements from the common law cases of master and servant in the area of discharge.

Given its shift of position in this case, the Arbitrator is inclined to conclude that the Company is itself in some doubt that the grievor's failure to give notice of his absence, standing alone, would justify his discharge.

On the whole of the evidence I am satisfied that it does not. While it is true that on several prior occasions the grievor attracted discipline for violations of Rule 1.24, the material does not disclose any specific instance in which the grievor was previously disciplined for failing to give notice of his absence. On the other hand, there are several occasions upon which the grievor was disciplined for being absent without authorization, and it is clear to the Arbitrator that his obligation to improve his performance in that regard was clearly communicated to him by the Company by means of progressive discipline.

In the Arbitrator's view the grievor's failure to notify the Company of his absence, given his prior record, must be viewed as a serious infraction deserving of commensurate discipline. For the reasons related above, however, there appears to be substantial doubt that his discharge was justified in the circumstances. In the Arbitrator's view the imposition of a lengthy suspension would be a more appropriate measure of discipline in the circumstances. For the foregoing reasons, the grievor shall be reinstated forthwith, with compensation for wages and benefits lost for one half of the period of time from the point of discharge to the date of his reinstatement, with his disciplinary record to stand at fifty demerits, and without loss of seniority. The grievor must appreciate that given his prior record of attendance problems, his reinstatement in this case is in the nature of a last chance to demonstrate responsibility in that regard. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award

December 16, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR