CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3190

Heard in Montreal, Wednesday, 11 April 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

The assessment of 35 demerits and subsequent dismissal for accumulation of demerits in excess of 60 to Toronto Yard employee D. Carr.

JOINT STATEMENT OF ISSUE:

Toronto Yard employee D. Carr was assessed 35 demerits for "failure to maintain acceptable attendance management standards during the period of September 24 to November 28, 2000 inclusive." Mr. Carr's previous discipline record stood at 35 demerits and 1 written reprimand, and he was discharged for accumulation of 65 demerits.

The Union has appealed the severity of the discipline, the time frame used by the Company and any contravention of the **Canada Labour Code**.

The Company has declined the Union's appeal.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) R. J. LONG	(SGD.) F. O'NEILL
GENERAL CHAIRPERSON	FOR: SENIOR VICE-PRESIDENT, EASTERN CANADA

There appeared on behalf of the Company:

F. O'Neill	– Labour Relations Associate, Toronto
R. Helmle	– Transportation Supervisor, Toronto

And on behalf of the Council:

R. J. Long	– General Chairperson, Brantford
S. Tipton	– Local Chairperson, Toronto
D. Carr	– Grievor

AWARD OF THE ARBITRATOR

The grievor first entered Company service in August of 1989, working initially for a period of some eight years in the bargaining unit of the Brotherhood of Maintenance of Way Employees (BMWE). Since August of 1997 he has been a qualified conductor working in the bargaining unit of the United Transportation Union(UTU). It appears that during his BMWE service the grievor was once assessed five demerits for timekeeping problems.

To appreciate the Company's perception of events, it is important to note that Mr. Carr was the subject of prior discipline concerning his attendance on more than one occasion in the past. He received a written reprimand on January 10, 2000 for his "failure to meet attendance management standards from December 1, 1999 to Jan. 10, 2000." He was likewise assessed fifteen demerits on September 16, 2000 for the same infraction for the period August 16, 2000 through September 16, 2000. It is also common ground that although he was also assessed fifteen demerits for attendance difficulties between March 1 and June 30, 2000, that discipline was entirely removed from his record, as it appears that it was due in part to difficult circumstances relating to his newborn twins.

It is important to appreciate that the instant case has not been treated by the Company as one of administrative discharge as a result of innocent absenteeism. For reasons it best appreciates, the Company chose to deal with the grievor's attendance record on the basis of alleged misconduct and the assessment of corresponding discipline. It is, of course, therefore incumbent upon the Company to bear the burden of establishing, on the balance of probabilities, that there was just cause for discipline against Mr. Carr, and that the assessment of thirty-five demerits and his ultimate termination from service were justified in the circumstances.

The material before the Arbitrator raises substantial questions as to the ultimate merits of the case presented by the Company. The only period of time at issue for the purposes of this grievance concerns the dates between September 24 and November 28, 2000 inclusive. During that time the grievor admittedly missed a call on September 24th and on November 28th. It is not disputed, however, that in fact he did work on the 24th, albeit somewhat later than the time of the original call. The record further discloses that during the period in question Mr. Carr booked sick for a total of some twelve days. That included a period of five consecutive days of absence due to illness between October 1 and 5, 2000 inclusive.

As emphasized in the brief of the Council, during the period in question the grievor was nevertheless either at work or available for work for a substantial number of eligible days. Using the parameters of article 33.1 of the collective agreement, whereby a spareboard employee would be required to work ninety days in the period between August 1, 2000 and November 30, 2000, the Council's representative stresses that in fact the grievor worked seventy-nine days, was otherwise available for a further ten days and was booked off on Company business for three days and authorized leave of absence for six days during that period. The Arbitrator is inclined to agree with the suggestion of the Council that that performance, on its face, is a doubtful basis for the outright dismissal of an employee.

The Council's case is further bolstered by reference to articles of the collective agreement and the **Canada Labour Code**, considered within the context of the facts of this case. Article 3.5 builds in to the spareboard rules penalties for employees who are unavailable for miss a call, and provides, in part, as follows:

> **3.5** In the application of sub-paragraph 3.4(b):
>
> **(a)** an employee (or employees) standing first-out in the spare board rotation at calling time who make themselves unavailable or who miss a call for a vacancy (or vacancies) for which called will be penalized as described by sub-paragraph 3.4(b).
>
> **(b)** in addition to the monetary penalty provided by sub-paragraph 3.4(b), an employee (or employees) standing first-out in the spare board rotation at calling time who make themselves unavailable or who miss calls for a vacancy (or vacancies) for which called will be held off the board for 12 hours which will commence at the calling time and, at the expiry of 12 hours, will be placed at the bottom of the spare board.
>
> **…**

In addition to the foregoing, article 36.4 of the collective agreement further makes provision for the reduction of an employee's guarantee in the event of missing more than two two hour calls in a fourteen day period. It is not

disputed that the grievor did not bring himself within that provision, and in any event worked well beyond the period which triggers the payment of any guarantee.

The Council also directs the Arbitrator's attention to the provisions of article 53, which give to the Company the discretion to require a doctor's certificate of an employee in certain circumstances. It provides, in part, as follows:

> **53.2** Employees, on resuming duty after sick leave, will not be required to produce a doctor's certificate except employees who are considered continual offenders book sick when called or while on duty after being called may be required to produce a medical certificate within 48 hours of resuming duty and/or submit to an examination from a Company medical officer. Payment for taking such required examinations will not accrue to employees governed by the provisions of this paragraph.
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> **NOTE:** The 48-hour requirement in paragraph 53.2 will exclude weekends and general holidays.

Reference is also made to section 239 of the **Canada Labour Code** which would preclude the discharge of an employee for reasons of sick leave where the individual has been requested in writing by the Company to provide a medical certificate within fifteen days of his or her return to work. In the instant case it is common ground that at the time of the absences due to illness incurred by Mr. Carr the Company took no issue with his physical state, and only questioned the merits of his absences at the time of the disciplinary investigation held on December 13, 2000.

While the Company's brief identifies the various days of absence attributable to sickness, and stresses that no medical certificate was provided by Mr. Carr to justify his absence, the facts remains that at no time did any supervisor or Company officer request him to provide such documentation, as indeed the Company was entitled to do. With respect, it does not now lie in the mouth of the employer to hold the lack of any medical documentation against the grievor when no such documentation was ever sought in the first place. Additionally, there is no evidence before the Arbitrator to give any basis for comparing the grievor's level of absenteeism with that of the average for other employees within the same bargaining unit and workplace.

The Arbitrator recognizes the need for the Company to expect and receive regular attendance at work from its employees. The 24 hour / 7 day per week nature of railway operations necessitates a high expectation of attendance and a corresponding high level of duty on the part of employees. In that circumstance, I am satisfied that the employer was well within its rights in providing notice to employees, by Eastern Division – Great Lakes Notice No. 971, dated 29 October 1999 that attendance management was important and that refusals of calls, late booking sick and missing calls would be dealt with seriously. In the instant case, however, the evidence presented by the employer does not, with one exception, disclose conduct on the part of the grievor which can be said to be deserving of discipline. The only infractions for which no adequate explanation has been forthcoming on the part of Mr. Carr involve his missing of calls on two occasions, September 24 and November 28, 2000. Additionally, the first missed call is somewhat mitigated by the fact that the grievor did work later on that same day. On the whole, therefore, I am satisfied that the case for the assessment of thirty-five demerits and the grievor's termination is not made out. In the Arbitrator's view the assessment of ten demerits for the missed calls would be justified, and should be substituted as a penalty.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits, and with no loss of seniority. The thirty-five demerits assessed against Mr. Carr shall be stricken from his record, with a substitution of ten demerits for having missed calls on two occasions, with his discipline to reflect a total of forty-five demerits.

April 12, 2001

(signed) MICHEL G. PICHER
ARBITRATOR