CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3639

Heard in Montreal Tuesday, 8 January 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Locomotive Engineer Kate Skinner for accumulation of demerits after being assessed 25 demerits for missing a call on April 24, 2006; the imposition of 20 demerits for failing to maintain Attendance Management Standards for a 28 day period in November 2005; the imposition of 35 demerits for not reporting for her assignment on August 17, 2005; and the imposition of a seven (7) day suspension for alleged failure to comply with attendance management guidelines.

JOINT STATEMENT OF ISSUE:

The TCRC has grieved the appropriateness of imposing 25 demerits and discharge for missing a single call.

As well, in respect of the 20 demerits and the 7 day suspension imposed for failure to comply with attendance management standards, the TCRC challenges the appropriateness of adopting a disciplinary approach in response to absences due to illness.

In the alternative, the TCRC alleges that the penalty imposed is too severe in the circumstances.

Finally, the TCRC challenges the quantum of penalty for the missed assignment on August 17, 2005.

The Company maintains that the penalties in each instance are appropriate and proportional and that discharge is warranted in light of the grievor's overall record.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) P. VICKERS	(SGD.) B. J. HOGAN
GENERAL CHAIRMAN	MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

B. Hogan	– Manager, Labour Relations, Toronto
R. Bowden	– Manager, Labour Relations, Toronto
J. Kelly	– Sr. Manager, Commuter Operations, Toronto

And on behalf of the Union:

J. C. Morrison	– Counsel, Ottawa
P. Vickers	– General Chairman, Sarnia
K. Skinner	– Grievor

AWARD OF THE ARBITRATOR

The record before the Arbitrator discloses that the Company had substantial concern with what appears to have been a high rate of absenteeism registered by the grievor over the years, in addition to her apparently repeated failures in respect to missed calls. As understandable as that concern may be, the grievor is entitled to be treated in accordance with the provisions of the collective agreement and the established jurisprudence with surrounds them.

What the evidence in this case discloses is that on at least two occasions the Company purported to assess discipline against the grievor for absences due to illness which in fact the Company did not challenge. In other words, because her illness-related absences exceeded the guidelines of the Company's Attendance Management Standards (AMS), she was assessed two forms of discipline, the first being a seven day suspension on June 29, 2005 and the second being the assessment of twenty demerits for her failure to maintain the Attendance Management Standard in the period November 1 to November 28, 2005.

At the outset, the Arbitrator accepts the position argued by the Union with respect to the treatment of employees who are absent by reason of illness. It is well established that where an employer does not challenge the legitimacy of a claimed illness, the corresponding absence must be viewed as non-culpable and the employer is not at liberty to assess discipline for it. That is not to say, of course, that repeated absences that are non-culpable might not lead, in the end, to the termination of an individual's employment. Where the record discloses that an individual has, for a significant period of time, recorded a level of absenteeism substantially in excess of that of his or her peers, and that there is little or no prospect of any change with respect to that pattern in the future, the employer may well be justified in terminating the employee for his or her innocent absenteeism. That right of the employee is subject, of course, to respecting the duty of accommodation of an employee's disability as protected by the **Canadian Human Rights Act**. Where, in the end, accommodation has been exhausted and the continuing absenteeism of the employee constitutes undue hardship, the employer may be justified in viewing the employment of the individual as no longer viable, even though there may be no culpable conduct involved. However, illness, standing alone, is not grounds for discipline, especially when the *bona fides* of an absence for illness is not challenged.

In the case at hand it does appear that certain of the discipline assessed against Ms. Skinner was, at least in part, for her failure to attend at work by reason of illness. The seven day suspension assessed against Ms. Skinner on June 29, 2005 involves both culpable and non-culpable conduct. It appears that in a four month period the grievor was absent from work by reason of illness on three occasions and that she also missed two calls over the same period. As the grievor had already been assessed a deferred suspension for missing calls for duty on May 20, 2004, the Arbitrator is satisfied that some suspension would have been appropriate in light of the recidivism as to missed calls reflected in the period of March 15 to June 6, 2005. It was not, however, appropriate to attribute any part of a suspension for her failure to be at work by reason of illness on the three days recorded in that four month period. In the result, I am satisfied that a three day suspension would have been sufficient in the circumstances which were then under review, and that that discipline should be adjusted accordingly. For the purposes of clarity, the three day suspension shall be only for missed calls, and no discipline can be attributed to the grievor's absence due to illness not challenged by the Company.

On August 17, 2005 the grievor was assessed thirty-five demerits for failing to report for her regular assignment. It does not appear disputed that she simply over-slept that day, which caused her to report for work late and to work a different assignment. This appears to have been the second time the grievor was assessed demerits for failing to protect her assignment, the first having been in 1997 when fifteen demerits were assessed against her on May 21 of that year. In the circumstances I am satisfied that a twenty demerit assessment would have been appropriate for the grievor's admitted failure to report for her regular assignment on August 17, 2005.

Next, the grievor was assessed twenty demerits for failing to meet the standards of the AMS for the month of November 2005. The record discloses that there were two heads of concern giving rise to that discipline. One was a missed call on November 6 and the second involved the grievor booking sick on November 27 in circumstances where she felt she was too tired to work. The Arbitrator is satisfied that the second incident did not merit discipline. The record discloses that Ms. Skinner had remained available for a call on the day in question for a period of some fifteen hours but that towards the end of the day she felt that she was too tired work safely, as a result of which she booked unfit for work. The Arbitrator is satisfied that in that circumstance no cause for discipline is disclosed. The same cannot be said, however, with respect to the grievor's failure to respond to a call on November 6, 2005. I am

satisfied the discipline can stand as regards that culpable conduct, and that the assessment of twenty demerits was reasonable, given the grievor's overall record.

Finally the grievor was assessed twenty-five demerits for missing a call on April 24, 2006, as a result of which she was discharged. In the Arbitrator's view the Company was then arguably entitled to assess twenty-five demerits against the grievor, given her prior record of having missed calls. Given the Arbitrator's award as reflected above, she would then have had forty demerits on her record, being twenty for her failing to protect her assignment on August 17, 2005 and twenty for her missed call in November of the same year. The assessment of twenty-five demerits would therefore place the grievor in a dismissible position.

On the whole of the material before me, however, I am satisfied that it is appropriate to exercise my discretion to substitute a reduction of penalty with respect to the missed call of November 24, 2006. Bearing in mind that the grievor is an employee of some twenty years' service, I consider that it is appropriate to reduce the measure of discipline for the missed call of April 24, 2006 to the level of ten demerits, a measure which would permit the grievor to return to work with her disciplinary record to stand at fifty demerits, albeit that adjustment should be made without any order for compensation.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the seven day suspension assessed against the grievor be reduced to three days, with compensation for wages and benefits accordingly, that the assessment of thirty-five demerits for the failure to report for her assignment on August 17, 2005 be reduced to twenty demerits, that the twenty demerits assessed for her missed call in November of 2005 remain intact and that she be assessed ten demerits the missed call on April 24, 2006. She shall be reinstated into her employment forthwith, without loss of employment and without compensation for her wages and benefits lost, save in respect to the reduction of her suspension, as determined above.

The grievor must appreciate that none of the foregoing relieves her against the ability of the Company to monitor her ongoing attendance and to take such steps as may ultimately be appropriate should she demonstrate an inability to maintain a reasonable standard of attendance over time in the future.

January 14, 2008

(signed) MICHEL G. PICHER
ARBITRATOR