CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 536

Heard at Montreal, Tuesday, February 10, 1976

Concerning

CANADlAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood alleges that the Company violated Article 24.5 when it discharged the grievor for excessive absenteeism.

JOlNT STATEMENT OF lSSUE:

Mr. U.J. Cormier was employed as a Mail Clerk at Moncton, N.B. on the 1300 to 2100 hours shift. He reported sick on January 6, 1975 and returned to work one month later on February 6, 1975. On the basis of the grievor's record the Company discharged him for excessive absenteeism. The Brotherhood alleges that the grievor has been unjustly dealt with under the provisions of Article 24.5 of Agreement 5.1. The Company denies this allegation.

This grievance was processed through the various steps of the grievance procedure and ultimately to arbitration.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(Sgd.) J. A. Pelletier National Vice-President	(Sgd.) S. T. Cooke Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

P. A. McDiarmid	System Labour Relations Officer, C.N.R., Montreal
D. J. Matthews	Asst. Regional Labour Relations Officer, CNR, Moncton
M. W. Lanigan	Manager Administrative Services, C.N.R., Moncton

And on behalf of the Brotherhood:

W. C. Vance	Representative C.B.R.T., Moncton
L. K. Abbott	Regional Vice President, C.B.R.T., Moncton
J. A. Pelletier	National Vice President, C.B.R.T., Montreal

AWARD OF THE ARBITRATOR

The grievor was discharged on the ground of excessive absenteeism.

The grievor's seniority dates from 1957. His record of absence from June, 1963 until the time of his discharge has been filed, and it will be necessary to analyse that record in some detail. It reveals that in 1963 the grievor was absent for 19 calendar days because of a strained back muscle. That problem does not reappear in the record. The grievor was absent for 1 day in 1963, over 7 weeks in l964, and for 1 day in 1965 because of a strained groin. That problem does not appear after that. He was absent from 6 October 1965 until 3 November of that year because of acute esophagitis and gastritis, and this problem became one for which the grievor was frequently absent thereafter.

ln 1966, the grievor was absent for 3 calendar days with esophagitis, for 23 days due to severe bruising of the chest, and for 10 days due to acute gastritis. The record shows no absence in 1967. In 1968, the grievor was absent for 13 days with functional dyspepsia. No absences are shown in 1969 or in 1970. In 1971 the grievor was absent for 16 days because of a sprained wrist. In 1972, he was absent for 10 days with dermatitis, for 5 days with flu and bronchitis, and for 7 days for which no reason is given. The grievor was absent for 1 day with a twisted ankle, for 10 days with acute bronchitis, for 1 day with a pain in his thigh and lower back, and for 9 days for which there is no record. More importantly, he was absent on three occasions, for a total of 65 calendar days, with some form of gastritis. In 1974, he was absent for 26 days with a sprained knee, and was absent on two occasions for a total of 53 calendar days with gastritis or esophagitis or both. ln 1975 he was absent for one month, as the Joint statement indicates, and in this case the reason for absence is shown as esophagitis and hiatus hernia.

The record of absences which was filed by the Company fills a page, and certainly suggests that the grievor has not enjoyed the best of health. lt must be remembered, however, that the twenty-four entries on the record relate to a period of some twelve years, and that this shows an average incidence of absence of two times per year, and an average absence og roughly thirty days - that is, calendar days - per year over the twelve years ending in 1974. During this period nine absences, for a total of 143 days, were due to injury of some sort. FIve, for a total of 42 days, are not attributed to any gastro-intestinal condition. It is not suggested that injury, or any normal illness have any effect on the grievor's ability to attend at work with reasonable regularity. The concern, it seems, is with the gastro-intestinal condition, and this has been responsible for the grievor's absence for a total of 170 calendar days over the twelve-year period. More importantly, it accounts for his absence for 65 calendar days in 1973, and 53 in 1974.

Generally speaking, cases of discharge for absenteeism fall under one of two heads: disciplinary matters and medical matters. Wbere an employee, through his own fault, fails to attend regularly promptly at work, he is subject to discipline. As a general rule, such discipline should be of a progressive nature, the employee being entitled to know that his employment is in jeopardy if his attendance does not improve. On the other hand, even where an employee's absence is not due to any fault of his own, being due to some illness or injury beyond his control, an employer will be entitled to

terminate his employment where it does not appear that there is any reasonable expectation of regular future attendance.

The Company appears to have treated the instant case as being of a disciplinary nature. Thus the grievor was given notice of an investigation of the sort usually conducted in disciplinary matters. At this investigation the matter of the bona fides of the reasons given for the grievor's absences was not pressed. It would appear that these reasons were accepted at the material times, and that they were usually supported by Doctors' certificates. There is no evidence from which it could be concluded that the grievor's absences were not bona fide, in the sense that he did in fact suffer the injuries or illnesses referred to. lt is the Company's position however, as appears from the questions put at the investigation and the representations made at the hearing of this matter, that the grievor's absences were, in many cases, due to conditions brought on by excessive use of alcohol.

From the material before me, there would appear to be little doubt that the grievor did, from time to time, have "a problem" with alcohol It would be quite improper, however, to conclude from this material that the grievor was an alcoholic. The strongest evidence for that conclusion appears to be a doctor's statement, obtained by the Union on the day before the hearing, in which one of the doctors who has treated the grievor sets out his diagnosls as "alcoholic gastritis and Upper G. I. bleeding". The doctor goes on to state that the grievor "could have other medical problems like a Hiatal-Hernia and esophageal varices as well". Certificates of this sort are usually of slight value, and in this case the certificate was objected to by the Company on the ground that it was new evidence which it had not been given the opportunity to consider. lt has, however, been the custom at hearings in the office to accept such documents (in the absence of collective agreement provisions to the contrary) although it should be obvious that since they cannot be verified, they are of slight value. Certainly this certificate in itself does not establish that the grievor is an alcoholic.

From all of the material, it appears clear that the grievor does have a hiatus hernia. This condition appears to be associated with his attacks of gastritis. It is possible, one supposes, that such attacks may also be caused, or aggravated, by consumption of alcohol. However this may be, what is important for the determination of the instant case is that it has not been shown either that the grievor is an alcoholic or that his absences from work have been due, in any substantial degree, to drinking.

The Company has, in the past, made the grievor aware that it consitered him to have some problem with drinking. The grievor has taken some steps to deal with such a problea, although he has rejected the assistance offered by the Company. As the Company no doubt correctly points out it is an essential step for the alcoholic to recognize the fact of his problem, so that he may deal with it effectively. The grievor denies that he is an alcoholic. This denial cannot be taken as some sort of sign of obstinacy on his part unless it is otherwise established that the grievor is in fact an alcoholic - and that, as I have noted, has not been shown.

While the grievor had been given, in the past, some sort of intimation of the Company's dissatisfaction with his attendance, there is no record of any formal warning, or of any prior discipline in this regard. Ther is no evidence to show how bad the grievor's attendance record was in comparison with that of other employees. In my view, it has not been shown that the grievor's absences were not in fact for the medical reasons given, or that they were due to some fault of his own. There were not, I find, grounds for the imposition of discipline of any sort in this case.

If the matter be considered as one of discharge on medical grounds - that is, as one where there appears to be no reasonable expectation of regular future attendance - it must again be concluded that the case has not been made out. A large number of the grievor's absences, as has been noted, are attributable to injuries which are not suggested to have any lasting effect. The only recurring problem of any moment is the grievor's gastro- intestinal trouble, attributable in large degree, it appears, to his hiatus hernia. It would appear that this condition would be a source of continuing difficulty for the grievor, but there is no adequate medical evidence as to any particular prognosis in the grievor's case. No representations were made in this regard. ln these circumstances, it would be improper to conclude that there was no reasonable expectation of regular attendance in the future. There may have been some doubt about the matter, but that is not a basis on which this case can be determined.

For the foregoing reasons, it is my conclusion that there was not just cause for the termination of the grievor's employment. lt is my award that he be reinstated in employment without loss of seniority or other benefits, and that he be compensated for the loss of earnings he would have received had he not been discharged.

J.F.W. WEATHERILL
ARBITRATOR