CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1168

Heard at Montreal, Thursday, December 22, 1983

Concerning

CANADIAN NATIONAL RAILWAYS
(CN Rail Division)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of 15 demerit marks assessed the record of Yardman C. K. Arnett of Toronto, Ontario and subsequent discharge due to accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

Mr. C. K. Arnett was assigned to the Yardman's spare board at Toronto. On certain dates between August 1 and Septex?er 16, 1982, Mr. Arnett was not available for duty.

Following an investigation, Yardman C. K. Arnett was assessed 15 demerit marks, effective September 16, 1982 for:

> "Unavailability for duty while on
> Yardmen's Spare Board - Toronto,
> 1 August 1982 to 16 September 1982.".

As a result, Mr. Arnett was discharged for accumulation of demerit marks effective November 26, 1982.

The Union appealed the assessment of 15 demerit marks, and the resultant discharge on the grounds that it was unjustified.

The Company declined the appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) W. G. SCARROW General Chairman	(SGD.) D. C. FRALEIGH Assistant Vice-President Labour Relations

There appeared on behalf of theCompany:

G. C.Blundell	- System Labour Relations Officer, CNR, Montreal
D. W. Coughlin	- Manager Labour Relations, CNR, Montreal
J. A. Sebesta	- Co-ordinator Transportation - Special Projects, CNR, Montreal
J. Ohorodynk	- Trainmaster - Crews, CNR, Toronto

M. S. Fisher - Trainmaster, CNR, Hornepayne

And on behalf of the Union:

W. G. Scarrow - General Chairman, UTU, Toronto
R. Proulx - Vice-President, UTU, Ottawa
C. K. Arnett - Grievor, UTU, Toronto

AWARD OF THE ARBITRATOR

The grievor has been employed by the company as a Yardman at its Toronto yard since 1976. Although he has accumulated approximately six years service with the company he has remained "on call" on the Spare Board for work as opportunities might arise. Eventually a yardman "on call" may be assigned a regular position at the Toronto yard when a vacancy occurs. But until such an opportunity arises, he is required to remain available for calls from the company s dispatcher to provide relief work as might be dictated by operational requirements. Approximately 53 yardmen participate on the spare board at one time. The dispatcher gives employees "on call" the opportunity to work on a rotational basis. That is to say, once a yardman "on call has worked a shift he goes to the bottom of the list. Indeed, if a yardman is unavailable for a call or otherwise misses an opportunity to work he goes to the bottom of the list.

Yardmen on call are paid a salary for remaining on call Should they be unavailable for a call or otherwise miss a call without leave of the company they are penalized for each incident by the deduction of an amount from their monthly salary.

The evidence of Mr. J. Ohorodynk, Trainmaster, who is responsible for policing the spare board at the Toronto yard, indicated the following procedure with respect to disciplining yardmen who are unavailable for work when called upon. Mr. Ohorodynk stated that he allows an employee eight missed opportunities before he is called in for an interview. At the interview the employee is warned of the potential consequences, inclusive of his eventual discharge, should he fail to correct his lack of availability to answer a call (i.e., protect a work assignment). Thereupon for every subsequent incident the employee is given 5 demerit marks and ten demerit marks, etc., until he has attained 60 demerit marks at which time he faces termination at the discretion of the company. Of course, for each full year worked where no infraction is committed an employee's accumulated total of demerit marks is reduced by twenty.

The grievor lives in Thornhill, Ontario, some distance away from the company's yard. He complained that he has encountered difficulty in responding to calls because of his transportation problem At the time of the culminating incident that resulted in his discharge the grievor had accumulated 55 demerit marks attributable to incidents where he was unavailable to protect a work assignment. The demerit marks received for those past infractions were not grieved.

Each time the grievor was disciplined, he was advised by his superiors of the potential danger to his job security should he continue to be unavailable to respond to calls. On each occasion

that his shoddy record was brought to his attention the grievor acknowledged his lack of reliability and undertook to improve his record.

Following his latest infraction in August, 1981, the greivor began what can only be described as an unsavoury practice with respect to avoiding his obligation to respond to calls. Mr. Arnett, in order to avoid work, would call in sick. That is to say, either in aniticipation of being called in or in response to a call the grievor would complain that he was ill and thereby would circumvent the requirement for work. Mr. Arnett claimed that his practice was a procedure condoned by the employer. He specifically accused Mr. Ohorodynk of sanctioning this practice. Mr. Ohorodynk emphatically denied this to be the case.

During the period between August 1, 1982 and September 16, 1982, Yardman Arnett missed 7 calls and booked off sick for 13 days resulting in his being unavailable for duty for a total of 20 days out of a possible 47 days. For his latest infraction the grievor was assessed "effective November 26, 1982" fifteen demerit marks. In light of his accumulated total of 70 demerit marks for the same or similar infractions the grievor was terminated.

In response to the grievor's termination a number of technical arguments were advanced by the trade union to persuade me to mitigate the discharge penalty. Firstly, it was submitted that the company, in accordance with its past practice of determining the effective date of the commission of an infraction to be the date the grievor was advised of his discipline, should have had deducted twenty demerit marks from the grievor's accumulated record. The company has admitted its error in assigning the effective date to be the date of the grievor's notification of his discipline in lieu of the day the infraction was actually committed. It has since amended the notice advising the grievor that his discipline has been made effective on September 16, 1982, the last day he was unavailable for work. In this light, the employer submitted that the grievor has not, particularly in having regard to his absentee record, worked a full year without the coamittal of an infraction. I was, therefore, requested to reject the trade union's request to deduct twenty demerit marks from the grievor's disciplinary record.

I must agree with the employer's representations in this regard. A Board of Arbitration ought to be loathe to upset an otherwise appropriate disciplinary response to an employee's misconduct unless the procedural infraction committed by the employer is contained in the collective agreement and thereby binds the employer in mandatory language to adhere to its terms. In this case the employer has amended the effective date of the grievor's infraction to be the last day the infraction has occurred. In my view there has been coxmitted no prejudice to the grievor's case by virtue of the amendment being allowed and, accordingly, I do not propose to mitigate the discharge penalty on this ground alone.

The second technical argument advanced in support of the mitigation of the discharge rested on the notion that the grievor has been singled out for discriminatory treatment with respect to discipline

in relation to the like infractions committed by his colleages in the bargaining unit. Although the trade union submitted the disciplinary records of some of these employees with respect to their past infractions none shared the same abysmal record as the grievor with respect to their reliability. In sum, it suffices to say in disposing of this submission that the trade union has failed to establish the ground work to support its allegation of discriminatory treatment by the employer. Indeed, the evidence of Mr. Ohorodynk established beyond doubt the company's zeal in adhering to the principl of progressive discipline in meting out penalties for this type of infraction.

Thirdly, it was submitted that in having regard to the grievor's otherwise exemplary record as an employee with six years service with the company and in light of his difficulties in having access to transportation to the company's yard which has now been resolved by his purchase of an automobile I ought to give the grievor a second chance. The grievor has also testified that he has learned from his past infractions and is not likely to repeat them if he should be reinstated. In short, I was asked to substitute the grievor's discharge with a long term suspension and thereby reinstate him to the employ of the company.

There are several concerns that I hold in acceding to the trade union's request for a long term suspension which were not answered at the hearing. Firstly, I am deeply concerned about the grievor's abuse of his sick leave privileges in order to avoid his availability for calls to protect a work assignment. Moreover, what has compounded this concern was the grievor's efforts to discredit Mr. Ohorodynk whom the grievor alleged counselled him to engage in this unsavoury practice. Clearly, Mr. Ohorodynk in no manner gave the grievor any cause to com?it this wrongdoing in order to circumvent his responsibilities as an employee on call. Indeed, consistent with this unacceptable practic the grievor produced a medical certificate that can only be described, in having regard to its content, as being of dubious probative value. Indeed, the grievor, in a rare exercise of candour, could not separate those occasions when he missed opportunities for work for reasons related to real sickness from those related to feigned sickness. In short, I am reluctant to direct the grievor's reinstatement to the employ of the company when to do so would be to reward him for his dishonest conduct.

But of far more importance in the exercise of my discretion in the grievor's favour is the real reason alleged by Mr. Arnett for his failure to respond to his dispatcher's calls to protect a work assignment. I do not doubt that his access to the work place from his residence in Thornhill, Ontario, was a significant factor contributing to his lack of reliability. Nonetheless I am also satisfied that this was by no means the ixmediate cause of his difficulty. I am satisfied that the single reason that emerged from the evidence causing the grievor to miss calls to report for work was his personal life style. The exigencies exacted on the grievor by virtue of his being on call on the company's spare board simply interfered with the grievor's personal, private endeavours. It appears that Mr. Arnett could not accommodate the requirements of the yardman's position to the nature of his personal lifestyle. Accordingly, the clashes that resulted with his employer could not be

avoided but were inevitable. In this regard I rely on the grievor's statement (at p.2):

> "I know I could make more money working the spareboard but I've had a problem in doing it. I believe the problem is that I've been taking advantage of the freedom of working the board such as missing calls and booking off too often for my private life."
>
> emphasis added

I am of the view that in light of the grievor's record no useful purpose would be served by directing his reinstatement. I am satisfied that he is sufficiently young (25 years) in age that he should make an effort to secure employment in an environment that is more in keeping with his personal lifestyle. Moreover, I am satisfied that the grievor's termination will serve the purpose of being a meaningful deterrent preventing others from following his practices. For all the foregoing reasons the grievance is denied.

DAVID H. KATES,
ARBITRATOR.