CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1646

Heard at Montreal, Tuesday, May 12, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of discipline assessed the record of Trackman J. Villemure of Limoilou, Quebec effective 17 December 1985.

JOINT STATEMENT OF ISSUE:

Following an investigation on 23 December 1985, Mr. Villemure was assessed 15 demerit marks for absence from work without authorization on 17 December 1985. This resulted in Mr. Villemure's discharge from service effective 23 December 1985 due to accumulation of demerits in excess of 60.

The Brotherhood contends that the discipline assessed the grievor's record for the culminating incident was too severe a disciplinary measure for the offence committed.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(Sgd.) PAUL A. LEGROS	(Sgd.) JUNE PATRICIA GREEN
System Federation	For: Assistant Vice-President
General Chairman	Labour Relations

There appeared on behalf of the Company:

J. Dunn	- System Labour Relations Officer, Montreal
T. D. Ferens	- Manager Labour Relations, Montreal
M. Vaillancourt	- Coordinator Engineering Special Projects, Montreal

And on behalf of the Brotherhood:

P. A. Legros	- System Federation General Chairman, Ottawa
M. Gottheil	- Assistant to the Vice-President, BMWE, Ottawa

The 15 demerit marks assessed against Mr. Villemure for his absence from work without authorization on December 17, 1985, raised his disciplinary record to an accumulation of 70 demerits. The issue is whether the assessment of 15 demerits was excessive in the circumstances, and whether in light of the culminating incident the Company had just cause to terminate the grievor's employment.

A preliminary issue arises with respect to the computation of demerits and the extent of the 'record' for the purpose of assessing discipline. Article 18.3 of the Collective Agreement provides as follows:

> In determining corrective action, only the employee's discipline record of the last five years prior to the incident under investigation will be considered. (emphasis added).

It is common ground that the grievor's record stood at 45 demerits on April 23, 1981. With the imposition of further demerits on a number of occasions over the next five years, with allowance for the substraction of 20 demerits in two separate years for which he was discipline free, his total of demerits stood at 55 immediately prior to the culminating incident. The Union asserts that to the extent that the original 45 demerits formed part of the computation of the grievor's disciplinary record at the time of the culminating incident, the Company has effectively looked beyond the five year period described in Article 18.3 in determining the measure of discipline appropriate on the occasion of his dismissal. It maintains, in effect, that under the Brown system, as applied to the instant Collective Agreement, an employee would not be liable to discharge unless he or she accrued a total of 60 demerits within a given 5 year period.

The Arbitrator has some difficulty with that submission. Although it might appear to flow logically from the language of Article 18.3 of the Collective Agreement, it would fly in the face of the long standing practice of the parties. It is not disputed that Article 18.3 was first incorporated into the Collective Agreement in 1977, at a time when the Brown system had been in effect for a great many years. Under that system points are accumulated and forgiven on a continuous basis, a practice that the Company continued to employ after the introduction of Article 18.3 in 1977. Before this grievance the Union has apparently made no objection to the Company's practice. Moreover, that practice would appear consistent with the wording of Article 18.3 taken against the context of the Brown system: the grievor's 'record' of the 5 years prior to the incident under investigation would, in keeping with that system, include such points as were carried against his record at the commencement of the 5 years. In any event, the application of Article 18.3 was not made an issue in dispute within the Joint Statement of Issue placed before the Arbitrator. Pursuant to the provisions of Article 12 of the Memorandum of Agreement which governs the procedures of the Canadian Railway Office of Arbitration, I am therefore without jurisdiction to consider the application of Article 18.3 now raised by the Union.

I turn to consider the merits of the grievance. In relative terms the grievor is not a long-term employee, with 7 years service to his credit at the time of his termination. At the time of the culmination incident, he had 55 demerits registered against his record and had been repeatedly counselled with respect to the need to be faithful to his attendence at work and the obligation to give his employer sufficient notice whenever he would be absent. His record since 1981 reveals repeated instances of failure to attend at work

without any communication to the Company, with progressive discipline having little apparent effect over the years. In all of the circumstances, given the grievor's prior record and the concerns communicated to him by the Company prior to the culminating incident, the Arbitrator cannot conclude that the assessment of 15 demerits, or indeed of 5 demerits which would still result in an accumulation of 60 points, was not within the appropriate range of discipline in the circumstances. For these reasons the grievance must be dismissed.

MICHEL G. PICHER
ARBITRATOR