CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1850

Heard at Montreal, Wednesday, 9 November 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Appeal of assessment of 20 demerit marks for alleged insubordination toward a Company officer on June 1, 1987 on behalf of grievor, Mr. D. A. Walker, P.I.N. 148416, which led to his dismissal.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 1, 1987 at 08:15, Mr. Walker sustained an injury while on duty. He was taken by his Foreman to see a doctor in Prince George, B.C. who treated him and advised him to remain off work for seven to fourteen days.

The contention of the Brotherhood is that Mr. Walker was unjustly dealt with by the Company in assessing the grievor 20 demerit marks, resulting in his subsequent dismissal, due to the fact that this incident was provoked by Roadmaster Pettorosso while the grievor was off duty.

The Brotherhood further contends that the Company's Discipline Policy was also violated, as well as Article 18.2 of Agreement 10.1 and all other applicable rules.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD) G. SCHNEIDER
System Federation General Chairman

There appeared on behalf of the Company:

R. Lecavalier	- Counsel, Montreal
G. C. Blundell	- Labour Relations Officer, Montreal
A. Watson	- System Labour Relations Assistant, Montreal

S. Pettorosso - Roadmaster, Prince George
G. Basra - Regional Maintenance Supervisor, Edmonton

And on behalf of the Brotherhood:

M. Gottheil - Counsel, Assistant to the Vice-President Ottawa
G. Schneider - System Federation General Chairman, Winnipeg
D. A. Walker - Grievor

AWARD OF THE ARBITRATOR

The material establishes that Mr. Walker sustained a compensable injury while on duty. He proceeded to the hospital in Prince George and was told by the doctor who examined him to stay off work for seven to fourteen days. Shortly thereafter, during a telephone conversation with Roadmaster Pettorosso, the grievor was asked whether he would attend to be examined by a Company doctor in Prince George to determine whether he was fit for light duty, to which he initially agreed. He later changed his mind, and decided to proceed directly home to McBride, where he was to see his family doctor in accordance with the instructions of the doctor he had seen at the hospital at Prince George.

While Mr. Walker was in the course of hitchhiking to Prince George from a point near the Company's crew accommodations, Roadmaster Pettorosso, who was driving by, stopped to talk to him. Mr. Pettorosso asked the grievor where he was going and whether he had gone to see the Company doctor as they had earlier discussed. The grievor responded that he had not seen the Company's doctor and that he was going home to see his family doctor in McBride. While the precise details of the incident are sketchy, it does not appear disputed that Roadmaster Pettorosso took the position that he was giving the grievor an affirmative directive to be examined by the Company's doctor to see whether he was fit for light duty. The grievor, in an equally affirmative tone, was taking the position that he would not do so, and that he was going home. During the course of the exchange it is clear that the grievor used abusive language. I am satisfied that his words to the roadmaster included, "Fuck you, I'm not going anywhere and if you think I didn't get hurt on the job, I will go see my lawyer." as well as "Fuck off, I'm off duty now and I don't care what language I use toward you."

It is not disputed that the grievor did suffer a compensable injury. He subsequently received Workers Compensation Benefits for the period of his absence. The Company took the position, however, that the grievor was insubordinate, based both upon the tone of his language with his supervisor as well as his refusal to comply with Mr. Pettorosso's directive. Noting that the grievor was paid for the time during which the incident took place, the Company asserts that he was on duty, and acted in a manner clearly insubordinate to his supervisory officer, as a result of which he was assessed twenty demerit marks which, coupled with his prior disciplinary record, resulted in his discharge.

The first issue is whether the grievor was under an obligation to

comply with Mr. Pettorosso's directive to be examined by a Company physician to determine his fitness for light duty. On this issue the arbitral jurisprudence is well established. While it may the prerogative of an employer to require a medical certificate to justify an employee's absence, and to require an employee to undergo a medical examination where there are reasonable and probable grounds to doubt the employee's fitness to return to work in a safe and efficient manner, absent some statutory or contractual authority, as a general matter an employer does not have a right to require an employee to subject himself or herself to a medical examination. (See Re Riverdale Hospital and Canadian Union of Public Employees, Local 79 (1985) 19 L.A.C. (3d) 396 (Burkett), Re Brewers Warehousing Co. Ltd. and United Brewers Warehousing Workers Provincial Board, Local 311 (1982) 4 L.A.C. (3d) 257 (Knopf) and Re Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (1978) 20 L.A.C. (2d) 419 (M. Picher).)

The principles were summarized in the Monarch Fine Foods case at pp. 421-2 as follows:

> It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person. An employer could not at common law assert any inherent right to search an employee or subject an employee to a physical examination without consent: Latter v. Braddell et al (1881), 50 L.J.Q.B. 448(C.A.). Thus there is nothing that can be described as an inherent management right to subject an employee to what would otherwise be a trespass or an assault upon the person. The right of an employer to require an employee to submit to an examination by a doctor of the employer's choice was reviewed by the Court in Re Thompson and Town of Oakville (1963), 41 D.L.R. (2d) 294 (Ont. High Ct.). In that case two constables were effectively discharged for refusing to submit to a medical examination when ordered to do so by their chief constable. The orders of the municipal council discharging the constables were quashed on certiorari on the basis that there was no lawful authority in the employer to impose the requirement of a medical examination upon them. McRuer, C.J.H.C., stated:
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> > The right of employers to order their employees to submit to an examination by a doctor of the choice of the employer must depend on either contractual obligation or statutory authority.
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> Normally, where an employment relationship is governed by a collective agreement, the authority of an employer to require an employee to submit to a medical examination must, apart from statutory authority, be either expressed or implied in the collective agreement.

> The arbitration cases which have dealt with this issue most frequently are those in which an employee returns to work after an absence due to illness and an issue arises as to the ability and fitness of the employee to return to work. Boards of arbitration have consistently held that it is implicit in the rights of management to require that employees be physically fit to perform their work efficiently and safely. Thus it has been found that an employer may, where reasonable and probable grounds exist, require that the employee pass a medical examination by the company's doctor or by a medical practitioner named by the company to determine an employee's fitness to return to work: see Re Studebaker-Packard of Canada Ltd. and U.A.W., Local 525 (1960), 11 L.A.C. 139 (Cross); Re Eaton Automotive Canada Ltd. and U.A.W., Local 27 (1969), 20 L.A.C. 218 (Palmer); Re Firestone Tire & Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113 (1973), 3 L.A.C. (2d) 12 (Weatherill).

In the instant case it is not disputed that the grievor suffered an injury, and was instructed by the doctor in Prince George who examined him to stay off work for a period of between seven and fourteen days, and to see his doctor at home in McBride. He was acting in pursuance of that intention when he was encountered by Roadmaster Pettorosso. The material further establishes that the grievor had advised his own foreman that he was leaving for McBride. The Arbitrator is satisfied that as a matter of law the grievor was then no longer on duty, and, quite apart from whether he was or was not on duty, the Company in the person of Roadmaster Pettorosso had no right to require him to be examined by a Company doctor. If Mr. Pettorosso had any doubt about the bona fides of the grievor's injury, it was open to him to request that the grievor produce the necessary medical documentation at the appropriate time. The Arbitrator must therefore conclude that in the circumstances at hand the grievor was not insubordinate or defiant of Company authority merely by exercising the right which he had to decline to be examined by a Company doctor as directed by his Roadmaster.

The issue then becomes whether the abusive language utilized by the grievor renders him liable to some measure of discipline. In this regard the fact that the grievor was not on duty or on Company premises does not necessarily constitute a defence. It is clear that assault, threats or abusive conduct between employees or between employees and supervisors while off duty and off working premises may be the subject of discipline where the incident is job-related and the conduct in question impacts negatively on legitimate employer interests. (See CROA 1701.)

For the reasons related above I am satisfied that the grievor was entitled to refuse his roadmaster's directive to see a Company doctor that day. I am not satisfied, however, that the defiant tone, and in particular the abusive language, utilized by the grievor towards his supervisor was justified, or that it was not deserving of some

measure of discipline. If Mr. Walker wished to avail himself of his right to return home as instructed by the Prince George physician, he need only have communicated that intention in clear and civil terms to Mr. Pettorosso. Whatever view the grievor may have had of Mr. Pettorosso's intentions or the legitimacy of his request, he did not have a licence to use unacceptably abusive language with his roadmaster.

The grievor is not a long-term employee, and his disciplinary record is quite negative. There are, in other words, few mitigating circumstances that bear in his favour. I am satisfied, on the other hand, that the Company did proceed on a clear basis of mistake with respect to its rights in respect of the directive which Mr. Pettorosso put to the grievor. Considering that it was Mr. Pettorosso's directive which sparked the grievor's heated response, and notwithstanding the fact that the grievor's record stood at fifty demerits at the time, I am satisfied that in all of the circumstances discharge is excessive, and a substantial suspension in substitution is a sufficient measure of discipline.

For these reasons the grievor shall be reinstated, without compensation or benefits, and without loss of seniority, with the period of time from his discharge to his reinstatement to be recorded as a suspension for using abusive language with a supervisor. I retain jurisdiction in the event of any dispute between the parties in respect of the interpretation or implementation of this award.

November 10, 1988

MICHEL G. PICHER
ARBITRATOR