CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1934

Heard at Montreal, Thursday, 13 July 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of discipline assessed the record of Conductor G.D. Miller of Vancouver, B.C. August 29, 1986.

JOINT STATEMENT OF ISSUE:

On May 18, 1986, Conductor G.D. Miller was unavailable for his regular assignment and remained unavailable until the time of his discharge. It was ascertained that Conductor Miller was unavailable during this period due to being incarcerated.

An investigation into this matter was conducted on August 11, 1986, at the Vancouver Pre-Trial Centre. Following this investigation, Conductor Miller was discharged effective August 29, 1986, for failure to be available and protect his assignment from May 19, 1986 to the date of his discharge.

The Union has appealed the discharge contending that Conductor Miller was discharged without due cause. It is the Union's further contention that the Company should have granted Conductor Miller a leave of absence as requested and by not granting such leave, the Company was unjust and unfair.

The Union seeks that Conductor Miller be reinstated in Company service with full seniority and compensation or alternatively, some lesser penalty than discharge as the Arbitrator deems fit in the circumstances.

The Company has declined the appeal.

| FOR THE UNION: | FOR THE COMPANY: |
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| (SGD) L. H. OLSON | (SGD) M. DELGRECO |
| GENERAL CHAIRMAN | for: ASSISTANT VICE-PRESIDENT LABOUR RELATIONS |

There appeared on behalf of the Company:

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| J. R. Hnatiuk | - Manager, Labour Relations, Montreal |
| K. G. Macdonald | - Manager, Labour Relations, Edmonton |
| W. V. Stasiuk | - Labour Relations Officer, Edmonton |
| D. E. Lussier | - Co-Ordinator, Special Projects, Montreal |

And on behalf of the Union:

C. S. Lewis - Secretary, GCA, Edmonton
L. H. Olson - General Chairman, Edmonton
G. D. Miller - Grievor

AWARD OF THE ARBITRATOR

The material establishes that Mr. Miller was unavailable for duty because of his incarceration as a result of a criminal charge unrelated to his employment. It is common ground that the grievor was present when a friend and fellow employee was the fatal victim of a physical altercation at a party. It is undisputed that he had no responsibility in the tragic fatality that occurred. The charges against him arose out of his actions subsequent to the death, which led to his conviction as an accessory after the fact.

It is not disputed that before and after the incident that led to his being charged and convicted, Mr. Miller had no criminal record, nor any involvement with criminal activities. But for the tragic incident in question, he had been a good and law abiding citizen. The material confirms that the criminal Court so concluded and, in the circumstances, sentenced Mr. Miller to a relatively brief period of incarceration. On a full review of the material the Arbitrator is satisfied that the grievor's actions in relation to the incident for which he was convicted were entirely uncharacteristic, and were prompted in part by feelings of confusion and fear for his own life. I further accept the medical documentation filed, as well as the opinion of Mr. Miller's correctional caseworker confirming that he is not a criminal and is a sincere and hard working person who fell victim to "(running) into a bad situation".

The issue in the instant case is whether the Company was entitled to discipline Mr. Miller because of his unavailability for work during his incarceration. I am satisfied that it was. The issue then becomes whether, in light of all the factors to be considered, a measure of discipline short of discharge is appropriate. In assessing that question a number of factors must be weighed. Among them are the impact, if any, on the employer's operations and interests arising out of the grievor's criminal conviction, as well as the grievor's length and quality of service. The principles that apply were expressed in the following terms in CROA 1645, which also involved the discharge of an employee convicted and incarcerated in relation to a fatality:

> As is implicit from the cases, there can be no automatic presumption that conviction for a serious criminal offense, including subsequent incarceration, are necessarily inimicable to the continuation of an employment relationship. In this, as in any matter of discipline, each case must be assessed on its own merits, with close regard to a number of factors, including the nature and circumstances of the offense, efforts at rehabilitation, the nature of the work performed by the employee, the length of an employee's service and the quality of his or her disciplinary record and prior criminal record, if any. Obviously, careful consideration must be given to the reinstatement of any employee who is absent without leave due

> to incarceration for a serious criminal offense, having particular regard to the need of the Company to provide, and appear to provide, a public service consistent with the highest standards of safety and integrity in its employees. Those considerations should not be compromised or placed at risk. On the other hand, great care should be taken not to overreact and unduly sever the career of an employee of long-standing and good service when the evidence establishes, on the balance of probabilities, that there is not real jeopardy to the Company's legitimate interests.

In CROA 1645, the grievor, whose sentence was longer than that of the grievor in the instant case, was a good employee of 21 years' service who was reinstated into his employment. (See also generally, CROA 583, 981, 1476 and Re Alcan Products and United Steel Workers (1974) 6 L.A.C. (2d) 366 (Shime).)

Mr. Miller is an employee of 21 years' service with the Company. The evidence before the Arbitrator confirms beyond question that he has always been a good and faithful employee. He had a clear disciplinary record at the time of discharge, and in fact had once received merit points for his alertness in responding to a fire on a bridge. His tragic involvement in the fatality of a friend and co-worker was not work related, and was clearly an uncharacteristic aberration given his lifelong record of decent and law abiding conduct. Moreover, while the Court saw fit to impose a relatively light sentence, the Arbitrator accepts that Mr. Miller has suffered personally, feels remorse for what happened, and has paid his debt to society.

The Company suggest that some employees may not welcome the prospect of working with Mr. Miller in light of his conviction. Be that is it may, the interests of the grievor, as a long service employee of good record, must also be weighed in the balance. There is in the Arbitrator's view no basis to conclude that the return of Mr. Miller to work as a conductor poses any threat to other employees or any genuine reason for concern among them. Moreover, even accepting that there may be some vestige of negative feeling, the Arbitrator is not persuaded that the grievor's future should be predicated on placating the sensitivities of a less forgiving minority of employees.

For the foregoing reasons the Arbitrator deems it appropriate to reduce the grievor's penalty to something less than discharge, having particular regard to the isolated and uncharacteristic nature of his criminal offence, and to his previous long service and good record over some 21 years with the Company. The grievor shall therefore be reinstated into his employment as a conductor, without compensation and without loss of seniority. I retain jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this award.

July 14, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR