

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2029

Heard at Montreal, Tuesday, 12 June 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal the dismissal of P. Konstantakos, Trainman, Toronto as a result of his failure to qualify in the Uniform Code of Operating Rules.

JOINT STATEMENT OF ISSUE:

The Canadian Railway Act requires that, in order to work as trainmen, employees must pass an examination on the Uniform Code of Operating Rules.

The grievor's rule card expired on February 13, 1989. He was, therefore, required to write his Rules examination, 'A' Book, prior to this date in order to maintain his qualification as a trainman. The grievor failed to pass this examination on three occasions, February 9, 10 and April 14, 1989. On February 10, 1989 the grievor was removed from service pending successful completion of the Rules examination. Subsequent to April 14, 1989 the grievor was dismissed from the Company account his failure to qualify in the Uniform Code of Operating Rules.

The Union has appealed the dismissal on the grounds that the Company's actions were discriminatory, unreasonable and excessively punitive and requests the grievor be reinstated and paid loss of earnings.

The Company disagrees.

FOR THE UNION:

FOR THE COMPANY:

(SGD) W. G. SCARROW  
GENERAL CHAIRPERSON

(SGD) M. DELGRECO  
for: ASSISTANT VICE-PRESIDENT  
LABOUR RELATIONS

There appeared on behalf of the Company:

S. F. McConville -- System Labour Relations Officer, Montreal  
J. B. Bart -- Manager, Labour Relations, Montreal  
M. Hughes -- System Labour Relations Officer, Montreal

M. Fisher -- Co-Ordinator, Transportation, Montreal

And on behalf of the Union:

W. G. Scarrow -- General Chairperson, Sarnia  
T. Slywka -- Local Chairperson, Toronto  
W. C. E. Crossman -- Local Chairperson, Oshawa  
P. Konstantakos -- Grievor

#### AWARD OF THE ARBITRATOR

The material establishes that on three occasions, on February 9, 10 and April 14, 1989, the grievor failed his required rules examination for 'A' Book qualification under the Uniform Code of Operating Rules. The Company maintains that it is highly unusual for persons to fail the test, and that the grievor was provided every opportunity for both classroom instruction and materials to study prior to the tests. In the circumstances it maintains that Mr. Konstantakos' discharge was justified.

The Union raises two factors in mitigation. Firstly, it maintains that on at least three prior occasions employees of long service who were regularly employed in yard operations were allowed as many as three or four opportunities to pass the 'A' Book examination. The cases of two employees at Sarnia and one at Oshawa were cited to the Arbitrator, without apparent contradiction or specific confirmation by the Company. In part, the Union's representative submits that employees regularly assigned to yard work can encounter difficulty with the road signals portion of the UCOR examination, and are therefore entitled to some consideration in that regard. This, it submits, was the grievor's circumstance.

Secondly, the Union maintains that the grievor's personal circumstances were deserving of compassionate consideration. At the hearing Mr. Konstantakos stated that during the night between February 8 and 9, 1989 he was involved in rushing his common-law wife to the hospital, where she suffered a miscarriage and came close to dying. In the Arbitrator's view this fact, if proved, would raise an arguable ground for disregarding the negative test results registered by the grievor on both February 9 and 10. Unfortunately, however, documentary evidence tendered by the Company appears to conclusively disprove the grievor's assertion. His common-law wife, who is also an employee of the Company, filed a medical absence form, accompanied by a doctor's statement, in respect of her absence from work because of illness in February of 1989. That document discloses that she was, in fact, at work through the end of her shift on February 10, 1989, that she was hospitalized for six days for abscesses to her arms, but not until February 13. There is no indication from the documentation that she was pregnant, suffered a miscarriage or was in any way involved in a life threatening situation, as related by the grievor. The Union called no evidence in rebuttal of the medical documentation filed by the Company.

The Arbitrator is compelled to the regrettable conclusion that no credence can be lent to the grievor's account of his personal

circumstances offered in attempted justification of his failure of the UCOR examinations on three separate occasions. I am, moreover, not persuaded that the Union has established a case of inequitable treatment or discrimination in respect of Mr. Konstantakos, when his case is compared to that of the other employees who, according to the Union, were given several opportunities to pass the examination. It is not disputed that in all three of the cases compared, the employee was a long service employee, at or near retirement, whose latter years of service had been almost exclusively in yard work. Those are not the circumstances of the grievor, who had less than five years' seniority at the time of his discharge. It is not disputed that he had some experience in road service, and in a prior examination he had passed the examination with a high grade. On the whole I am not satisfied that the Union has established inequitable treatment or discrimination against Mr. Konstantakos, nor can I find that the change in the training schedule implemented for a time in 1989 operated to materially prejudice the grievor's reasonable opportunity to prepare and perform well on the examination.

For all of the foregoing reasons the grievance must be dismissed.

June 15, 1990

(Sgd.) MICHEL G. PICHER  
ARBITRATOR