CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2036

Heard at Montreal, Thursday, 14 June 1990

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Discipline was assessed to Ms. B. Reid on three separate and unrelated instances as follows: (a) 20 demerit marks for failing to be available for duty of various occasions from January 26 to March 27, 1989; (b) 20 demerit marks for failing to appear for a properly scheduled investigation at Thunder Bay on April 4, 1989; and (c) 40 demerit marks for failing to be available for duty April 29, 1989 which resulted in her dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

An investigation was conducted with Ms. Reid on April 5, 1989 concerning her not being available for duty on various occasions from January 26 to March 27, 1989. As a result of the facts developed during the investigation, Ms. Reid was assessed twenty demerit marks.

The Union appealed the discipline on the basis of alleged irregularities in the investigation and that twenty demerits was excessive.

Also on April 5, 1989, a separate investigation was conducted with Ms. Reid concerning her failure to appear for an investigation scheduled for April 4, 1989. As a result of this investigation, Ms. Reid was also assessed twenty demerit marks.

The Union has appealed this discipline assessed due to typographical irregularities in the written record of the investigation of April 5, 1989, as evidenced by the incorrect date shown on Ms. Reid's statement. The Union has also claimed the discipline was excessive.

A statement was taken from Ms. B. Reid on May 3, 1989, concerning her failure to be available for duty on April 29, 1989. She was subsequently assessed forty demerit marks and then dismissed for the accumulation of demerits.

The Union appealed the discipline arguing that it was excessive and unjust.

In all of the above instances, the Company has declined the Union's appeals and submits that the discipline assessed was neither unwarranted nor excessive.

FOR THE UNION:	FOR THE COMPANY:
(SGD) D. DEVEAU GENERAL CHAIRPERSON	(SGD) J. M. WHITE GENERAL MANAGER OPERATION & MAINTENANCE, HHS

There appeared on behalf of the Company:

D. A. Lypka -- Unit Manager, Labour Relations, HHS, Vancouver
K. E. Webb -- Labour Relations Officer, Vancouver
L. Winslow -- Labour Relations Officer, Montreal

And on behalf of the Union:

D. Deveau -- General Chairman, Calgary
J. Manchip -- General Chairman, Montreal
C. Pinard -- Vice-General Chairman, Montreal
B. A. Reid -- Grievor

AWARD OF THE ARBITRATOR

The material establishes that the grievor was unavailable for calls between January 26 and March 27, 1989, as alleged. The Union points to the fact that other employees who, like the grievor, refused calls in the first two weeks of the January layoff received no discipline. The Arbitrator accepts the position of the Union that it would be inequitable to penalize the grievor in a discriminatory manner, and to that extent the assessment of twenty demerits against her is called into question.

However, it also appears that some of the discipline assessed on that occasion relates, at least in part, to conduct of the grievor that distinguishes her from other employees. Most apparent is her failure to notify her employer of her inability to return from a vacation out of the country. While the Arbitrator accepts the grievor's assertion that she was in difficult circumstances on a trip to Mexico, where she was the victim of a robbery, I am not persuaded that Ms. Reid was unable to communicate her plight to her employer and keep the Company posted of her likely date of return and future availability for work. This she did not do, and thereby rendered herself liable to discipline. In the circumstances I am satisfied that the assessment of ten demerits was justified for the incident, and that the grievor's record should be revised accordingly.

The Union further submits that the discipline in respect of the January-March absence should be entirely nullified because the Company failed to give the grievor written notice of her disciplinary investigation as required by Article 27.1 of the Collective Agreement. The Arbitrator agrees with the Union's interpretation and application of Article 27.1 in the circumstances of this case. Ms. Reid had returned from her trip abroad, and had indicated her

availability to return to work. The Company nevertheless continued to hold her out of service, in circumstances which, in my view, went beyond what is contemplated in Article 25.9, whereby an employee who fails to report for duty is considered out of service. From the time she communicated her availability to work she was held out of service within the meaning of Article 27.1. In the circumstances, therefore, Ms. Reid was entitled to written notice of the accusation against her in advance of the investigation.

In my view, however, her claim that the procedures are a nullity cannot succeed. The record discloses that Ms. Reid attended at the hearing, with Union representation, and raised no objection with respect to any procedural irregularity regarding the notice which she had received. The Company then proceeded with the investigation, and assessed discipline, part of which it relied upon in support of her eventual discharge. No objection was raised by the Union until after the grievor's discharge, in June 1989. To allow the Union to now plead a procedural irregularity not raised at the appropriate time would cause substantial prejudice to the Company in the circumstances. I am satisfied that Ms. Reid and the Union must be taken to have waived her right to assert any procedural irregularity by not raising that issue at the investigation itself. In the circumstances, therefore, I am satisfied that the assessment of ten demerits in respect of the grievor's unavailability for duty from January 26 to March 27, 1989 is justified.

The Arbitrator has more difficulty with the assessment of twenty demerit marks for the grievor's failure to appear for an investigation scheduled at Thunder Bay on April 4, 1989. The record discloses that in fact Ms. Reid overslept and called her employer approximately one hour after the scheduled commencement time of the investigation to apprise the Company of her circumstances. Given those facts, it is in my view more accurate to say that she was late in making herself available for a scheduled investigation. That is an infraction which, in the Arbitrator's opinion, is more appropriately dealt with by the assessment of ten demerits, and a substitution is so ordered. However, the Arbitrator can find no merits in the Union's submission that typographical irregularities in the documentation of the investigation can have any bearing on the outcome or merits of the investigation.

The record does disclose beyond controversy that the grievor failed to appear for work as scheduled on April 29, 1989. That was an assignment which she had previously accepted. She is plainly deserving of discipline for that infraction. As an employee of some fourteen years' standing, however, with a prior disciplinary record that is not extensive, she is deserving of less discipline than forty demerits assessed against her on that occasion. In the Arbitrator's view twenty demerits are a more appropriate measure of disciplinary response in all of the circumstances, and her record shall be so revised.

In the result, the grievor is entitled to be reinstated into her employment, without loss of seniority. Having regard to the totality of the record, however, and in particular the apparent disregard by Ms. Reid on a number of occasions of her obligation to maintain reasonable contact with her employer with respect to her whereabouts

and work availability, as well as the recidivist tendencies of these infractions, the Arbitrator is not persuaded that this is a case for an order for compensation. As Ms. Reid's disciplinary record will now reflect four incidents of discipline since February of 1988, all relating to her attendance, she must appreciate that any further incidents of this type in the future may have the most serious of consequences.

June 15, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR