

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2100

Heard at Montreal, Tuesday, 12 February 1991

concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

On August 17, 1990, Lois Belan was terminated by the Company. The termination was based upon failure to comply with Rule 9 and the past record of the grievor.

JOINT STATEMENT OF ISSUE:

The Company alleges that the grievor failed to call in two hours prior to the commencement of her shift on July 20th and July 23rd, 1990.

The grievor asserts that she did call in or in the alternative, if she is confused in this respect, that the stresses of her life and her conditions at work were such that she cannot be blamed for any failure.

The Union also asserts that there was no violation of Rule 9 in the circumstances.

The grievor seeks reinstatement with full compensation for lost wages and benefits and full seniority or such other relief as seems appropriate. Included in the claim for relief is a request that the grievor ought to have been placed on disability benefits given her condition.

The Union asserts a violation of Article 8, including Article 8.7 of the Collective Agreement.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) J. J. BOYCE
SYSTEM GENERAL CHAIRMAN

(SGD.) B. F. WEINERT
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

M. D. Failes
B. F. Weinert

-- Counsel, Toronto
-- Director, Labour Relations, CPET,
Toronto

D. Salmon

-- Manager, Administration, Obico
Terminal

E. Kuivinen

-- Manager, OS&D, Obico Terminal

M. Arsenault	-- Manager, (AM Shift) Dock, Obico Terminal
G. Pratt	-- Board Clerk, Obico Terminal
J. Viola	-- Customer Service Clerk, Obico Terminal

And on behalf of the Union:

H. Caley	-- Counsel, Toronto
J. Crabb	-- Secretary/Treasurer, Toronto
M. Gauthier	-- Vice-General Chairman, Montreal
L. Belan	-- Grievor

AWARD OF THE ARBITRATOR

There is some conflict with respect to the facts giving rise to this grievance. While it is common ground that the grievor reported late for work on July 20 and was absent on July 23, 1990, she maintains, and the Company denies, that she did call in to give notice of her circumstances sufficiently in advance of the commencement of her tour of duty on both occasions. The employees and supervisors with whom she claims to have spoken do not corroborate her account. Moreover, the Company's records of telephone calls logged, which the Arbitrator judges to be the best evidence on this matter, do not reveal any calls received from the grievor at the times in question. On balance, therefore, I am inclined to conclude that the position of the Company respecting the failure of the grievor to have called on both dates is to be preferred.

Counsel for the Company relies, understandably, on the grievor's past record with respect to failures to call in two hours prior to the commencement of her shift when she is to be late or absent. Indeed, she was disciplined some seven separate times between December 15, 1986 and November 14, 1989 for that same infraction, culminating in a two day suspension on the last occasion.

If the foregoing were the full extent of the facts the Arbitrator would have some difficulty concluding other than that the two further infractions of July 20 and July 23, 1990 were in the nature of a culminating incident. Given that the grievor's disciplinary record previously stood at fifty-nine demerits, absent any mitigating circumstances discharge would have been justified in the circumstances.

There are, however, mitigating circumstances to be considered. The record before the Arbitrator includes a medical certificate signed by the grievor's physician, a specialist in psychotherapy, which establishes that Ms. Belan was under her care from June 28, 1990. The doctor's statement establishes that the grievor suffered, and to some extent continues to suffer, from a serious reactive depression for which she has been placed on antidepressant medication. It does not appear disputed that at the time material to this grievance her medical condition was occasioned, or at least aggravated, by difficult personal and family circumstances which she was experiencing at the time. In the opinion of the grievor's physician, Dr. J. Gaal, it is doubtful that the grievor should have been at

work in July of 1990, and she states that she is unable to give a date at this time with respect to when the grievor will be fit to return to work full-time.

While it appears that the Company was, in a general way, aware that the grievor was going through some family problems, it is also not disputed that no medical evidence or doctor's certificate was ever presented to the Company to inform her supervisors of her medical condition and ongoing treatment, at any time prior to her termination. Indeed, the letter provided by Dr. Gaal, dated one month prior to the arbitration hearing, is the first formal notification which the Company received in that regard, and then only shortly before the hearing.

In the Arbitrator's view, on the whole, the grievor's circumstances do justify mitigation of the penalty assessed against her. While the record does disclose previous difficulties with lateness and failure to give adequate notice to her supervisors when she would be unable to report for work, it also demonstrates positive efforts, and some substantial success, at rehabilitation. On at least two occasions the grievor registered discipline free years of service. On the other hand, however, the Company acted on the basis of the knowledge available to it, in circumstances which to all outward appearances suggested she was the author of her own misfortune and which would have justified the termination of the grievor's services. In these circumstances I am satisfied that a reinstatement of Ms. Belan into her employment, on conditions, and without compensation or benefits is justified.

For the foregoing reasons the grievor shall be reinstated forthwith into her employment, without loss of seniority and without the payment of compensation or benefits for the time lost. As the grievor's fitness to return to work is not yet established, her return to active service will be conditioned upon the production of a satisfactory medical certificate, to be provided by Dr. Gaal, or such other physician as the parties mutually determine. As an employee reinstated to the rolls, however, Ms. Belan shall be entitled to apply for such disability benefits to which she may be entitled prospectively, subject, of course, to establishing the merits of her claim through the normal procedures.

February 15, 1991

(Sgd.)MICHEL G. PICHER
ARBITRATOR