CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2401
Heard at Montreal, Wednesday, 13 October 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION - CANADA]
DISPUTE:
Appeal of the dismissal of Trainperson E.R. Ross effective 12 November 1992 for failure to protect service in accordance with the provisions of Clause 15, Paragraph 8, Sub-paragraphs (a) and (b) of the Conductor Only Agreement.
JOINT STATEMENT OF ISSUE:
On 27 October 1992, the Crew Management Centre sent a registered letter to Mr. Ross advising him there was work offering as a Trainperson in Halifax, N.S., and that he was required to report. Mr. Ross failed to report for work within the 15 day time limit provided by Clause 15, Paragraph 8, Sub-paragraph (b) of the Conductor Only Agreement and his services were dispensed with effective 12 November 1993 [sic].
The Union contends that Mr. Ross complied with the provisions of Clause 15, Paragraph 8, Sub-paragraph (b), that he reported within the 15 day period and personally delivered a letter to explain his unavailability.
The Union requests that Mr. Ross be reinstated with full compensation for all loss of earnings and benefits.
The Company disagrees with the Union's contentions.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. LEBEL	(SGD.) W. D. AGNEW
GENERAL CHAIRMAN	for: VICE-PRESIDENT, ATLANTIC REGION

There appeared on behalf of the Company:

W. D. Agnew	- Manager, Labour Relations, Moncton
B. O. Steeves	- Transportation Officer, Moncton
D. L. Brodie	- System Labour Relations Officer, Montreal

And on behalf of the Union:

R. Lebel	- General Chairperson, Quebec

AWARD OF THE ARBITRATOR

The facts giving rise to the dispute are agreed. On October 27, 1992, the grievor was sent a registered letter advising that he must report for duty within fifteen days, namely November 11, 1992. Mr. Ross was then an employee on the furlough board at Halifax and was being called for service on the spareboard. It appears that Mr. Ross was in fact living in Sydney at the relevant time. On November 9, 1992 the grievor called the Crew Management Centre and placed his name upon the spareboard as available for work. As the Company had been unable to locate him, whether by way of a mailing address or a telephone number, he was then asked by the crew clerk whether he had a telephone at which he could be reached. He gave a response indicating that he was in the process of obtaining a telephone, and that he would call in periodically to determine where he stood on the board. In fact Mr. Ross did not call the Crew Management Centre again until November 13, 1992. In that call he initially indicated that he would respond to a call for 13:00 that day at the Halifax Ocean Terminal. However, he called back a few minutes later and told the crew clerk he would be unavailable due to an appointment in the afternoon. When the crew dispatcher advised him that his failure to respond to the call would be highly disruptive, Mr. Ross instructed him to book him off sick.

There is much in the material before the Arbitrator to suggest that the conduct of Mr. Ross, over a substantial period, was arguably in violation of a number of his obligations under the collective agreement with respect to keeping the Company aware of his current address and whereabouts, failing to be available for duty when called and, on at least one occasion, failing to appear at a disciplinary investigation. However, the Company did not to choose to discipline Mr. Ross. Rather, it formed the opinion that, following the call of Ocotber 27, 1992, he had failed to report in accordance with the provisions of clauses 15.1(8)(a) and (b) of the Memorandum of Agreement between the Company and the Union governing conductor only operations. On that basis it took the position that Mr. Ross' failure to report within 15 days resulted in the forfeit of his seniority, and that his services were terminated. The provisions of the clauses are as follows:

15.1(8)(a) When in accordance with the provisions of this Memorandum of Agreement, employees on the furlough board are required to fill a permanent or temporary position or vacancy or any temporary assignment advertised at the terminal for which no applications have been received, they will be afforded 72 hours notice to report for such.

NOTE: for the purposes of this agreement, when it is necessary to increase the number of employees on the spare board, and employees on the furlough board are required to go to the spare board, their position on the spare board will be deemed to be a temporary assignment.

15.1(8)(b) Employees failing to report at the expiration of 72 hours will, thereafter, no longer be entitled to the guarantee. At the expiration of 15 days from the date called, such employees will forfeit all seniority rights and their services will be dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

The narrow issue to be decided is whether Mr. Ross failed "to report" before the expiration of 15 days, within the meaning of clause 15.(8)(b) of the Memorandum of Agreement.

Clause 15 of the Memorandum of Agreement concerns the operation of furlough boards. Paragraph 8 of clause 15 appears under the sub-heading "Protecting Service at the Home Station." It may be noted that sub-paragraph 11 bears the heading "Protecting Service on the Seniority District". A number of expressions are used within the terms of clause 15 to describe the obligations of employees. As noted above, paragraph 8(b) of clause 15 speaks of the obligation of an employee on the furlough board who is required to fill a permanent or temporary position or vacancy, including a spare board assignment, "to report" within the time limits described. Paragraphs 10(a) and (b) speak of the obligation of an employee on a furlough board in respect of available work as a qualified locomotive engineer or yardmaster, respectively. Paragrpah 10(a) reads as follows:

(10) Employees on the furlough board will not be exempted from the terms and conditions governing their status as a qualified locomotive engineer or yardmaster except that:

10 (a) They will not be required to accept calls for work, on a tour of duty basis, as a locomotive engineer pursuant to paragraph 66.15 of article 66 of agreement 4.16 except in accordance with such local arrangements as established pursuant to paragraph (9) hereof. In the event such employee fails to respond, his or her guarantee will be reduced by 1/20th (i.e., the amount set out in sub-paragraph (2)(b) of this clause 15).

The foregoing provision appears to speak to the obligation of an employee "to respond" to a specific call for work, in the special circumstances described, and the consequences which flow from failing to respond. The expression "to respond" also appears in paragraph 11 of clause 15 where the following provisions are found:

(11) When their services are required elsewhere on the consolidated seniority district, employees on the furlough board will be required to respond in accordance with the following conditions:

...

(c) When it is necessary to utilize employees on the furlough board to protect service elsewhere, employees will be obtained from the closest terminal (by rail) to the point of shortage where there are employees occupying positions on the furlough board.
(d) The junior employee from such closest terminal will be required to protect such service whether or not he or she is occupying a position on the furlough board. Employees failing to report at the expiration of 7 days will, thereafter, no longer be entitled to the guarantee,. At the expiration of 15 days from the date called, such employees will forfeit all seniority rights and their services will be dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

As can be seen from the foregoing, the phrase "to respond" is utilized in paragraph 11 with reference to the obligation of employees on a furlough board to provide services elsewhere on the consolidated seniority district. Sub-paragraph (d) speaks to the consequences for employees who fail "to report" when called upon to provide services at other locations on the seniority district.

The provisions of paragraph 11(d) of clause 15 are remarkably similar to those of paragraph 8(b). Both appear to speak to the obligation of an employee to move from a furlough board to availability for some other form of service, either in a permanent or temporary position or vacancy or a temporary assignment, including spare board service. In the Arbitrator's view it is important to limit the interpretation of the phrase "to report" as it appears in paragraph 8(b) to the facts of the case at hand. The issue of what constitutes reporting for the purposes of responding to call for a permanent position, for example, does not arise on the facts disclosed. For the purposes of the case at hand, the Arbitrator need only deal with what might constitute the obligation to report for spare board duty. The language of paragraph 8(b) plainly ties the obligation to report to the call which triggers both the seventy-two hour and fifteen day periods contained within the paragraph. In that context, the call cannot easily be interpreted to mean a call to a specific spare board trip or assignment. Rather, it must be interpreted as relating to the obligation to present oneself as available to be placed upon the spare board, so as to be available for a specific call to work when when one's turn comes up.

The foregoing interpretation is, moreover, consistent with the realities of furlough board service. Employees who are on furlough boards may be idle for substantial periods of time. In this case, for example, there are two furlough boards at Halifax, each of which is idle for two weeks at a time, in turn. The fact that employees on a furlough board may absent themselves from their home for periods of time, in the expectation that they will not be called to work, explains the period of delay allowed within the provisions of clause 15 when furlough board employees are called to some other form of service.

The facts in the case at hand reveal that Mr. Ross was not in Halifax when he was called for spare board service on October 27, 1992. He did, however, call the crew dispatcher on November 9, 1992 and placed his name on the spare board, as being available for work. However, he could not be reached when his turn came due on November 11, and declined an assignment when his turn came due again on November 13.

The concept of reporting as it is understood in paragraph 8(b) of the Memorandum of Agreement must, at a minimum, imply that an employee, in good faith, places himself or herself as available for service and willing to undertake any ensuing work assignment. While unforeseen circumstances may excuse an employee who has reported from the subsequent failure to protect a specific assignment, there can be no excuse for the employee who purports to report while harbouring no true intention of protecting any assignment of work. In the case at hand the Arbitrator is satisfied that Mr. Ross intended to manipulate the system so as to ensure his continuing unavailability for any assignment, as it appears he had since August 2, 1992. In these circumstances I cannot find that there was a true "reporting" within the meaning of paragraph 8(b) of the Memorandum of Agreement. In the result the grievor duly forfeited his seniority and his employment. In coming to that conclusion, the Arbitrator is satisfied that Mr. Ross did not provide a satisfactory explanation for his abandonment of his employment obligations.

For these reasons the grievance must be dismissed.

October 15, 1993 (sgd.) MICHEL G. PICHER
ARBITRATOR