CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2497
Heard in Calgary, Thursday, 16 June 1994
concerning
Canadian National Railway Company
and
Canadian Council of Railway Operating Unions [United Transportation Union]
Ex Parte
DISPUTE:

Appeal of the discharge of L. Maga of Red Deer, Alberta, effective 5 March 1992.

Union's STATEMENT OF ISSUE:

On November 9, 1990, Mr. Maga booked sick with the CMC. He submitted a claim for weekly indemnity benefits in December 1990 and on February 4, 1991 submitted a supplementary claim for benefits in which his physician indicated that Mr. Maga would be able to return to work in four to six weeks.

In July 1991, the Company sent two double registered letters to Mr. Maga requesting an employee statement regarding his absence from work. Having received no response, on August 27, 1991 the Company indicated to the Union that Mr. Maga's status would be changed to "held out of service pending an investigation" and that he would be staffed out if he did not contact the Company within ninety days.

On October 15, 1991 Mr. Maga contacted the Company and advised that he was now able to return to work. During subsequent discussions with the Company Mr. Maga was advised of the outstanding investigations pending against him and it was suggested that his resignation might be an acceptable alternative. The Company alleges that Mr. Maga stated that he would go to Mirror to turn in his keys and resign.

The Company alleges that it left a message for Mr. Maga at his parent's home to contact the Deputy Superintendent and after receiving no further contact from Mr. Maga he was officially staffed out on March 16, 1992, effective March 5, 1992.

The Union contends that there is no record of a formal investigation or Form 780 being issued to Mr. Maga and that there was a total miscommunication and misunderstanding between Mr. Maga and the Company. The Union maintains that Mr. Maga was legitimately unable to work up until October, 1991 and advised the Company of this through the submission of regular medical forms. The Union further submits that the Company failed to take in to consideration Mr. Maga's medical condition prior to discharging him.

The Union requests that the grievor be reinstated and made whole for time held out of service since March 5, 1992.

The Company maintains that Mr. Maga's discharge was justified and has declined the Union's request.

Company's STATEMENT OF ISSUE:

On November 9, 1990, Mr. Maga booked sick with the CMC. He submitted a claim for weekly indemnity benefits in December 1990 and on February 4, 1991 submitted a supplementary claim for benefits in which his physician indicated that Mr. Maga would be able to return to work in four to six weeks.

In July 1991, the Company sent two double registered letters to Mr. Maga requesting an employee statement regarding his absence from work since February 25, 1991. Having received no response, on August 27, 1991 the Company indicated to the Union that Mr. Maga's status would be changed to "held out of service pending an investigation" and that he would be staffed out if he did not contact the Company within ninety days.

On October 15, 1991 Mr. Maga contacted the Company and advised that he wished to return to work. During a subsequent discussion with the Company on October 16, 1991, Mr. Maga was advised of the outstanding investigations pending against him and it was suggested that his resignation might be an acceptable alternative. Mr. Maga stated that he would go to Mirror to turn in his keys and resign.

The Company left a message for Mr. Maga at his parent's home on November 1, 1991 to contact the Deputy Superintendent, and after receiving no further contact from Mr. Maga he was officially staffed out on March 16, 1992, effective March 5, 1992.

The Union contends that there is no record of a formal investigation or Form 780 being issued to Mr. Maga by the Company. The Union maintains that the grievor was legitimately unable to work up until October 1991 and advised the Company of this through the submission of regular medical forms. The Union further submits that the Company failed to take in to consideration Mr. Maga's medical condition prior to discharging him.

The Union requests that the grievor be reinstated and made whole for time held out of service since March 5, 1992.

The Company maintains that the grievor's discharge was justified and has declined the Union's request.

FOR THE UNION: FOR THE COMPANY:

(SGD.) M. G. Eldridge (SGD.) G. Blundell

for: General Chairperson For: Senior Vice-President, Western Canada

There appeared on behalf of the Company:

M. A. King - Solicitor, Edmonton
G. C. Blundell - Manager, Labour Relations, Edmonton
B. Laidlaw - Labour Relations Officer, Edmonton
R. G. MacDougall - Student at Law, Edmonton
J. Gosse - General Yard Co-ordinator, Vancouver
J. Adamson - Manager, Train Service, Edmonton
A. Wingrave - Transportation Officer, Kamloops

And on behalf of the Union:

D. Ellickson- Counsel, Toronto
J. W. Armstrong - General Chairperson, Edmonton
L. H. Olson - National President, UTU-Canada
M. G. Elridge - Vice-General Chairperson, Edmonton
B. J. Henry - Vice-General Chairperson, Edmonton
C. S. Lewis - Secretary, GCofA, Edmonton
D. Gagnon - Sr. Office Administrator, Edmonton
K. Armstrong- Secretary, Edmonton
L. Maga- Grievor

AWARD OF THE ARBITRATOR

Upon a review of the material filed the Arbitrator is satisfied that Mr. Maga did fail in his obligation to remain in reasonable communication with the Company with respect to his

status, and in particular his eventual fitness to return to work. It is not disputed that by reason of a work related injury incurred in November of 1990 Mr. Maga undertook an extensive period of medical care, which included surgery to his right elbow in January of 1991 and the maintaining of his right arm in a cast through June of the same year.

It does not appear disputed that during the summer of 1991 the Company was unable to contact Mr. Maga in Red Deer, when on two occasions, on July 11 and 23, 1991 double registered letters sent to him were returned unclaimed. It also appears, however, that he was not at his parents' home in Red Deer during that period of time, although he did remain in contact with his parents for the purpose of obtaining his mail. It would further appear that there were a number of changes in the nature and location of postal services in Red Deer during the period in question.

It is true, as reflected in the Company's statement of issue, that in October of 1991, when Mr. Maga contacted the Company to advise that he wished to return to work, he engaged in a conversation with a Company officer, Deputy Superintendent Raynard, which resulted in a statement by the grievor that he would resign his position. That statement resulted from comments made by Mr. Raynard to the grievor to the effect that the investigation pending in respect of his failure to respond to the registered letters, and his related absence from work, would in all likelihood result in his discharge. Shortly after that conversation, however, Mr. Maga decided that he would not resign, and it is not disputed that he submitted no letter or other documentation to confirm his intention to sever his employment.

On the whole, what the evidence reflects is an error of judgement and a serious failure of communication on the part of Mr. Maga, although the Arbitrator is satisfied that that there was no deliberate intent or recklessness in his part with respect to abandoning his employment. He was, if anything, relatively naive as to his obligations and believed that he was justified in his actions by reason of his injury. In the circumstances I am satisfied that while the Company was justified in assessing discipline against Mr. Maga for remaining unavailable for the purposes of communication as to his availability to work, discharge is an excessive outcome in the circumstances. The Arbitrator therefore directs that the grievor be reinstated into his employment, without compensation or benefits and without loss of seniority. The grievor must appreciate the importance, in the future, of remaining at all times fully in touch with and available to the Company, as contemplated under the terms of the collective agreement.

June 21, 1994 _____

MICHEL G. PICHER
ARBITRATOR