

- 4 -

Canadian Railway Office of Arbitration

Case No. 2526

Heard in Montreal, Wednesday, 14 September 1994

concerning

Canadian Pacific Express & Transport

and

Transportation Communications Union

ex parte

Dispute:

The imposition of 10 demerits, and 20 demerits, on December 23, 1993 to Obico employee William Hultoy for failure to report to work and for a violation of Rule #9 respectively.

Ex Parte Statement of Issue

Mr. Hultoy did not report for work on November 17, 1993 through November 26, 1993. Consequently, he was disciplined for this action, and was dismissed for accumulation of demerits.

Mr. Hultoy was arrested on November 17, 1993 as a consequence of a new work-related matter. He was kept in custody until his bail could be arranged. Mr. Hultoy was eventually acquitted of the charges that resulted in his incarceration.

The Company was advised of this situation by Mr. Hultoy's lawyer, Mr. Larry Moldaver, by telephone in November, 1993 and again by letter dated May 18, 1994.

The Company contends that both, in the present circumstances, and having regard to Mr. Hultoy's past record, the discharge was warranted.

The Union contends that in light of the exceptional circumstances giving rise to his absence from work, the discipline imposed was not warranted. The Union requests that he be reinstated with full seniority and benefits and be compensated for all lost time while held out of service.

The Company declined the Union's request.

for the Union :

(sgd.) D. J. Dunster

Executive Vice-President

There appeared on behalf of the Company:

M. D. Failes- Counsel, Toronto

B. F. Weinert - Director, Labour Relations, Toronto

D. Tarsay - Manager, Personnel, Obico Terminal, Toronto

And on behalf of the Union :

D. Wray- Counsel, Toronto

D. Graham - Division Vice-President, Regina

Wm. Hultoy - Grievor

award of the Arbitrator

The material before the Arbitrator establishes that the grievor, an employee with some four years' seniority at the time of the event in question, was charged with a serious criminal offence in September of 1993. It appears that he was released on bail, but that thereafter he found himself either unwilling or unable to respect the conditions of his bail, which included a prohibition against returning to his former place of residence. As a result he suffered a series of incarcerations of relatively brief duration in October and November of 1993. Although it is not material to the dispute, he was also incarcerated from February 3, 1994 until April 21, 1994, at which time he was

acquitted of the charges against him and was released.

It is not disputed that the Company was made aware of the grievor's circumstances, in general terms, by his lawyer in November of 1993. In particular, it would appear that Obico Terminal Manager of Personnel, D. Tarsay, was aware, as of November 8, 1993 that Mr. Hultoy was criminally charged and had been incarcerated for certain periods of time. This was conveyed to Mr. Tarsay by the grievor in a telephone conversation on November 8, 1993. However, the grievor continued to remain absent from work, without further notification or explanation, notwithstanding a direction from Mr. Tarsay, and the grievor's own confirmation, that he would report for work on November 9.

It appears that the grievor was seen in the terminal on November 15th, at which time he was provided a letter directing that he report for work at 6:00 p.m. that evening, or have his employment terminated. Mr. Hultoy worked November 15 and 16, but again was absent from work from November 17 until November 26, without permission and without any notification to the Company of his circumstances. A letter provided by Mr. Hultoy's lawyer, Mr. Larry H. Moldaver relates that the grievor was charged with breach of his bail conditions on or about November 17 and was in custody for a number of days until "on or about November 22, 1993." There appears to be little doubt that his absence during the period in question was occasioned by his incarceration, and that he did not contact his employer to explain his circumstances. In fairness to the grievor, however, this aspect of the case may to some extent be mitigated by an admission that Mr. Moldaver did contact the Company by telephone, at Mr. Hultoy's request, to explain his circumstances to the Company. The exact date of that communication is not clear on the material before me, although it appears to have been sometime after November 8. The evidence also discloses that Mr. Hultoy was notified to attend at a disciplinary interview on November 29, and that he failed to attend that interview, although he was not then in custody. He relates that on that date he came into the terminal but left "... because he had other things on his mind."

In the letter terminating the grievor, dated December 23, 1993, the Company assessed ten demerits for his failure to report for duty during the period November 17 through November 26 and failing to notify the Company of his circumstances. In a part of the letter which the Arbitrator has difficulty understanding, the Company further advised that the grievor was being assessed twenty demerits, apparently for having failed to heed a warning given to him previously when his record stood at fifty-five demerits. Whether an issue of double jeopardy is disclosed is not material to the outcome, however, as the grievor's record stood at fifty-nine demerits at the time of the assessment of the discipline against him. In the result, the assessment of the lesser penalty of ten demerits would nevertheless place him in a dismissable position.

The first issue is whether the Company had just cause for the assessment of the ten demerits for the failure of Mr. Hultoy to appear for work as scheduled in the period November 17 through November 26, 1993. I am satisfied that it did. Incarceration is obviously not a reason, on its face, acceptable to the Company for the absence of an employee. That is the more so when, as in the instant case, unauthorized absence for that reason has been

repeated and sporadic.

Are there reasons to consider the reduction of the penalty in the case at hand? It is difficult to find mitigating factors that would favour that outcome. Firstly, it is not disputed that the grievor, who is not of long service, had an unenviable record of prior discipline which included several incidents of failure to notify the Company prior to an absence. These culminated in a two day suspension in July of 1993 and a further final warning, coupled with four demerits bringing the grievor's total to fifty-nine demerits, on August 18, 1993. Notwithstanding that record, when the grievor was first incarcerated in September of 1993 he made no effort to explain his circumstances to his employer, and indeed concealed the truth until November 8, 1993. As is reflected in the letter of dismissal, even after November 8, 1993 Mr. Hultoy was delinquent in notifying the Company that he would not be reporting for duty during the period November 17 through November 26. As an employee with fifty-nine demerits on his record he knew, or reasonably should have known, that any further infractions on his part with respect to his obligation to report for duty, or in the alternative to provide a timely explanation of his circumstances to his employer was of paramount importance. While there can be little doubt that the criminal charges brought against Mr. Hultoy, of which he was fully acquitted, were a source of great personal stress, they do not, in my view, serve to excuse his failure to communicate with the Company, particularly where it is evident that he was in attendance at the terminal on a number of occasions during the period in question. Unfortunately the record discloses a course of conduct which suggests that the prior discipline assessed against Mr. Hultoy for failing to report for work or notify the Company of his circumstances had little rehabilitative effect. Having regard to the grievor's disciplinary record and his relatively short service, the mitigating factors in the case at hand do not justify a substitution of penalty.

For the foregoing reasons the grievance must be dismissed.

16 September 1994(sgd) MICHEL G. PICHER

ARBITRATOR