CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2688

Heard in Montreal, Wednesday, 13 December 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Assessment of discipline to Mr. L. Cartier.

JOINT STATEMENT OF ISSUE:

On October 24, 1994, the grievor was assessed 15 demerits for an alleged unauthorized use of a Company vehicle. This resulted in the grievor's discharge for accumulation of demerits.

The Union contends that the discipline assessed was too severe and unwarranted in the circumstances.

The Union requests that the discipline assessed be removed from the grievor's record and that the grievor be returned to duty forthwith without loss of seniority and with full compensation for all losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. F. LIBERTY	(SGD.) J. TORCHIA
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA

There appeared on behalf of the Company:

S. Michaud	– Labour Relations Officer, Edmonton
J. Dixon	– Assistant Manager, Labour Relations, Edmonton
L. McKay	– Track Supervisor - Engineering, Peace River
A. C. Giroux	– Legal Counsel, Montreal
N. Dionne	– Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Ottawa
D. B. Brown	– Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

The instant grievance was heard concurrently with three other grievances, **CROA 2685, 2686 and 2687**. For ease of reference, given that the events in question occurred within a relatively short period and are, in substantial part, related, the Arbitrator deems it preferable to deal with all of the matters within this award.

In the spring, summer and fall season of 1994 the grievor, Mr. L. Cartier was employed as an extra gang foreman on Gang 123 in Northern Alberta under the supervision of Program Supervisor Larry Mckay. Prior to the events in question the grievor's disciplinary record stood at ten demerits. There is no indication before the Arbitrator that he was other than a good employee from the time he first entered the Company's service of September of 1983.

The grievor was assessed twenty demerits on July 14, 1994 for unsatisfactory work performance in the period between April 26 and June 25, 1994. That would have raised his disciplinary record to thirty demerits.

All of the events leading to his discharge subsequently occurred on October 2, 1994. Firstly, Mr. Cartier was found to have failed to secure proper track protection, contrary to CROR rule 803/807 for a section of track upon which his crew was performing work. The evidence discloses that at 2:50 p.m. Mr. Mckay drove the grievor away from the workplace in a Company vehicle, during which time he informed the grievor that he was pulled out of service because of the error he had made in respect of track protection. This prompted an angry reaction from the grievor who became verbally abusive to Mr. Mckay, insisted on being let out of the truck, and momentarily switched off the ignition of Mr. Mckay's vehicle. For that conduct he was assessed twenty demerits for insubordination and endangering the life of a fellow employee.

The third incident flows directly from the second. It appears that Mr. Mckay advised the grievor that as he was pulled out of service he was not to use any Company vehicles. Once Mr. Mckay had regained control of his truck and brought it to a stop at or about mile 15.7, Mr. Cartier angrily left Mr. Mckay's truck and took possession of a Company all-terrain vehicle which he then drove to his own Company truck. He subsequently drove that truck to his hotel. It is not disputed that subsequently Supervisor Mckay had some difficulty reaching the grievor by telephone, and had to attend personally at the hotel to obtain the keys to the Company truck and the all-terrain vehicle. A loud altercation ensued between Mr. Cartier and Mr. Mckay during which Mr. Cartier finally retrieved the keys and threw them in his supervisor's direction.

Several things emerge clearly from the evidence before the Arbitrator. Firstly, a deep animosity grew between Mr. Cartier and Mr. Mckay over the course of the working season. Without commenting on the merits of that relationship, it appears that the grievor formed the opinion that Mr. Mckay, working in his first season as a supervisor, was out to get him, and was building a case for his eventual dismissal.

The second thing which emerges is that the grievor did in fact perform in a number of respects which were questionable during the course of the period form April 26 to June 25, 1994, for which he was assessed twenty demerits. While the Arbitrator is persuaded by certain of the mitigating factors raised by the Brotherhood's representatives, and would find that the assessment of twenty demerits was excessive in the circumstances, it is nevertheless evident that certain of the grievor's actions during that period, the details of which need not be reviewed here, did justify the assessment of some discipline. It is also clear that Mr. Cartier did fail to obtain the proper rule 803/807 protection when he moved his crew to work at Mile 8 of the Grande Prairie Subdivision on October 2, 1994. That violation of a cardinal rule would also be deserving of discipline.

In the Arbitrator's view, the course of conduct exhibited by Mr. Cartier after he was pulled from service by Mr. Mckay on October 2, 1994, from the time of the verbal altercation in Mr. Mckay's truck to the acrimonious exchange between the same two gentlemen later in the day concerning the return of the vehicle keys is best considered as a single, continuing event of anger and defiance on the part of Mr. Cartier, aimed directly at Mr. Mckay.

Most importantly, the Brotherhood has filed before the Arbitrator medical evidence which confirms that since October 28, 1994 the grievor has been diagnosed as suffering from a clinical depressive disorder for which he has received ongoing treatment, both from his own physician and the Alberta Alcohol and Drug Abuse Commission. A letter provided to the Company, dated December 5, 1994, signed by Dr. K. Grinwich-Erasmus states, in part, the following:

> I have seen Mr. Cartier on a regular basis, since October 28, 1994, when he was referred to me by his regular physician. At that time, he was having a great deal of difficulty, both in his personal life and at work. He was showing impaired judgement, decreased ability to concentrate, and decreased memory functions. I did a psychiatric questionnaire on this gentleman, on which he scored very high on depressive episodes.
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> All of these symptoms that you relate, quick temper and memory relapse, slow and poor decision making, nervousness and edginess, mood swings, poor communication or adaptiveness of what is happening around him at time, fatigue, poor eating habits, lack of sleep, and overall performance at work or home can be related to his depressive episodes. He has probably been having a low grade depression for a substantial period of time prior to it being serious enough for him to feel that he had to seek help.

It may also be noted that in the final paragraph of her letter Dr. Grinwich-Erasmus also makes note of what she described as the grievor's "alcohol problems".

At the arbitration hearing the grievor's Union representative, the System Federation General Chairman, related that in fact Mr. Cartier is still under treatment, and is not at present fit to return to work, if reinstated by the Arbitrator. The Company, on the other hand, rejects the medical opinion produced by the Brotherhood as constituting evidence that the grievor in fact suffered from clinical depression at the time of the incidents giving rise to the discipline assessed against him for events which occurred between April and October of 1994.

The Arbitrator does not. When conduct as irrational as that demonstrated by Mr. Cartier is coupled with a professional medical diagnosis of clinical depression, estimated by a competent medical specialist to have existed "for a substantial period of time", it is not unreasonable to conclude, on the balance of probabilities, as the Arbitrator is prepared to do, that the actions of the grievor were in substantial part influenced by his medical and mental state. In my view, while the grievor's conduct to the point of his discharge of October of 1994, and the information available to the Company prior to December 5, 1994 would tend to justify the Company's view as to the blameworthiness of the grievor's actions, that situation cannot be considered to have endured past December 5, 1994. At or about that point, the Company knew, or reasonably should have known, that the grievor's conduct and work performance were influenced by the medical condition for which he was then receiving treatment, including a prescription for an anti-depressant drug. A further letter of Dr. Grinwich-Erasmus, dated March 13, 1995 elaborates that the grievor attends regular psycho-therapy sessions on a weekly basis, continues to take the anti-depressant drug Zoloft and was to take counselling for anger control.

In the Arbitrator's view the above diagnosis should not have come as a surprise to the Company. As part of its own presentation before the Arbitrator, the Company stressed that since early 1994 the grievor was approached by several members of management urging him to obtain the assistance of an EAP counsellor. It appears that Planning and Production Supervisor Lawrence Gizowski, as well as Administrative Officer Fran Metcalfe and the grievor's supervisor, Mr. Mckay, made that proposal to him. In the Arbitrator's view the fact that he rejected their suggestions out of hand is neither here nor there for fully understanding the nature of the condition which then afflicted him, although it may properly go to issues of compensation in a case such as this.

In the Arbitrator's view the Company did not have just cause to terminate Mr. Cartier, as it did on October 21, 1994, for the accumulation of demerits. This is, therefore, an appropriate case for a substitution of penalty. The Arbitrator is satisfied that the grievor was not wrongfully held out of service by the Company at the time of his purported discharge. The evidence clearly demonstrates that he was not medically or mentally fit to work at that time. The evidence also shows, however, that the Company knew, or reasonably should have known, no later than the time it received a copy of the letter from Dr. Grinwich-Erasmus, dated December 5, 1994, that the grievor should not have been discharged and should, at minimum, have been treated as an employee entitled to such protections in respect of sick leave or long term disability protection as might be available to him under his collective agreement. Accepting, as I do, that the Company cannot be held responsible for the grievor's absence from work from October 21 to the point in time at which it received the doctor's opinion, as it previously had no firm basis to understand what had influenced the grievor's conduct, no compensation should be ordered in respect of that period. From that time forward, however, the Arbitrator is satisfied that the grievor should be entitled to be reinstated to the employment rolls, albeit not as an active employee, and to have such protections as he may enjoy under the terms of his collective agreement in respect of sick leave, long term disability protections or any other benefits. He should also, as with any employee, be

accorded a reasonable leave of absence for his recovery, with the opportunity to return to work at such time as he may be confirmed to be medically and mentally fit to do so.

For all of the foregoing reasons the Arbitrator directs as follows: Mr. Cartier is to be reinstated forthwith to the ranks of employees in the bargaining unit, without loss of seniority, with his disciplinary record to stand at twenty demerits. The grievor's right to sick leave benefits, long term disability benefits, should he qualify for such, and any other similar benefits or protections under the terms of the collective agreement shall be reinstated effective the date the Company came into possession of the letter of Dr. Grinwich-Erasmus dated December 5, 1994. Further, the grievor shall be returned to active service if he can, within a reasonable time, be confirmed physically and mentally fit to resume active service, as certified by medical opinion, and subject to such conditions as the parties may fashion with respect to the ongoing monitoring of his condition, including any possible depression and/or alcohol problems. Should the parties be disagreed as to the means of obtaining the appropriate medical opinion, or as to any other aspect of the interpretation or implementation of this award, these matters may be spoken to, and dealt with further by the Arbitrator.

December 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR