

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2846

Heard in Montreal, Wednesday, 9 April 1997

concerning

ST. LAWRENCE & HUDSON RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]**

DISPUTE:

The discipline (40 demerits) assessed Yard Foreperson Joseph V. Seberras on April 7, 1995 and his subsequent dismissal from Company service for the accumulation of in excess of 60 demerit marks.

JOINT STATEMENT OF ISSUE:

On March 20, 1995 employee J.V. Seberras was employed on the Yard Foreperson's Spareboard at Toronto, Ontario.

Subsequent to an investigation, Mr. J.V. Seberras was assessed 40 demerits for "...booking sick after accepting a call, resulting in unnecessary delay to an assignment ...".

The assessment of this discipline, when added to his existing record of demerits, resulted in his being, "dismissed from Company Service for the accumulation of demerit marks under the Brown System of Discipline".

The Union appealed the discipline on the basis that Mr. Seberras did not, in fact, accept the call, and further, that he was legitimately sick at the time of booking sick and requested that the discipline be removed from the grievor's record and that he be compensated for all lost wages and benefits.

The Company declined the Union's request.

FOR THE COUNCIL:

(SGD.) D. A. WARREN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) G. CHEHOWY
FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

H. B. Butterworth	– Labour Relations Officer, Toronto
M. Senécal-Tremblay	– Counsel, Montreal
G. Chehowy	– Manager, Labour Relations, Toronto
A. Rivest	– Road Manager, Toronto

And on behalf of the Council:

P. Sadick	– Counsel, Montreal
D. A. Warren	– General Chairman, Toronto
J. V. Seberras	– Grievor

AWARD OF THE ARBITRATOR

The sole substantive issue in this grievance is whether the grievor was deserving of discipline for booking sick after accepting a call, as alleged, on March 20, 1995. The evidence discloses that at approximately 0430 hours on that date a call was placed to the grievor's home, which was answered by his mother. After some delay, she returned to

the telephone and indicated to the calling clerk that she was taking her son's call for work, and the particulars of his assignment were relayed to her. At 0510 hours the grievor called the Crew Management Centre clerk and indicated that he was sick and would not be able to respond to the call which he had already accepted.

The way matters were disclosed during the course of the disciplinary investigation caused the Company substantial credibility problems with respect to the grievor's explanations. For example, Mr. Seberras seemed less than clear as to who, if anyone, had previously accepted the call on his behalf. He only conceded that his mother had done so after a five minute recess requested by his Union representative.

The Company also had reason to have concerns about the quality of the medical documentation presented by Mr. Seberras. The Company was given a medical note from Dr. Dutczak dated March 20, 1995. It relates that the grievor had suffered "recurrent episodes of bronchospasm" in the past and that "... he is unable to work today because of dyspnea." When Trainmaster André Rivest sought to obtain elaboration of the medical note from Dr. Dutczak by means of a telephone call, it appears that the grievor's physician presented him with conflicting and confusing information. According to a memorandum prepared by Mr. Rivest, Dr. Dutczak seemed to have little detailed knowledge of the grievor's condition, and indicated that any opinion that he may have expressed was based entirely on assumptions taken from the symptoms described to him by Mr. Seberras. In the result, the Company chose to ignore the medical certificate of March 20, 1995 and assessed forty demerits against Yard Foreman Seberras, resulting in his discharge for the accumulation of demerits.

In the Arbitrator's view the totality of the evidence now advanced does sustain the position of the Union that at least some of the absenteeism registered by Mr. Seberras in the past appears to have been related to a medical condition, in the nature of a respiratory problem. More specifically, the letter of Dr. Dutczak of March 20, 1995 does confirm that on that date he suffered dyspnea. On the merits, therefore, there is reason to consider to reversal of the decision of the Company.

The Arbitrator is not persuaded, however, that this is a case for full compensation. As discussed above, and in **CROA 2845**, notwithstanding an extensive record of prior absenteeism problems, there was never any indication to the Company, prior to March 20, 1995, that the grievor suffered from any chronic illness which would explain his circumstances. Moreover, the Arbitrator accepts the evidence of Mr. Rivest that his telephone conversation with Dr. Dutczak substantially undermined the credibility of the note of March 20, 1995. The Company used reasonable care in obtaining the facts in relation to the grievor's failure to respond to the call which he had accepted, and, if anything, may have been misled by the grievor's own physician. By the same token, there is reason to conclude that the response of the Employer was unduly hasty, to the extent that the entire explanation of the grievor, with respect to his having been ill, was rejected out of hand.

In the result, the Arbitrator is satisfied that, on the balance of probabilities, the grievor must be held responsible for the accepting of the call by his mother, and his own failure at the time in question to indicate to the Employer that he was ill and in fact unable to attend at work. He was, in the circumstances, deserving of discipline for that infraction. However, in light of the mitigating evidence with respect to the history of his respiratory problems, and the medical note which was ultimately provided to the Company, I am not satisfied that the assessment of forty demerits was an appropriate disciplinary measure in the circumstances. It appears to the Arbitrator that the reinstatement of the employee, subject to conditions that will protect the interests of the Company in respect of his future attendance, and with only a partial measure of compensation, is appropriate in the circumstances.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with his disciplinary record to stand at fifty demerits. He shall be compensated for one-half the wages and benefits lost by reason of his discharge. However, in light of the grievor's prior rates of absenteeism, and the medical evidence adduced, the grievor's reinstatement is conditional upon his maintaining a rate of attendance which shall be not less than the average for the employees in his classification at his location, for a period of not less than two years following his reinstatement, calculated on the basis of any three months consecutive. Should the grievor fail to meet that standard, he shall be subject to termination, with recourse to arbitration limited to the calculation of the relevant rates of absenteeism. Should there be any dispute with respect to the implementation of this award, the matter may be spoken to.

April 11, 1997

(signed) MICHEL G. PICHER
ARBITRATOR