CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2958
Heard in Montreal, Tuesday, 9 June 1998
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

The propriety of the termination of G. Gillespie.

JOINT STATEMENT OF ISSUE:

Effective February 5th, 1998, Mr. G. Gillespie was discharged from the Company's service for: "deliberate frustration of the basic employer/employee relationship through his continuous abrogation of his obligations to protect employment security."

The Union has appealed the discharge of the grievor on the basis that it was unwarranted, excessive and contrary to the Company's policy on progressive discipline.

The Company has declined the Union's appeal on behalf of the grievor.

FOR THE UNION: FOR THE COMPANY:
(SGD.) R. JOHNSTON (SGD.) A. E. HEFT
PRESIDENT, COUNCIL 4000 FOR: **SENIOR VICE-PRESIDENT, LINE OPERATIONS**

There appeared on behalf of the Company:
H. Koberinski - Labour Relations Officer, Toronto
G. Search - Assistant Manager, Labour Relations, Toronto
F. O'Neill - Labour Relations Officer, Toronto

And on behalf of the Union:
A. Rosner - National Representative, Montreal
R. J. Fitzgerald - Vice-President, Unit Chair, Local 4003
Y. Braconnier - President, Local 420 1, Montreal
G. Gillespie - Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses that the grievor has had a long history of high absenteeism during his employment. First hired in July of 1981, the grievor recorded the following absenteeism between January 1, 1985 and December 31, 1997.

1985	148 days
1986	128 days
Nov. 13, 1987 - Jan. 9, 1989	414 days
April 1989 -Feb 28, 1990	197 days

1990	41 days
1991	116 days
1992	82 days
1993	59 days
1994	67 days
1995	43 days
June 1996 - Dec. 31, 1997	130 days

The grievor's discharge was occasioned by the Company's concerns with respect to his rate of absenteeism during the period of June of 1996 and December 31, 1997. It is common ground that during that period the grievor was on employment security, following the abolishment of his position in the Crew Management Centre in Toronto, effective June 17, 1996. The Company formed the opinion that the grievor was feigning illnesses and deliberately under-performing on training tests to avoid being called to work into either a temporary or a permanent position while on employment security. Following a disciplinary investigation into that issue, the grievor's employment was terminated effective February 5, 1998 by a notice dated March 4, 1998 for "... your continuous and deliberate frustration of the basic employer/employee relationship through your continuous abrogation of your obligations to protect your employment security."

The material before the Arbitrator discloses that the grievor had never before been disciplined, cautioned or indeed investigated for his absenteeism record. Company concerns with respect to the legitimacy of the grievor's medical condition, including his claim of chronic back problems, appears to have matured after the grievor went on employment security. Its concerns are understandable, given the physical prowess exhibited in non-work related activities by Mr. Gillespie. In the late summer of 1996 he participated in a gruelling endurance race in British Columbia which involved horse riding, mountain climbing, mountain bike riding, hiking, canoeing and kayaking. Shortly after that event, when called to work for training, the grievor informed the Company, on September 9, 1996 that he was ill and would not be able to attend the training. In fact it appears that he had been detained in British Columbia on the date of the commencement of the training session, in any event.

Mr. Gillespie again went on sick leave on February 2, 1997. It appears that shortly thereafter, he applied for a personal leave of absence to allow him to do a marathon kayak trip to raise funds for cancer research, between Ottawa and New Orleans, scheduled for May to October of 1997. In this regard it may be noted that previously, in 1995, the grievor had successfully completed his personal "River of Hope Marathon", kayaking from the Atlantic Ocean to Burlington, Ontario. He was supported by that effort by the Company, to the extent that in addition to some four weeks' vacation time, he was accorded an additional six weeks of paid leave by the Company to support his effort. However, the grievor's request for the New Orleans excursion in 1997 was refused.

According to the record before the Arbitrator, on March 14, 1997 the

grievor was left a message advising him that he would commence training for a position in the revenue management department on March 17, 1997. The Company's evidence confirms that Mr. Gillespie participated in a hockey tournament at Fort Erie on March 15 and 16, 1997. He did not, however, report for training on the 17th. Rather, he called in sick, explaining that he was suffering from a migraine headache. As a result, he missed the training session all together. When the grievor was next called to work, on March 27, for an assignment in the Macmillan yard diesel shop, he informed the Company that he was unable to take that work, as he was suffering back pain. It appears that that disclosure was contrary to the information available to the Company's medical consultants with respect to any known restrictions on Mr. Gillespie's record.

There followed a series of requests on the part of the Company for the grievor to report to work, coupled with the grievor either booking sick or providing notes from his personal physician indicating that he was unable to work by reason of a recurring back injury. Further, on November 21, 1997, Mr. Gillespie failed to pass a fairly elemental examination following a training module for a position as an accounts receivable representative, registering a mark of 45% on an examination for which the pass mark was 75%. On December 5, 1997 he again failed to pass a rewrite of the same examination, obtaining a mark of 60%. The Company's position is that the grievor deliberately failed to pass those tests, registering results entirely inconsistent with his prior work record and capabilities, for the sole purpose of avoiding work and remaining idle while receiving employment security benefits. When the Company ultimately sought to investigate the pattern and history of the grievor's absenteeism and failure to protect work consistent with his obligations in respect of employment security, it met with some frustration at scheduling the investigation. Following notice to attend at an investigation on January 23, 1998 the grievor failed to report at the investigation, and the Company had to notify him by registered letter of its adjournment to February 2, 1998.

The position argued by the Union is that the grievor was in fact at all material times physically disabled from performing the work and training programs which the Company offered him. The Company submits that at all material times the grievor was malingering or under-performing on the tests which would have resulted in his resuming productive employment. During the course of its investigation the Company's concerns were not alleviated by the grievor's answer to a question as to whether he was in fact engaged in physical training for his planned kayak endeavours. He responded that he was not. The Company then had in its possession a news article from the Hamilton Spectator of June 10, 1997 which contained the statement "... he says he's training harder and is even more enthusiastic now that he has a full year to improve trip plans and seeks sponsorships." Unfortunately, the investigating officer did not disclose the article to Mr. Gillespie or his Union representative. The Company has difficulty rationalizing the news report with the fact that the grievor booked sick on June 10, 1997 for a period of approximately one month.

The initial question is whether there were some grounds to discipline Mr. Gillespie. In my view, albeit unusual, in the instant case the Company can justify discipline against Mr. Gillespie, if only for his failure to return in a timely fashion to attend the training session for which he was scheduled on September 3, 1996. In the normal course, questions would attach to the right of the Company to investigate and assess discipline in February of 1998 for an event that occurred a year and a half previous. In the instant case, however, the Company's intention was to review the grievor's overall problems of absenteeism, and it is in that legitimate context that the unjustified absence of early September of 1996 came to be scrutinized. I am satisfied, on the evidence before me, that the grievor has provided no sufficient explanation for his absence on that occasion, and is liable to discipline for that incident, standing alone.

I am less persuaded, however, with the balance of the Company's case against the grievor. In all instances of medical absences, save perhaps for two, the grievor provided the Company with a doctor's certificate explaining his medical condition. At no time prior to the eventual investigation of Mr. Gillespie in January of 1996 was he ever questioned or approached with respect to the legitimacy or timing of his absences. For reasons which it best appreciates, the Company appears to have tolerated the grievor's clearly unacceptable rate of attendance at work, both before and after he went on employment security, and did not subject him to any form of progressive discipline in respect of his absenteeism. Rather, it sought to accumulate a number of incidents into a single allegation of fraud, resulting in his discharge in February of 1998, following a single investigation.

The Arbitrator can appreciate the basis upon which the Company suspected the *bona fides* of the grievor's claims of a medical inability to either attend training sessions or take on various work assignments being offered to him. The fact remains, however, that the employer bears the burden of proof in any matter of discipline. As has been stressed in prior awards and court decisions, that burden is particularly onerous to the extent that the employer would allege conduct in the nature of bad faith or fraud. In the instant case, however, there is little, if any, direct evidence offered by the Company to prove its allegations that the grievor was in fact feigning illness or disabilities at any given time. On the opposite side of the ledger is a series of notes from his physician, uncontested by any request on the part of the Company to undergo examination by its own doctors or by a third party physician, which tend to substantiate Mr. Gillespie's claim that he has in fact suffered recurring back problems and migraines as a result of a work-related accident in 1987.

The courts have repeatedly confirmed that it is the obligation of a board of arbitration to deal with the true matter in dispute in resolving a grievance, and to avoid undue technicality. In the instant case it appears to the Arbitrator that the reality of what has transpired is, at a

minimum, that the Company is confronted with a serious problem of ongoing absenteeism, coupled with a disciplinary overlay, at least to the extent that Mr. Gillespie failed to honour his obligation to be in attendance at a training course, as scheduled, in early September of 1996. Serious concern also arises in the instant case with respect to the quality of the investigation which was conducted by the Company's representative, especially given that Mr. Gillespie was not provided a copy of or confronted with the contents of the Hamilton Spectator newspaper article with respect to his training which was in the possession of the employer at the time of the investigation. To the extent that the collective agreement does not specifically require the disclosure of documents and the Union did not argue the nullity of the investigation, the Arbitrator need not, for the purposes of this award, determine whether there was the failure of the standard of a fair and impartial investigation by reason of that oversight. I am satisfied that the matter can be properly resolved by an order of reinstatement without compensation, subject to certain conditions fashioned to protect the interests of the employer in the future.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds that the Company did have just cause for the assessment of discipline against the grievor. In all of the circumstances, however, discharge is an excessive penalty, and the grievor is to be reinstated into his position, without compensation for wages or benefits lost. Mr. Gillespie's reinstatement shall, however, be conditional upon his maintaining a rate of attendance at work, or of availability for work, which is not less than the average for employees within his classification and location, calculated over a period of any four months in the two year period following his reinstatement. Failure to meet the average for attendance or availability shall render the grievor subject to discharge.

June 12, 1998

MICHEL G. PICHER
ARBITRATOR