CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3020
Heard in Montreal, Thursday, 10 December 1998
concerning
ST. **LAWRENCE & HUDSON RAILWAY COMPANY**
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)
EX PARTE

DISPUTE:

The issue in dispute involves the discipline (20 demerits) issued Mr. L. Masse.

EX PARTE STATEMENT OF ISSUE:

By notice of form 104 dated February 14, 1997, Mr. Masse was advised as follows;

"Please be informed that your record has been debited with 20 demerit marks for your failure to test the joint to ensure proper coupling was made & for failure to be in a position to observe a shoving movement resulting in a run through switch and for leaving cars foul of the lead track at Outremont Yard on December 26, 1996, in violation of G.O.I. Section 7, Item 2.3, CROR Rules 115, 114, 104 (k), 106 (a) and (d), General Rules (1) (iii) and General Notice."

The Union submits that the quantum of discipline imposed, with respect to Mr. Masse's involvement, is excessive. The Union's position is based on the mitigating circumstances developed within the investigation. To this extent the Union requests that the discipline be reduced accordingly.

Furthermore, the 20 demerits in the immediate dispute when combined to the 10 demerits issued on the same date resulted in the dismissal of Mr. Masse.

Accordingly, the Union has requested that Mr. Masse be reinstated into Company service and be compensated for all loss of earning and benefits.

The Company declined the Union's appeal.

FOR THE COUNCIL:
(SGD.) Q. A. WARREN
GENERAL CHAIRPERSON

There appeared on behalf of the Company:
G. Chehowy - Manager, Labour Relations, Toronto
And on behalf of the Council:
D. A. Warren - General Chairperson, Toronto
J. Brunet - Local Chairperson, Montreal
B. Caron - Local Chairperson Elect, Montreal
L. Masse - Grievor

AWARD OF THE ARBITRATOR

The Arbitrator directs that files **CROA 3018, 3019 and 3020** be hereby consolidated for the purposes of a single award.

These disputes concern three separate heads of discipline assessed against Yard Foreman L. Masse. The first concerns the assessment of fifteen demerits for failure to protect his assignment on December 6, 1994. The second concerns the assessment of ten demerits for absenteeism between January 3 and February 5, 1997. The third concerns the assessment of twenty demerits for rules violations relating to a run-through switch and leaving cars foul of the lead track at Outremont Yard on December 26, 1996. The grievor was further discharged for the accumulation of demerits in excess of sixty.

The Arbitrator is satisfied that the incident of December 6, 1994 was deserving of discipline, and that the assessment of fifteen demerits was within the appropriate range of penalty. The evidence reveals that on that day the grievor sought to make use of fax facilities in the yard office. When he was advised by Terminal Supervisor Luc Trahan that the office in which the fax machine was located was no longer accessible to employees, and that he could not fax the material himself, he left the office in a fit of anger. It appears that words were further exchanged between the grievor and Mr. Trahan outside the office, as a result of which Mr. Masse left the workplace and did not fulfill his tour of duty.

The grievor does not deny the essential sequence of events, and states that words uttered by Mr. Trahan, to the effect that he could put himself at risk of losing his job, irritated him to the point that he felt no longer able to work.

The Council also argues that the Company violated section 239(l)(c) of the **Canada Labour Code:**

> **239(l)** Subject to subsection (1.1), no employer shall dismiss, suspend, lay-off, demote or discipline an employee because of absence due to illness or injury if
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> (c) if the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specific period of time, and that period of time coincides with the absence of the employee from work.

The Arbitrator cannot sustain the position of the Union with respect to the application of the foregoing provision of the Code. The obvious pre-conditions to the operation of sub-section (c) are that the employer has requested that a medical certificate be provided, and that the

employee has complied with that request, producing a medical certificate confin-ning the illness or injury which prevented the individual from being at work. None of those conditions obtained in the instant case.

I am satisfied that in the instant case the grievor failed in his duty to be at work for his tour of duty on December 6, 1994. If he had concerns about his supervisor's actions with respect to his access to the fax machine, his obligation was to follow the well accepted principle of "work now - grieve later". Unfortunately, the grievor it took upon himself to respond to what he perceived as irritating pettiness on the part of Mr. Trahan, to absent himself from the workplace, in the Arbitrator's view without justification. In the circumstances there is no basis for a reduction of the fifteen demerits assessed.

The second two heads of discipline are relatively contemporaneous, arising in December of 1996 and January of 1997. Mr. Masse was assessed ten demerits for his absenteeism between January 3 and February 5, 1997. Upon a review of the material filed, the Arbitrator cannot sustain the position of the Company. Firstly, no comparable figures with respect to employee attendance were tabled, to enable this Office to assess whether the performance of the grievor was comparable to that of other employees within his classification and location over the period of time in question. More significantly, it does not appear disputed that in fact the grievor worked a total of twenty-six tours of duty during the month of January. While it is true that he did book unavailable on several occasions, it is less than clear to the Arbitrator that he can be disciplined for failing to have worked for the Company seven days out of each week, as it appears the employer would have wished. The Arbitrator therefore directs that the ten demerits assessed against the grievor for his absenteeism between January 3 and February 5, 1997 be struck from his record.

The final discipline to be considered concerns the assessment of twenty demerits for the grievor's failure to test the coupling of a joint while making a yard movement at Outremont Yard on December 26, 1996. The Arbitrator is satisfied, on the evidence tendered, that Mr. Masse did fail to properly protect the point of his movement, by not first checking that all of the cars in a given cut were securely coupled. In the result, when he made a pushing motion against the cut in question, cars at the extremity of the cut, at a location out of his sight line, rolled free, ran through a switch and ultimately fouled the lead track at the yard, being subsequently discovered in that hazardous position by someone else. The grievor could have avoided the incident by initiating a forward movement to take up the slack and ensure that all of the cars of the cut being handled were securely coupled. His failure to do that, and to properly observe the point of the cut of cars with which he was involved were, as the Company alleges, in violation of operating rules.

The record discloses that the grievor has been involved in previous rules violations, including two in July 1995 and April 1996. Against that

background, the Company had reason to treat this as a serious matter. However, given the length of the grievor's service with the Company, I am satisfied that in the instant case a substitution of penalty is appropriate. The substitution of a lengthy suspension should, I believe, serve to communicate to Mr. Masse the importance of greater care on his part with respect to the observance of operating rules in the future.

For the foregoing reasons the Arbitrator directs that the demerits assessed be struck from the grievor's record, with the period out of service to be recorded as a suspension for the incident of December 26, 1996. Mr. Masse shall therefore be reinstated into his employment, without compensation or benefits, and without loss of seniority with his record to stand at forty-five demerits.

December 14, 1998

MICHEL G. PICHER
ARBITRATOR