CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3029
Heard in Montreal, Tuesday, 9 February 1999
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

The discharge of Senior Operations Clerk Mr. Troy A. Davies for an accumulation of demerits.

JOINT STATEMENT OF ISSUE:

Mr. Davies had been absent from work between April 5 1998 until May 28, 1998. During this period of time he was advised of and failed to appear for two medical appointments, one arranged by MedCan for May 15, 1998 and one by himself for May 19, 1998.

An investigation was conducted with respect to the above mentioned and his record was assessed thirty demerits for "absence without permission from April 5, 1998 to May 15, 1998" which, when added to his previous disciplinary record, resulted in the grievor being dismissed for an accumulation of demerits effective June 18, 1998.

The Union contends that the Company acted in an arbitrary and excessive manner with respect to the discipline issued and the discharge was unwarranted because 1.) Mr. Davies' medical condition justified his absence; 2.) he was not interviewed as to his discipline situation when he attained the 40 demerit level; 3.) the Company should have found him alternate work suitable to his medical condition. The Union requests Mr. Davies be reinstated with compensation for all wages and benefits lost.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) **R. JOHNSTON** (SGD.) **J. PASTERIS**
PRESIDENT, NATIONAL COUNCIL 4000FOR: **ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:
J. E. Pasteris - Manager, Labour Relations, Montreal
J. R. Baranski - Assistant Manager - Administration, Edmonton
And on behalf of the Union:
B. McDonagh - National Representative, Vancouver
R. Johnston - President, Council 4000, Montreal
T. Donohue - Representative, Council 4000, Edmonton

AWARD OF THE ARBITRATOR

The material before the Arbitrator reveals that the grievor, Senior Operations Clerk Troy A. Davies, was absent from work after February 26,

1998 as he was placed on a "stress leave for medical reasons" at the direction of his family physician, Dr. T.H. Wong. The note provided by Dr. Wong did not give any elaboration as to the grievor's medical condition. The Company therefore sought to have the grievor examined by its own medical representatives prior to his return to work. Eventually the grievor claimed and was paid indemnity benefits for his absence from February 23 to April 5, 1998. He continued to be kept out of service, however, following that as the Company required medical confirmation of his fitness to return to work. It does not appear disputed that appointments were made for the grievor to attend at MedCan for that purpose, and that he apparently failed to do so on at least two occasions, May 15 and May 19, 1998. He finally did attend an appointment on May 26, 1998. He was then confirmed fit to return to work on the recommendation that he not be required to work night shifts continuously. Following a disciplinary investigation into the reasons for the grievor's failure to attend at the two scheduled medical examinations, he was assessed thirty demerits for his being absent from work without permission from April 5 to May 26, 1998, and discharged for an accumulation of demerits.

Upon a strict view of the facts it would appear that the grievor did, without justifiable excuse, fail to attend at the medical appointments scheduled for him, and as a result extended the period of time that he was absent from work without proper authorization or justification. By the same token, however, the circumstances are mitigated by a number of factors. Firstly, it was by the Company's own direction that the grievor was not allowed to return to work until such time as he completed the medical assessment. The fact that he did not attend the first scheduled appointment on May 15 effectively extended the delay in his return to work by some eleven days, to May 26. Bearing in mind that the Company advised the grievor that he was held out of service until such time as he obtained the medical clearance to return to work, his absence between April 5, 1998 and May 15, 1998 is something less than an unexplained absence without leave on his part. The material before the Arbitrator also establishes that the grievor suffers from a condition described as "circadian desynchronosis". A letter from his physician, dated April 15, 1998 elaborates that eighteen years of shift work created this condition, causing the grievor to suffer a degree of depression as a result of chronic sleep deprivation. On that basis his doctor's recommendation was and is that he not be compelled to work between 6:00 p.m. and 7:00 a.m., as reflected in the letter of April 15, 1998. It would appear to the Arbitrator that the diagnosis of Dr. Wong may to some degree explain the grievor's prior timekeeping problems, as a result of which he was disciplined on a number of occasions, commencing in July of 1993.

In the circumstances the Arbitrator is satisfied that this is not a case in which the discharge of an otherwise good employee of eighteen year's service is justified. I am satisfied that the grievor did render himself liable to discipline for failing to attend the medical appointments in furtherance of the Company's direction that he be declared medically fit before returning to work following his leave of absence for depression. I

am also persuaded that the grievor is somewhat the author of his own misfortune in that he failed to clearly explain to the Company at the time of the disciplinary investigation the precise nature of his disability, a matter which apparently remained confidential between his own physician and the Company's own medical officers and its insurance carrier. The fact remains, however, that the grievor's record did stand at fifty-nine demerits at the time of the incident giving rise to his discharge. In that circumstance, whatever the mitigating factors, he rendered himself liable to dismissal for failing to attend the medical appointments, and indeed failing to call to advise as to why he would not be able to attend. In light of the mitigating factors reviewed, however, I am satisfied that an extensive suspension of the grievor can be substituted for the demerits assessed against him, and that he can now be returned to work with due accommodation for his medical limitations.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits, and without loss of seniority. The parties are directed to meet and discuss appropriate measures to accommodate the grievor's medical condition. Should they be unable to agree in that regard the matter may be spoken to.

February 12, 1999

MICHEL G. PICHER
ARBITRATOR