CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3175
Heard in Montreal, Wednesday, 13 December 2000
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)
EX PARTE

DISPUTE:

The dismissal of Guy Verdi, Montreal Intermodal Terminal.

EX PARTE STATEMENT OF ISSUE:

On August 21, 2000, the grievor participated in an investigation with respect to: "vos absence non-autorisée entre le 7 juillet et le 31 juillet 2000."

On September 7, 2000, a disciplinary form 780 was issued by the employer indicating that the grievor's record had been assessed with "congédiement". The section headed "for the following reasons" is blank.

The Union contends that there was no just cause for dismissal, and in the alternative that the penalty assessed was excessive. The Union further observes that the employer has not, to date, clearly identified the alleged offence which in its view merited discipline and/or dismissal, and that the sanctions are further null and void on this ground. The Union requests the reinstatement of the grievor and that he be made whole for any loss or damages incurred.

The Company denies the Union's contentions.

FOR THE UNION:
(SGD.) N. PITCHEN
FOR: PRESIDENT, COUNCIL 4000
There appeared on behalf of the Company:
J. Coleman - Counsel, Montreal
A-F Charette D. Gagn6 L. Poitras A. Y deMontigny
And on behalf of the Union: A. Rosner C. Rainville J. Simard J. Savard G. Verdi
- Counsel, Montreal
- Manager, Intermodal, Montreal
- Supervisor, Operations, Montreal
- Manager, Labbour Relations, Montreal
- National Representative, Montreal
- Regional Representative, Montreal
- Negotiating Committee - Intermodal, Montreal

President, Local *4004,* Montreal
- Grievor

AWARD OF THE ARBITRATOR

This grievance concerns the discharge of Heavy Equipment Operator Guy Verdi from his employment in the Montreal Intermodal Terminal. Mr. Verdi, an employee of the Company with some twenty-six years' service, was provided with a Form 780 discipline notice dated September 7, 2000. The notice, written on the standard form of notice of discipline utilized by the Company for many years, states that his record has been assessed with a discharge. Under the space headed "For the following reasons: ..." no information is provided. It is common ground that the discharge came following a formal disciplinary investigation on August 21, 2000. The notice convening the grievor to that investigation indicated that it was in respect of "vos *absence non-autonsée entre /e 7juillet et /e 31 juillet 2000."*

As the evidence before the Arbitrator discloses, the investigation of August 21, 2000 concerned three separate circumstances involving Mr. Verdi's absence from work. The first was his absence in the week of July 10 through 14, a period which the grievor maintains he believed was his fifth week of scheduled vacation. The second head of absences during the period involved Mr. Verdi's failure to attend at work July 24, 2000, when Mr. Verdi maintains that his personal vehicle broke down on the way to work, and he was unable to make it. The third head of investigation concerns Mr. Verdi's absence from work on July 25, 26, 27 and 28 for illness. It is common ground that he called in sick for each of those days.

The evidence also discloses that following receipt of his notice of termination Mr. Verdi had a brief meeting with Terminal Manager D. Gagn6. It does not appear disputed that during the course of that conversation Mr. Gagn6 stated to Mr. Verdi that his discharge was on the basis of information gained through the investigation. He told the grievor that the Company's conclusions resulted in the assessment of demerits against him which placed his record in a position of having accumulated more than sixty demerits, a dismissable position. Mr. Gagn6's evidence, which the Arbitrator accepts, is that during the course of that conversation he indicated to Mr. Verdi that his failure to attend at work after he was notified that he was not on vacation in the week of July 10through 14, as well as his further absences later in the same month resulted in the assessment of the demerits and his discharge. It is common ground, however, that no particulars as to the demerits, or their actual total, were ever relayed to the grievor or his union.

The Union raises a preliminary objection with respect to the sufficiency of the notice of discharge provided to Mr. Verdi. Its representative submits that this is the first time the Company's history that the Form 780 utilized to notify an employee of his or her termination, and the reasons for it, contains absolutely no information with respect to the reasons for discharge. He submits that in the circumstances the Union was left with no real understanding of the specific findings of the investigation, for example whether Mr. Verdi was disciplined for mere absenteeism, for insubordination, for fraudulently claiming to be ill or for some other reason or combination of reasons. He further submits that any lack of specificity with respect

to the number of demerits attached to different aspects of the conduct investigated leaves the Union disadvantaged as to its ability to prepare its case for arbitration, as it remained unaware of the specific findings upon which the grievor's discharge was based. For example, the Union's representative stresses that the Union learned for the first time at the arbitration hearing that the Company did not discipline the grievor in any part for his absence on the date of his vehicle breakdown. He submits that the system of disciplinary investigations, including the disciplinary notice utilized by the Company without variation in its practice for decades, contemplates that an employee is entitled to know the reasons for his or her discharge, with some specificity.

Counsel for the Company stresses that there is no provision in the collective agreement which requires the employer to provide specific reasons for discipline assessed against an employee. Additionally, the Company asserts that Mr. Verdi was clearly advised by Mr. Gagn6 that the reason for his discharge was the subject matter of the investigation conducted on August 21, 2000, an investigation relating to his absences over a number of days in the month of July. The Company submits that there is no surprise to the employee in the circumstances disclosed, stressing that in fact the Union came to the hearing with submissions and evidence pertaining to the absences in question, in full defence of the grievor.

The Arbitrator can readily understand the concerns which motivate the preliminary objection raised by the Union. The long-standing practice of the Company, apparently without variation prior to the instant case, has been to give employees notice of any discipline on a standard form, part of which contains the specific reasons for the discipline assessed. That practice obviously facilitates the grievance and arbitration procedure contained within the collective agreement. It allows the employee to know, at least in general terms, the case which he or she must meet to successfully progress a grievance against the discipline, whether through the grievance procedure or ultimately to arbitration.

The collective agreement of the parties clearly contemplates a considerable degree of industrial relations due process in the assessment of discipline. For example, article 23.1 provides as follows:

> 23.1 Employees who have completed their probationary period, will not be disciplined or discharged for major offences without a fair and impartial hearing.
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> 23.3 Except as provided under Appendix 11, "Corrective Behaviour - Informal Investigations", when a formal hearing is to be held, the employee and the designated Union representative will be given at least forty-eight (48) hours' notice of the hearing and will be notified of the time, place and subject matter of such hearing. This shall not be construed to mean that a proper officer of the Company, who may be on the grounds when the cause for investigation occurs, shall be prevented from making an immediate investigation.
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> 23.4 Employees may, only if they so desire, have the assistance at the hearing of one

or two co-workers which could include their chief shop steward or authorized committee members of the Union who are employees of the Company.

23.5 At the beginning of the hearing, the employee (and the authorized representative if present) will be provided with a copy of all written evidence that is to be introduced. The employee and the authorized representative will be given an opportunity through the presiding officer to ask relevant questions of the witnesses present at the hearing. The questions and answers will be recorded and the employee and the authorized representative will be furnished with a copy of statements and all evidence presented.

23.6 The decision will be rendered within 21 calendar days from the date the statement is taken form the employee being investigated. Employees will not be held out of service pending the decision except in the case of a dismissible offence.

23.7 If the decision is considered unjust, the matter may be appealed in the grievance procedure as set out in Article 5. Such appeal shall set forth the grounds upon which it is made. On request, the designated national representative of the Union shall be shown all evidence in the case.

It appears to the Arbitrator at least arguable that it is counter-intuitive to conclude that the parties, having established such an elaborate process for pre-disciplinary investigation would have contemplated that the employer could, at the conclusion of an investigation involving complex facts, and perhaps multiple allegations, simply assess discipline against an employee without giving the findings of the investigation or any specific reasons for that discipline. If, for example, an employee is separately charged with attending at work under the influence of alcohol, physically assaulting another employee and falsifying a punch card, all on the same tour of duty and is simply notified, after a disciplinary investigation into all of the events of that day that he or she is fired, without any statement of the reasons for the Company's action, on what basis can he or she meaningfully file a grievance and proceed to arbitration? Has the employer exonerated the employee of being under the influence of alcohol, but nevertheless found that there was an assault and a falsification of the employee's time card? Was there some other view of his or her actual wrongdoing? The answer to such questions obviously colours the grounds which the employee would bring to bring to bear in the formulation of his or her grievance, and the evidence which would be marshalled in his or her defence both in the grievance procedure and at arbitration.

There is some basis in the language of article 23 of the collective agreement to believe that the parties implicitly agree that the employee is to be given some understanding of the reasons for the discipline assessed. Article 23.7 provides, in part, with respect to any grievance: "... Such appeal shall set forth the grounds upon which it is made." It is at least arguable that that provision pre-supposes a degree of knowledge on the part of the disciplined employee as to the specific reasons he or she was imposed demerits, a suspension or was discharged. That interpretation of the disciplinary procedure is the more compelling when it is considered against the considerable history of the Company's consistent practice, over many years, of using a specific form to advise employees of their

discipline, a section of which is specifically headed "For the following reasons: Implicit in the argument of the Union is the suggestion that the Company has, by its own long-standing adherence to general rules of fairness with respect to notifying employees of the reasons for their discipline, led the Union to believe that such notification is an intrinsic part of the general process of discipline contemplated under article 23 of the collective agreement, to the point of being an inherent part of a fair and impartial investigation.

There has been considerable jurisprudence, including some in this Office, to the effect that an employer cannot change the reasons for an employee's discipline or discharge at the time of the arbitration hearing. In CROA 2103 the Arbitrator declined to allow the instant Company to amend the characterization of discipline assessed against a bus driver in its service who was discharged. This Office commented: "Mr. Higgins, like any employee, is entitled to know the allegation against him and to bring forward a defence against that allegation at the time of arbitration." The principle so stated reflects a general precept of fairness and integrity which is at the heart of the arbitration process. If arbitrators have a concern for fairness when an employer seeks to change the grounds of an employee's discharge at the arbitration hearing, arbitral concern is all the more understandable where no specific reasons for discharge have been articulated by the employer.

There are also broader purposive industrial relations concerns which flow from recording discipline without stating the specific reasons. In a system of progressive discipline an employee's prior record is of obvious importance. However, a "nonspeaking" notice of discipline such as that issued to Mr. Verdi is of questionable value for future reference as part of an employee's prior disciplinary record. If, for example, the disciplinary notice to Mr. Verdi assessed demerits short of discharge, without making reference to any form of misconduct, how could it be treated as a meaningful part of his disciplinary record in a future case? Should a subsequent supervisor, or a board of arbitration, be expected to divine the conduct which justified the demerits assessed? To pose the question is to state the problem.

In the Arbitrator's view, however, it is not necessary rule upon the Union's objection in the instant case, given the disposition of the grievance on its merits. Upon a review of the evidence I am satisfied that the Company had no basis to assess any discipline against Mr. Verdi in relation to any of the days he was absent in the month of July.

The evidence, beyond controversy, is that in early April of 2000 Mr. Verdi was provided with a notice from Operations Supervisor Linda Poitras with respect to the dates of his vacation, following the annual vacation bid. The first four weeks assigned to Mr. Verdi were in accordance with his preferred election, a result which he could reasonably expect by reason of his considerable seniority. The controversy giving rise to this grievance concerns the fifth week of vacation which was assigned to him. The election form which he submitted, which in fact became the notice document sent to him by Ms. Poitras, elected three options for his fifth week of vacation. The first two were weeks before and after Christmas, in the month of December. His third election for his fifth week of vacation was from the 10th to the 14th of July, inclusive. The three elections are written out on a single line, segmented into three boxes side by side on the form provided to Mr. Verdi. Ms. Poitras drew a line through the first

two boxes, both of which concern the December options. She then inserted the number 5 at the right extremity of the middle box, in her own mind designating the week of December 18 through 22 as the allotted fifth week of vacation. The number 5 does, however, slightly overlap into the right-most box on the same line, standing to the left of the July election, which did not have a line through it. The evidence of Mr. Verdi, which the Arbitrator accepts, and which indeed Ms. Poitras does not seem to question, is that he in good faith concluded from the form that was provided to him that the running of the line through the two boxes concerning the December elections, and the placement of the number 5 to the left of the July election indicated that he was given his third choice, namely July 10 through 14 as his fifth week of vacation.

Objective evidence further supports that conclusion. It is common ground that Mr. Verdi was on vacation in the week of July 3 through 7. Believing that he had a further week of vacation to follow, he would not expect to be called for overtime work on the weekend of July 8 and 9. In fact, when Mr. Verdi returned home on Sunday July 9, he noticed telephone messages on his answering machine requesting that he work overtime on the weekend of July 8 and 9. He telephoned the workplace and spoke with Timekeeper Daniel Perras to ask why he was receiving the calls. He was advised to call back on the next day, to speak with Ms. Chantal Legault, which he did. When Ms. Legault advised him that his name did not appear on the vacation list for the week of July 10, he asked to speak with Ms. Poitras.

There is little real dispute as to what took place in two ensuing telephone conversations between Mr. Verdi and Ms. Poitras. He immediately advised her that he interpreted the form which he received from her to say that he was scheduled for his fifth week of vacation during the week of July 10. It is not disputed that he also advised Ms. Poitras that the had made plans for that week, including commitments to his daughter. While he did not elaborate to Ms. Poitras, it emerged at the arbitration hearing that the grievor was then recently separated from his spouse, and had undertaken to have custody of their young daughter at his summer camping location during the week in question. Faced with the grievor's call, Ms. Poitras checked with her own supervisor after which she called Mr. Verdi again. She then advised him that he was under an obligation to come to work during the week of July 10th, and that if he failed to do so an investigation would ensue. Mr. Verdi responded that he could not change his plans and would not be at work.

At the arbitration hearing the Company maintained that the grievor was under an obligation to "work now - grieve later" when he was advised by Ms. Poitras that he would be viewed as absent without authorization if he did not come to work in the week of July 1Oth. The Arbitrator cannot agree. While the "work now - grieve later" rule is an important precept of general application, it is subject to certain exceptions. It is well established that if adhering to the "work now - grieve later" rule would place the employee in a position of prejudice, in the sense that he or she would suffer harm which could not be remedied by the grievance and arbitration procedure, there may be justification in the employee's refusal to obey the employer's directive. This Office has specifically found that such a circumstance may arise where an employee is confronted with a firm obligation in respect of the care of their own child (See CROA 1829 and see also CROA 2691.)

In the instant case, I am satisfied that the grievor was committed to the exclusive care and custody of his child during a significant portion of the week of July 10 and was, in the circumstances, justified in disregarding the directive of the employer that he should nevertheless come to work. Nor is the Arbitrator impressed by the suggestion by counsel for the Company that the grievor should, in any event, have come to work at least for one day on July 1Oth, as his obligation to his daughter apparently commenced on the 11th. That approach fails, in my view, to acknowledge the employer's own contribution to the grievor's situation by its use of a notification form for vacation schedules which was admittedly less than clear. I am satisfied that in the circumstances the grievor was entitled to view the two-week period which he considered to be his vacation as a single uninterrupted period, and that he did not make himself liable to discipline for declining to come to work for any part of the week in question.

The second area of dispute concerns Mr. Verdi's absences in the week of July 24 through 28. As noted above, on the 24th he did not come to work because of a breakdown of his truck. It now appears that the Company takes no issue with respect to that incident. Mr. Verdi maintains that he was absent on July 25, 26, 27 and 28 by reason of illness. His evidence confirms that on July 26 he contacted the CLSC in Ahuntsic to see a doctor. That approach was apparently motivated by his own view that he would wait an excessively long time if he should go to a hospital emergency room. The CLSC gave him an appointment with a doctor for the following week, on August 2. It does not appear disputed that on August 2 Mr. Verdi attended at the CLSC and was examined by Dr. T. Barbarosie. Dr. Barbarosie directed a series of blood tests to be performed on August 8th, withholding any diagnosis with respect to the precise nature of the grievor's ailment. It may be noted that the grievor did return to work on July 31, and missed no time thereafter until his discharge. Nor is there any suggestion that he had prior problems with absenteeism.

Significantly, at the time of the Company's investigation, on August 21, Mr. Verdi provided the Company with a document confirming that he had contacted the CLSC and had been sent for blood tests by Dr. Barbarosie, advising that he was still awaiting the results of those tests. The Company obviously did not wish to await the results, and discharged Mr. Verdi without requesting any further amplification in that regard.

The evidence also confirms that there is no requirement for employees to bring a doctor's note in respect of absence for reason of illness, unless the employee wishes to make a claim for sick leave indemnity, a right which apparently triggers only on the fourth day of a medical absence. For reasons he best appreciates, the grievor did not wish to make any such claim for his fourth day of absence, and has not sought to do so. In these circumstances the Arbitrator has some difficulty with the suggestion of the Company that Mr. Verdi did not provide adequate medical documentation with respect to his absences for the four day period of July 25 through July 28, 2000. At the time of the disciplinary investigation he advised the Company that he contacted the CLSC on July 26. He then had documented confirmation of his subsequent attendance for medical attention on both August 2 and August 8, 2000. While it is not clear what, if any, weight the Company gave to those documents, it appears to the

Arbitrator that Mr. Verdi did seek medical attention during t he period of his absence. That is evidenced by his seeking medical attention through the CLSC on July 26, a fact which does not appear disputed before the Arbitrator. While it might have been preferable for the grievor to seek a more immediate diagnosis in a hospital emergency room, it must be remembered that he was then under no positive obligation to produce a medical note for his absence.

Although evidence of further medical treatment of the grievor following his discharge was available to be adduced at the hearing, the Arbitrator does not consider it necessary. The material before me confirms that, at a minimum, Mr. Verdi sought medical attention during the week of his absence, and presented the Company with documentary evidence to confirm that fact at the time of his disciplinary investigation. I am satisfied, on the balance of probabilities, that Mr. Verdi did suffer from physical difficulties during the week in question, and was therefore justified in his absence. I am also satisfied that he made reasonable attempts to confirm that fact to the Company through the presentation of medical documentation flowing from his attempt to obtain medical attention commencing July 26.

In the result, based on the evidence before me, I can find no basis upon which Mr. Verdi can be said to have been liable to discipline of any kind by the Company. In the circumstances the Arbitrator finds and declares that the Company has not established that it had just cause for the termination of Mr. Verdi. The grievance is therefore allowed.

The Arbitrator directs that Mr. Verdi be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost.

December 15, 2000

MICHEL G. PICHER
ARBITRATOR