CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3180
Heard in Montreal, Thursday, I I January 2001
Concerning
ST. LAWRENCE & HUDSON RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:
The dismissal of trainperson/yardperson Bruno Caron of Montreal, Quebec, from Company service for the accumulation of in excess of 60 demerits pursuant to the Brown System of Discipline.

JOINT STATEMENT OF ISSUE:
On May 3, 1999, Mr. Caron, Montreal train person/yardperson and Local Chairperson of United Transportation Union Local 634, was assessed a formal caution for unavailability for work.

On July 12, 1999, Mr. Caron was further assessed discipline as follows, (a) 20 demerits for unavailability for service; (b) 10 demerits for sending an '... sending an objectionable and threatening document to company officers ..."; (c) 25 demerits for "... insubordinate conduct…" by refusing to attend properly scheduled investigations.

On July 12, 1999, a fourth 104 was also issued advising Mr. Caron that he was Dismissed from company service for accumulation of in excess of 60 demerits as per the Brown System of Discipline.

Subsequent to this dismissal, Mr. Caron did not commence a grievance pursuant to the collective agreement, in lieu he initiated a S. 94 complaint against his employer before the Canadian Industrial Relations Board. The employer, among other things, submitted that this was not a proper matter for hearing by the CIRB and that it should more properly have been dealt with through the grievance and arbitration process under the collective agreement. Subsequently, without a hearing, the CIRB ordered this issue to be reinstated into the grievance procedure for disposition by the Canadian Railway Office of Arbitration.

The grievor submits that his dismissal was improper for the following reasons: (a) Mr. Caron submits that the employer was not justified in imposing discipline because his absences were for union business; (b) Mr. Caron submits that the employer intimidated him during the investigation of April 7, 1999, by saying that he had violated the running trades employees' attendance policy; (c) Mr. Caron submits that the employer used the investigation procedure to harass him and to interfere in his union activities, (d) Mr. Caron submits that the Brown disciplinary system has been applied against him in a discriminatory fashion since the employer did not reduce his demerits following the passage of twelve calendar months following the previous assessment of discipline; (e) Mr. Caron submits that the fax of May 6,

1999, was a joke that was sent to seven people and only by mistake to the employees secretaries' office; (f) Mr. Caron submits that in the past, the employer has never before called an employee to an investigation for unavailability for duty.

As redress, Mr. Caron asks the Arbitrator to: (a) Declare that he was acting as a union representative and that his absences were authorized; (b) Declare that he should not be subject to disciplinary measures for his unpaid union leaves; (c) Declare that the employer used the investigation procedure and disciplinary measures to intimidate, harass and discriminate against Mr. Caron because of his union activities; (d) Declare that the employer interfered in union activities carried on by Mr. Caron; (e) Declare that the employer contravened Part I of the Canada Labour Code; (f) Overturn Mr, Caron's dismissal and the disciplinary measures taken against him; (g) Order the employer to rehire Mr. Caron with compensation for all lost wages, benefits and seniority; (h) Order the employer to compensate Mr. Caron for all damages; (i) Order the employer to cease its anti-union activities; 0) Retain jurisdiction with respect to the implementation of the award issued.

The Company has declined this grievance and submits that Mr. Caron has been treated property and was properly dismissed, as required pursuant to the governing collective agreement.

FOR THE COUNCIL:
(SGD) J. DRULET
FOR; GENERAL CHAIRMAN
FOR THE COMPANY:
(SGD.) G. CHEHOWY
FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

K. Fleming	- Counsel, Montreal
D.Launay	- Counsel, Montreal
G. Chehowy	- Manager, Labour Relations, Toronto
J. H. Blotsky	Assistant Director, MMC
R. Berwick	Assistant Yard Manager, Montreal
A. Regimbald	Manager, Operations, CIVIC

And on behalf of the Council:

J. Drolet - Council, Montreal
D. A. Warren - General Chairman, Montreal
D. Genereux- Vice-General Chairman, Montreal
R. Michaud - Provincial Legislative Chairman (UTU), Montreal
B. Brunet - Provincial Legislative Rep. (BLE), Montreal
R. Gagnon - Observer
B. Caron - Grievor

AWARD OF TH]E ARBITRATOR

This is a grievance concerning discharge. On July 12, 1999 the grievor, Mr. Bruno Caron, was assessed a total of fifty-five demerit marks. As he already had twenty-five demerits on his file, and an accumulation of a total of sixty demerits results in discharge, his employment was terminated by reason of the accumulation of eighty demerit marks. The Council claims that the Company did not have just cause for the discipline in question, and requests that Mr. Caron be reinstated into his employment, with compensation for all wages and benefits lost.

The grievor, hired in 1984, was assigned as a yardmaster at St. Luc Yard in Montreal. For some years he has held office as a Union representative at the local level. Among other things, he was the Union legislative representative since 1997, then chairman of the grievance and legislative committee in 1998, and finally chairman of Local 634 in 1999, as well as being a member of the Health and Safety Committee. It is common ground that the Union offices held by Mr. Caron were not the equivalent of a full-time union position as would be the case, for example, of a general chairman. He remained an employee in the service of the Company, with an ongoing obligation to work in the yard.

It is understood that Union officers at the local level may absent themselves from work from time to time to accomplish their Union duties, The evidence before the Arbitrator establishes, for example, that the Union officers elsewhere in the Company's system in Eastern Canada book off work for a total of up to sixty days a year to perform their Union duties. These figures include days for meetings of the Health and Safety Committee, which are counted as days off on Company business.

As a basis of comparison, it is notable that Union officer R. Gallop of Toronto booked off a total of thirty-four days for Union business in 1998, while Mr. B. Brunet, a colleague *of* the grievor at Montreal who occupies the same office vis-&-vis the local of the locomotive engineers, booked off sixty days during the same year. By contrast, in 1998 Mr. Caron booked off for Union business for a total *of* 241 days. He worked in the yard for only thirty-five days, which represents an attendance level of 12.6%. In 1999, until his discharge in July, he worked only one day. For all the other days he booked off for Union business.

It is clear that for some time the Company, which experienced a shortage of available employees at Montreal, was concerned by what it viewed as an abusive level of absenteeism for Union business on the part of Mr. Caron. Several measures were taken to communicate to the grievor that his absenteeism was unacceptable, but without success. On July 12, 1998 the Assistant Supervisor, Mr. André Bergeron, spoke to Mr. Caron to make him aware of the concerns of the employer, advising him that his performance in the matter of his absences would be followed closely. Shortly thereafter, in response to a letter of protest on the part of the grievor, Mr. J.H. Blotsky, Director of Operations, while always recognizing the legitimacy of union activities, reiterated the position of the employer concerning the presence at work of Mr. Caron:

> The Company recognizes the time necessary that is required of you to accomplish union business according to the terms of the collective agreement. However, I am sure that you would agree that the periods of time which you have been absent compared

with the majority of other local representatives greatly exceeds those of your local union colleagues.

We understand this necessity, but we believe that the periods of time could be reduced. Unless you have some information of which neither Mr. Bergeron nor myself are aware, I believe that you could ameliorate your level of attendance by reducing the periods of time that you allow for this type of business.

(translation)

The concerns so expressed were to no avail, even though the Company gave Mr. Caron what it characterizes as two verbal reminders, communicated by Mr. Blotsky in October and November of 1998. Finally, in order to avoid a confrontation in the thorny area of interference with union rights, the Company sought the aid of the Council's General Chairman, Mr. Don Warren, In an attempt to avoid confrontation, Mr. Warren sent a letter addressed in a general way to all Union officers at the local level, dated February 3, which reads as follows:

To All Local Chairpersons:

United Transportation Union
St. Lawrence & Hudson Railway
Eastern & Atlantic Regions:

Re - Leave of Absence for Union Business:

St. Lawrence & Hudson railway issued a bulletin on March 27th, 1996 advising employees of the company's absenteeism policy, Recently it has come to my attention that the company is prepared to investigate extensive absenteeism attributed to Union business.

Almost all union officers, because of their position in the union, lead dual lives. On one hand, they are spokespersons for the union, empowered to act for it and its members in the daily administration of the collective agreement. At the same time, they are commonly employed to work for, and receive their compensation from their employers. Accordingly, representatives of the Union are subject to the same duties and responsibilities inherent to all employees of the railway.

Arbitrators have held that leave of absence (LOA) for the purpose of handling duties inherent to union positions are subject to the implied right of management to restrict *"within reasonable* limits" and where there is good reason for so doing, the amount of time that may be permitted for such activities. As well, if an official abuses the right to absent himself on union business, he may expose himself to disciplinary sanctions. (Brown & Beatty 3rd edition at 9:1400)

In view of the above, when time is required to perform your responsibilities, leave of absence should be secured from the proper company officer. Additionally, leave should

not extend beyond the time specified in your request. If more time is required, notify the proper company officer of the additional time needed and ensure that it is approved.

If you have any question in respect to the above, please contact me at your convenience. I have enclosed a copy of the company's absenteeism policy as issued on the St. Lawrence & Hudson for your reference.

Fraternally yours,

(sgd.) D. A. Warren
General Chairperson
United Transportation Union (CCROU)

To all appearances, that letter, as well as an interview between Mr. Caron and another supervisor, Ron Berwick, on February 4, had no effect. As noted above, with the exception of a single day, in 1999 Mr. Caron absented himself completely from work to pursue his Union activities. It appears from the evidence that he seemed obsessed with the pursuit of the files of his members, and saw the efforts of the Company to have him return to work as an affront to his rights.

The intransigent attitude of Mr. Caron was revealed during a disciplinary investigation held by the Company in the spring of 1999. During one of the sessions of the investigation, on April 14, 1999, the following exchange between the Company's investigating officer and the grievor took place:

92 Q. From today can the Company expect to see on your part a better and more reasonable record of attendance of 5 tours of duty per week with the exception of those cases where it is absolutely necessary to book off due to urgent union needs?

A. At this moment the employer does not believe that each file that occupies me is very important or very urgent. By this question the investigating officer attempts to interfere in union business. As explained previously it is impossible for me to cover my regular assignment due to the expectations of each member of UTU Local 634. As the profession states it, I am only representing my members, therefore my absenteeism is caused by the 130 or 140 members that I represent, This question ought to be addressed to the members of my union, Local 634 of the UTU. Next meeting May 3 at 14:30 h,

93 Q. Can the Company rely on you, starting from today, to obtain permission from the manager of operations for all leaves without pay of 48 hours or more?

A. No. Exhibit D is a letter sent by General Chairman Donald Warren and

> addressed to all local representatives on the STL&H. This document is of no concern to the policies of Canadian Pacific or of the STUH. In any event the STUH is not implicated in this document and it has no force of law on its jurisdiction. Since when does the Chairman of the UTU have the right to interfere in the affairs of the Company? The question is nonsensical. You may have obtained that letter from someone but it is not addressed to you. How can you confirm the veracity of that document. I wish to add -further that that document concerns only the workers of the UTU and the interference of the employer in the interpretation given by Mr. Ron Berwick on the document when this document was not addressed to him and not addressed to the Company. I am very disappointed at the attitude of the employer and I ask for an apology from the employer for having used the material of the UTU against a member of the UTU.
>
> (translation)

The investigation resulted in the addition of a written reprimand, dated May 3, 1999, to the file of the grievor, a disciplinary measure which was not grieved.

Despite this disciplinary reprimand, the grievor continued to be absent from work. He carried on what had effectively become an indefinite, if not permanent, absence, in order to devote himself entirely to his Union projects. It appears, moreover, that on April 6, 1999, he filed a complaint with the Canadian Industrial Relations Board alleging unfair labour practices against him as a Union representative on the part of his employer. Unfortunately, in his eyes, the expectation of his employer that he must be available to participate in the operation of its enterprise, and the efforts of the Company to remind him of his obligations in that regard, were neither more nor less than the elements of an egregious illegal intimidation.

Finally, seeing itself without an alternative, the Company scheduled a last disciplinary investigation, which the grievor categorically refused to attend, a position which he communicated to the Company by fax on May 25, 1999. In the meantime, it appears that on May 6 the grievor had faxed to the yard office 2 cartoon which showed two hunters who had discovered testicles in a bear trap. One of the two says "Somewhere out there is one mean fuckin' bear." According to the Company, the supervisors, who had imposed discipline against Mr. Caron some days before, viewed this communication as an insult, if not a threat, from the grievor. According to the Company the unsavoury tone of this joke was also offensive to employees in the office where the fax machine is located. Therefore, the decision was taken to investigate that incident separately. Furthermore, as Mr. Caron refused to attend at the investigations, a third investigation was scheduled to determine whether that refusal constituted insubordination. A formal notice concerning the three investigations was sent to Mr. Caron on June 10, 1999. On June 16 he replied by letter, advising the Company that in his opinion the investigations constituted harassment, that he would not be present and that the employer could proceed in his absence.

On July 12 the Company sent Mr. Caron a letter containing four notices concerning his

discipline: the imposition of twenty demerit marks for his absence from work since April 15, 1999, ten demerit marks for the tasteless and threatening contents of his fax of May 6, 1999, twenty-five demerit marks for insubordination arising from his refusal to attend at the investigations, and finally his discharge for the accumulation of more than sixty demerit marks (a total of eighty demerits).

Firstly, the Arbitrator is inclined to agree with the submission of the Council concerning the fax incident. It involved a cartoon in poor taste, but which was not sent as a threat or an insult. The evidence establishes that the grievor broadcast the fax in question as a single message copied to several of his friends and colleagues, and that the number of the fax machine in the office at St. Luc Yard was included by mistake, It remains, however, that such a picture would be offensive to some people, and that its general distribution in the office demonstrates a failure of judgement. In the circumstances I consider that there was no cause for the imposition of ten demerit marks, but that a written reprimand would be appropriate.

However, I find less convincing the claim of the Council concerning the twenty demerits for the unavailability of Mr. Caron, and the twenty-five demerits for his insubordination by refusing to participate at the Company's investigation. I cannot accept the suggestion of counsel for the Council that the procedure and approach of the employer towards Mr. Caron was not proper, She submits that it was, very simply, incumbent on the employer to order Mr. Caron to present himself at work, as was the case on January 29, 1999, and he would obey. I do not agree. The employer is not compelled to resort to practices worthy of the treatment of a child in its relations with an employee. The contract of employment between the Company and Mr. Caron was clear. He had an obligation to be available for work2tSt. Luc yard five days a week, save for his right to absent himself exceptionally to perform a reasonable amount of union duties. In accordance with the well-established practice accepted by both parties, it could be expected that Mr. Caron would be absent the same number of days as his Union colleagues, at a maximum perhaps sixty days a year, more or less. Even if one were to accord him up to 100 days in recognition of a heavier burden (a fact which is not proved) it is difficult to see the justification for his absences at a rate of more than 200 days a year. The evidence establishes that the employer took a number of steps, including the discipline notice of May 3 1999, to make Mr. Caron understand that his level of absences for union business was abusive and would no longer be tolerated, but without any effect.

Mr. Caron is not a professional, full-time Union representative, as would be the case for a general chairperson on a long-term leave negotiated with the Company. He is an employee. His principal obligation is to work in the service of the Company, save for a right to absent himself in a reasonable fashion to accomplish his duties as a local Union officer. In the jargon of the industHal milieu, in the last three years he was a simple shop steward, chief steward or plant chairperson, and not a professional Union representative. He simply did not have the discretion to throw himself in an unlimited way into the pursuit of his Union files, the number of which does not, in any event, seem to have been outside the norm.

For reasons which only he understands, on his own Mr. Caron effectively gave himself a leave of almost 100% to become the equivalent of a full-time Union representative. His salary was

paid by his Union local and he spent his days working on his files. He dealt with government agencies, such as Labour Canada and the CSST, and in certain cases attended hearings as an observer. It seems clear, according to the responses which he furnished to the employer during the investigation on April 14, 1999, as well as in his written communications and his evidence before the Arbitrator, that Mr. Caron acknowledges no fault on his part concerning his unavailability to work. In his view, if he was unable to work more than a single day in six months, it was because of the demands of his members and the sorry state of the Company's industrial relations policy.

The Arbitrator sees it differently. To be sure, the protection of union rights and the right of employees to participate in the activities of their union are principles of first importance in our system of industrial relations. But a local union officer who retains his or her obligations as an employee cannot absent himself or herself from work as he or she sees fit (see CROA 3088). More specifically, he or she cannot follow a course of conduct which, for all practical purposes, is tantamount to abandoning his or her employment. In the instant case the evidence demonstrates that the burden of grievances and other files which Mr. Caron carried was not greater than the norm, and did not justify his almost total absence from work. Despite the efforts of his employer, on a progressive basis, to advise Mr. Caron and t;D correct him, nothing seemed to make him understand the importance of his obligations as an employee. The Arbitrator is satisfied, by the preponderance of the evidence, that there was no intimidation of Mr. Caron by his employer in the investigation of April 7, 1999, nor any harassment or interference in the legitimate business of the Union in any of these events. Furthermore, the evidence establishes that the calculation of the discipline file of the grievor by the Company in accordance with the Brown System of discipline was correct.

In my view, the Company was justified in assessing the twenty demerit marks for Mr. Caron's abusive level of absence. The twenty-five demerit marks for his refusal to appear at the investigations was equally justified. Given all of its efforts, it is difficult to conceive how the employer could have done otherwise. In consequence, even with the reduction of the penalty for the fax incident, the grievor accumulated a total of seventy demerit marks on his discipline file.

Unfortunately, this case reveals very little in mitigating factors which would justify a reduction in the disciplinary penalty. The service of the grievor was not remarkably long, and his prior disciplinary record leaves much to be desired. As noted, he seems not to understand or wish to recognize his responsibility to be available for work and his obligation to strike a reasonable balance between his duty to the Company and the occasional duties of a shop chairperson. I therefore conclude that the disciplinary penalties imposed for these aspects of his conduct were for just cause, and that the grievance concerning the discharge must be dismissed.

January 16, 2001

MICHEL G. PICHER
ARBITRATOR