

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3293**

Heard in Montreal, Thursday, 10 October 2002

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:

Employee S. Arnold was assessed twenty-four (24) demerits for allegedly giving false information to authorized personnel regarding an absence which occurred on May 17, 2002.

JOINT STATEMENT OF ISSUE:

The Union contends that Mr. Arnold was absent on the day in question with legitimate cause and did not give false information as alleged. In addition, the Union contends that the discipline was unjustified, unwarranted and excessive in the extreme and requested the discipline be removed from his record.

The Company denied all the Union's requests.

FOR THE UNION: FOR THE COMPANY:

(SGD.) D. J. DUNSTER

(SGD.) P. D. MACLEOD

STAFF REPRESENTATIVE

VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

P. D. MacLeod - Vice-President, Operations, Mississauga

R. Dupuis - Regional Manager, Quebec

R. Derouchie - Terminal Manager, Ottawa

And on behalf of the Union:

D. Dunster - Staff Representative, Ottawa

R. Quevillon - President, USWA Unit 2344

S. Arnold - Grievor

AWARD OF THE ARBITRATOR

The material confirms that the grievor, who has an established record of casual absenteeism, notified the Company that he would be absent from work on May 17, 2002, the Friday before the long weekend of May 24th. At the time he was performing modified duties by reason of a work-related back injury, and in his telephone call to the lead hand on the pre-load shift he stated that he was not coming in to work because he had a sore back. The evidence confirms that at the time the grievor was being

paid for eight hours a day, although he only worked four hours a day and attended therapy at the Back Institute at 1:00 p.m. each afternoon.

Because of the grievor's prior absenteeism, and at least one incident involving deception of the Company with respect to the reason for an absence, Terminal Manager Raymond Derouchie decided that the grievor should be contacted at home on his cell phone. There was no response to the telephone calls to the grievor's cell phone, nor any response to the Company pager that the grievor had in his possession. In that circumstance Mr. Derouchie then directed two supervisors to attend at the grievor's residence, as well as at his separated wife's residence, to confirm his whereabouts. They were unsuccessful in finding Mr. Arnold.

Subsequent investigation confirmed that the grievor was at his brother's home, in Ottawa, at the time. It was also determined that he did not attend his back therapy session on that day. After a disciplinary interview the Company concluded that the grievor did not have a legitimate basis for failing to attend work to perform modified duties and assessed twenty-four demerits against his record, placing him at a total of fifty-nine demerits, on the threshold of dismissal.

The first issue is whether in these circumstances the Company has discharged the burden of proof of establishing that the grievor did fail in his obligation to the employer. I am satisfied that it has discharged that onus. Quite apart from the grievor's prior record of absenteeism and lack of candour towards the Company on at least one occasion with respect to the reasons for his absence, there were circumstances from which the Company could reasonably draw an inference that Mr. Arnold was not being fully forthcoming with respect to his circumstances on the Friday preceding the long weekend. In my view it was open to the Company, as it is to the Arbitrator, to draw an adverse inference against Mr. Arnold based on all of the circumstances. Those circumstances include the grievor's apparent failure to make himself reachable through the normal course of telephone and pager. Perhaps most compelling is the fact that Mr. Arnold, who complained of aggravated pain in his back, called the Back Institute to cancel his therapy for that day. It does not appear disputed that he gave the Back Institute no indication that he was suffering an aggravated condition, but apparently indicated that he might be going out of town.

There are circumstances where the objective facts do allow an employer to draw inferences adverse to an employee. In those circumstances it is incumbent upon the employee to be

forthcoming with a full and satisfactory explanation. In my view, in this case Mr. Arnold has failed to do so. I am therefore satisfied that he was liable to the assessment of discipline for the events of May 17, 2002.

The issue then becomes the appropriate measure of discipline. The record indicates that Mr. Arnold is an employee of seventeen years' service. While it is true that he has registered high rates of absenteeism, for which he was given written warnings on some five previous occasions over the years, there is no assessment of any demerits whatsoever against his record for absenteeism in the past. In these circumstances I am compelled to agree with the Union's representative that the principle of progressive discipline has not been respected in dealing with Mr. Arnold. To go from a written warning to the assessment of twenty-four demerits is, in my view, excessive. I am satisfied that ten demerits would, in the circumstances, have sufficed to place Mr. Arnold on notice that any continued irregularities in respect of absenteeism might result in still more serious measures of discipline, and would have had the necessary corrective effect.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that ten demerits be substituted for the twenty-four demerits assessed against Mr. Arnold for providing incorrect information and absenting himself from work without justification on May 17, 2002.

October 11, 2002

MICHEL G. PICHER
ARBITRATOR