

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3380

Heard in Calgary, Thursday, 13 November 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Appeal the assessment of 45 demerits which led to a discharge for the accumulation of demerits for Mr. T. Bell; P.I.N. 174600.

BROTHERHOOD'S STATEMENT OF ISSUE:

By way of Form 780 dated June 13, 2001, the grievor, Mr. T. Bell, was discharged for his alleged absence from Company property without authorization during work on May 7, 2001, improper use of a Company vehicle and conduct unbecoming of CN employee at a local A&B Sound. The matter was grieved.

The Union contends that: **(1.)** The Company failed to take into consideration the serious family and home problems Mr. Bell was undergoing at the time of the incident. **(2.)** The Company's assessment of discipline was unwarranted and excessive. **(3.)** Mr. T. Bell was unjustly dealt with by the Company. **(4.)** That Mr. T. Bell was under duress and unstable due to the family problems he was having.

The Union requests that the grievor be reinstated to Company service forthwith, without loss of seniority and with full compensation for all financial losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. S. DAWSON

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Laidlaw – Manager, Human Resources, Winnipeg

G. Rybuck – Manager, Track Services, Winnipeg

R. Reny – Sr. Manager, Human Resources, Edmonton

And on behalf of the Brotherhood:

P. Davidson – Counsel, Ottawa

L. Gladish – General Chairman, Winnipeg

D. Brown – Sr. Counsel, Ottawa

T Bell – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond dispute, that while on duty at Portage Junction in Winnipeg on May 7, 2001, Mr. Bell proceeded to a commercial sound store at Hargrave Street and Portage Avenue, ostensibly have the battery of his cell phone examined for repairs. In fact, while in the store, the grievor attempted to shoplift a new battery, and was discovered in that effort when an alarm sounded as he left the premises. He was pursued by a store clerk who ultimately confronted him after observing him discarding the stolen battery among some parked cars. The confrontation occurred at the location of a Company vehicle where Mr. Bell was to meet his workmate, Foreman Welder Neil Peden, to drive back to the work site. Upon the grievor returning to the store with the store manager the Winnipeg police were notified of the incident.

Subsequently, on May 8, 2001 the grievor refused the request of the CN police to provide a statement about the incident. The following day, May 9, 2001 the Winnipeg police arrested the grievor and took him into custody for questioning. Mr. Bell then denied any wrongdoing and, in a four letter expletive, stated that the Company was trying to do him harm, apparently referring to an earlier incident for which he had been disciplined. In the subsequent disciplinary investigation conducted by the Company on May 22, 2001, the grievor again denied any wrongdoing at the sound company store. He explained that the employees who chased him were being over zealous and "terrorizing me". Following the investigation the grievor was assessed forty-five demerits for being absent from Company property without authorization during working hours, engaging in the improper use of a Company vehicle and for conduct unbecoming an employee at the sound equipment store. At that time he had forty-five demerits outstanding on his record. The further forty-five demerits resulted in his discharge on June 7, 2001 for the accumulation of ninety demerits.

As indicated above, at the arbitration hearing the grievor did not deny that he left the work site without authorization, making improper use of a Company vehicle for that purpose, and that he did attempt to shoplift a cell phone battery, as related above. On his behalf, the Brotherhood argues that the grievor was then in the throes of a number of personal crises involving his marital and family life, including his separation from his wife who was then terminally ill and was seeking a divorce and substantial support payments. In addition, it appears that the grievor had then become involved with another female companion who suffered from severe drug addiction, and who had become pregnant. On the grievor's behalf the Brotherhood argues that the confluence of these events created stresses and pressures upon Mr. Bell which caused him to engage in what it characterizes as the erratic and uncharacteristic behaviour exhibited on May 7, 2001. It's counsel compares the circumstances of this case to those dealt with in **CROA 2838**.

The Arbitrator cannot agree. While it appears undisputed that the grievor did suffer great stresses in his personal life, a review of his overall history of employment, spanning some twenty years, would suggest that the conduct in which he engaged on May 7, 2001 is not necessarily isolated or uncharacteristic. Early in his employment, apparently during a training period, he was assessed forty-five demerits for unruly conduct involving disturbing Company classes, damaging hotel property and being disrespectful to staff. In 1991 he was discharged for a rule G violation and the unauthorized use of a Company vehicle while under the influence of alcohol. Following his reinstatement under contractual terms in September of 1993 he incurred a further total of forty-five demerits for various incidents, including rules violations and the failure to report an accident causing substantial monetary damage to Company equipment and the failure to appear at formal investigations. He was later assessed a two year demotion for failing to protect and secure a Company truck, which was stolen and destroyed, a sanction for which a grievance is currently pending. Even setting apart the last incident, the unfortunate record

before the Arbitrator discloses a history of serious disciplinary infractions against the grievor, at least two of which are overtly behavioural and one of which resulted in his prior dismissal in 1991.

In such circumstances the standard of evidence necessary to mitigate against a serious disciplinary outcome is fairly evident. When a grievor claims impaired judgement and diminished capacity it is not uncommon for this Office to receive documentary medical evidence confirming the condition of the employee at the time of the events leading to his or her discharge. No such evidence is tendered in the case at hand. While the Arbitrator has little doubt that the grievor did suffer greatly in his personal life, and accepts the submissions, including letters of recommendation, which indicate that he has learned from his experience and turned his life around, the fact remains that the grievor's prior disciplinary record at the time of his discharge, and the nature of the offences in that record did, in the Arbitrator's view, give the Company just cause to come to the conclusion that the previous efforts at progressive discipline and rehabilitation, including his reinstatement following an earlier discharge, proved fruitless and should not be followed any further. The Arbitrator cannot responsibly disagree with that judgement.

For all of the foregoing reasons the grievance must be dismissed.

November 17, 2003

MICHEL G. PICHER
ARBITRATOR