ARBITRATION TRIBUNAL

CANADA
PROVINCE OF QUÉBEC

Deposit No :

Date : August 15, 2005

BEFORE ARBITRATOR : Me Mark Abramowitz

The national automobile aerospace, transportation and general workers union of Canada (CAW – TCA Canada)
Hereinafter called the « union »
And
Canadian national railway company
Hereinafter called the « employer »

Grievor : Claude Legros

Grievance : HRSDC n° YM2718-2797

Collective agreement : Agreement 12, effective January 1, 2001

DECISION

THE DISPUTE

[1] On April 12, 2004, Car Mechanic, Claude Legros, was assessed 30 demerits for insubordination and his refusal to perform an assigned work task. These demerits, when added to a previously existing accumulated record of 55 demerits brought the total beyond the threshold of dismissal of 60 demerits of the Brown (disciplinary measure evaluation) System traditionally accepted by the parties and resulted in the automatic dismissal of the grievor after some 29 years service with the company. The union submits that the discipline assessed was excessive, given the mitigating factor of severe dental pain which Mr. Legros was suffering that day prompting his outburst and, secondarily, that I am not bound to impose the disciplinary measure foreseen by the Brown System. Accordingly, it seeks his reinstatement. The employer, on the other hand, points to the past record of insolence and unauthorized absences of Mr. Legros which, it maintains, when combined with the incident in question, fully justifies the ultimate sanction of dismissal.

[2] In accordance with rules 28.4 and 28.6 of the collective agreement, the parties proceeded on the basis of a Joint Statement as to the essential issues and facts in dispute, supplemented by written and oral pleadings. No witnesses were heard and no preliminary exceptions were raised as to the procedure followed nor with regard to the jurisdiction of the undersigned. The delays to render the present decision were also waived by the parties (rule 28.7).

THE FACTS

[3] Mr. Legros commenced his employ with CN on October 23, 1974, initially as a carman trainee The position was later described as that of a car mechanic, the duties of which consist in inspection, maintenance and repair of freight and passenger train cars.

[4] On the day in question, Mr. Legros was working the 16:00 – 24:00 shift, and was assigned to car repairs by his supervisor (Mr. Turgeon). Mr. Legros was unhappy with this assignment and requested of another supervisor (Mr. G. Bélanger) that he be assigned to inspection. This request was refused and he was again instructed to proceed to work on car repairs. Instead of doing so, he was found some 15 minutes later in the canteen by supervisor Bélanger. Questioned as to his failure to report to his job assignment, Mr. Legros raised his voice utilizing vulgar language and advanced towards Mr. Bélanger in an aggressive manner, waiving his arms, apparently maintaining (that in accordance with the collective agreement) his seniority gave him the option of either working on inspection or on car repairs.

[5] This assertion, however, is not supported by any rule of the collective agreement and has no basis in practice. It was thus common ground that the work was validly assigned and that its refusal merited the imposition of a disciplinary sanction, the consequence of which the union maintains was too severe.

THE ARGUMENT

The employer position

[6] The employer position is straight forward. It submits that Mr. Legros twice refused, without cause, valid directives of his supervisors to proceed to a work assignment. His refusal was laced with profanity when he told supervisor Bélanger to “va chier”, and this was accompanied by aggressive arm waiving in the direction of the latter who felt sufficiently threatened to call the CN police to remove Mr. Legros from the premises. This behavior, it states, was insolent and disrespectful of Mr. Bélanger and totally unjustified. The union suggestion that his action was spontaneously triggered by a painful dental problem of which he was suffering was, according to the employer, not borne out by Mr. Legros’ answer to the following question posed during an investigation inquiry:

> (Union exhibit, tab 5)
>
> 21. Q. Si je comprend bien si M. Bélanger vous aurait assigné à l’inspection vous vous seriez dirigé immédiatement à votre poste de travail, est-ce exact?
>
> A. Oui, avec plus d’entrain

[7] Additionally, Mr. Legros’ post disciplinary record indicates numerous sanctions totaling 185 demerits imposed during the period of July 18, 1986 up to and including the culminating incident of April 12, 2004. These were imposed for repeated unauthorized absences, abusive language used towards supervisors, refusal to obey a supervisor’s order and the theft of company property. In essence, the company maintains that his

pattern of conduct was and is contrary to the good order, discipline and reasonable respect for supervisors which is required in the workplace.

[8] The assessment of 30 demerit points for the incident of April 12, 2004 was also, in the company's view, not disproportionate to the offense and, in support of the reasonableness of this sanction, it cites the following arbitral decisions:

§ *Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-TCA) local 100*, grievance of Carman R. Pratt, SHP-431, decision of arbitrator, Michel G. Picher, dated March 10, 1997, with regard to 25 demerits imposed for "[…] "alleged failure to follow the instructions of your Supervisor" […]". At page 4 of the decision, arbitrator Picher states:

> When regard is had to the prior discipline assessed against Mr. Pratt for similar acts of insubordination, the Arbitrator can see little reason to reduce the discipline assessed against him. In the result, the grievance must be dismissed. The twenty-five (25) demerits assessed in this case, coupled with forty (40) demerits for an earlier incident concerning abusive disregard of computer equipment therefore place the grievor in a dismissible position. Again, the Arbitrator can see no persuasive basis upon which to reverse that outcome, given the general lack of remorse or concern displayed by Mr. Pratt.

§ *Via Rail Canada Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada*, grievance of M. Fisette, decision of arbitrator, J.F.W. Weatherill, dated May 11, 2000. At page 4 of his decision, arbitrator Weatherill opines:

30 demerits is a heavy penalty for the offence of insubordination. This was, however, an offence for which the grievor had been disciplined on several occasions, as noted above. Even leaving aside whatever continuing force the "last chance" agreement might have, the grievor's record stood at 55 demerits, including 20 demerits assessed for a similar offence the year before and not counting a thirty-day suspension before that. To reduce the penalty assessed in the instant case to, say, 20 demerits would have no effect on the ultimate outcome of the instant case, and in any event, having regard to the whole record, and to the continuing nature of the grievor's outbursts, it is my view that there was just cause for the penalty assessed here. Accordingly, the assessment of 30 demerits is upheld. There was, I find, just cause in all of the circumstances for the discharge of the grievor for accumulation of demerit marks.

§ *Canadian National Railway Company and National Automobile, Aerospace, and Agricultural Implement Workers Union of Canada*, grievance of L.H. Bourque, decision of arbitrator M.G. Picher, dated July 27, 1992, upholding the assessment of 10 demerits for "[…] "Failure to obtain permission from your supervisor to leave the work area and directing profane language at a Company Officer" […]". This brought the total record of demerits to 65 and as a result Mr. Bourque was discharged. At page 3 of the decision, arbitrator Picher expressed the view that:

> Unfortunately, the grievor's record offers little by way of mitigating circumstances that would justify a reduction of the penalty. Prior to the events in question Mr. Bourque's discipline stood at 55 demerits. Most significantly, in the Arbitrator's view, his record discloses at least one incident of prior discipline for insubordination, on June 29, 1989. An arbitrator considering the merits of exercising his or her discretion to substitute a lesser penalty must find some reasonable basis in the evidence to do so. Where, however, the record of an employee suggests that the infraction for which he or she is disciplined is not a first offence, and where that employee's record is otherwise extensive, it is difficult to find any basis for the exercise of such discretion.
>
> Regrettably, that is so in this case. As an employee with 55 demerits on his record, and a prior instance of discipline for insubordination, Mr. Bourque must have understood that disobeying his supervisor's instruction, and addressing him in a disrespectful fashion would attract discipline which would have the most

> serious consequences for his employment. In those circumstances, the Arbitrator has little basis to draw favourable conclusions in respect of the likely rehabilitation of Mr. Bourque in the future.

§ *Canadian Pacific Limited and United Transportation Union* (T), Canadian railway office of arbitration, case no. 742, J.F.W. Weatherill, arbitrator, decision rendered following a hearing of March 11, 1980. The gist of the decision is contained at page 3 thereof:

> In these circumstances the grievor refused duty by not carrying out a reasonable instruction from a Company officer. He was liable to discipline on that account.
>
> […]
>
> The grievor was, therefore, properly subject to discipline, and the Company complied with the appropriate procedural requirements. It is not necessary to make any precise finding as to the number of demerits it would have been proper to assess. Whether or not forty-five demerits was proper, I have no doubt that it would not have been excessive to assess twenty demerits. That alone, added to the forty-five demerits which had been assessed against the grievor in September, 1978, for insubordination (and which were upheld at arbitration), would have meant the accumulation of over sixty demerits. In the circumstances, therefore, it is my conclusion that there was just cause for the assessment of a substantial number of demerits against the grievor, and that there was just cause for his discharge.

[9] Taking into account the past disciplinary work record of Mr. Legros, the seriousness of the culminating incident, and the lack of mitigating circumstances, the employer submits that his dismissal was the appropriate measure, it being apparent that the grievor’s behavior had not been modified by the imposition of previous sanctions and that he was not amenable to accepting reasonable supervision.

The union position

[10] The union submits that Mr. Legros's profane refusal to accept his job assignment that day was a momentary spontaneous childish reaction which admittedly the employer did not have to tolerate. Nevertheless, he was suffering from severe dental pain at the time, having either come from the dentist or having acted as his own dentist earlier that day with regard to the extraction of two of his own teeth. It was suggested that Mr. Legros did not have sufficient funds to see a dentist, but this contention is at variance with his answer to a question posed during the inquiry with regard to this incident:

> (Union exhibit, Tab 5)
>
> 20 Q. Selon la lettre de M. Bélanger, il s'est écoulé environ 15 minutes après que celui-ci vous ai donné votre tâche avant qu'il retourne vers la cantine et qu'il vous trouve encore à l'intérieur. Pourquoi vous ne vous êtes pas diriger à votre poste de travail avant son retour?
>
> A. Parce que je lui ai dit que quant je suis sur l'inspection j'y vais en courant mais quant je suis sur la réparation j'y vais en reculons, et de plus cette journée là j'arrivais de chez le dentiste pis j'étais pas bien bien vite, je filais pas.[1]

[11] Whatever may be the case, the union submits that had it not been out of his concern for a prior poor record of unauthorized absences, Mr. Legros would not have forced himself to come into work that day in an obvious unfit condition and that this constituted a mitigating factor which should be taken into consideration. The purely mathematical consequence of the Brown demerit System was in the union's view unjustified, especially given this momentary lapse into pain induced irrationality.

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[1] emphasis added.

[12] The union also states in its submission that Mr. Legros called Mr. Bélanger to apologize. The evidence, however, does not support this pretension, although a letter attesting to the disastrous consequences which befell Mr. Legros following his dismissal (union submission, tab 6) suggests that he was indeed remorseful. This proof was objected to as being posterior to the dismissal and was not accepted as proof on the merits of the grievance.

[13] Additionally, the union argued that the "culminating incident" differed from the absence related incidents in virtue of which Mr. Legros had accumulated 55 demerits and thus the arbitrator had the latitude of considering it separately and not simply in the light of the principle of progressive discipline for similar behavior which had not been rectified by the imposition of previous sanctions. An examination of the employee's disciplinary record, however, reveals that insubordination and abusive language, as demonstrated in the present instance, was not unique.

[14] Between January 21, 2003 and April 18, 2003, Mr. Legros had been assessed a cumulative total of 55 demerits for multiple instances of absenteeism without permission and for leaving his work station without notification and permission. This was followed by a written reprimand on September 29, 2003 for repeated absences between August 1 and September 29, 2003. The disciplinary record of the grievor previous to the aforementioned periods was even more deplorable:

October 16, 2002	Reinstated from discharge, time out of service to be considered a disciplinary suspension. Discipline stood at 1 year suspension & 20 demerits

October 19, 2001	Discharged for unauthorized possession of material belonging to the Company – theft. Discipline stood at discharge & 20 demerits
October 9, 2001	Assessed 10 demerits for addressing supervisor using abusive language. Discipline stood at 20 demerits & 2 written reprimands
October 9, 2001	Assessed a written reprimand for unjustified absence on August 27, 2001. Discipline stood at 10 demerits and 2 written reprimands
October 9, 2001	Assessed a written reprimand for unjustified absence on September 5, 2001. Discipline stood at 10 demerits and 1 written reprimand.
October 5, 201	Assessed 10 demerits for addressing Manager – Building Management using abusive language. Discipline stood at 10 demerits.
May 9, 1991	Assessed 10 demerits for repeated absences
November 30,l 1990	Assessed 10 demerits for repeated absences
July 19, 1990	Assessed 5 demerits for absence on July 5 & 8, 1990.
May 6, 1990	Assessed 5 demerits for absence on April 13, May 5 and 6, 1990.
February 26, 1990	Assessed 10 demerits for refusing to obey supervisor's orders.
February 27, 1987	Assessed a written reprimand for the incident on February 27, 1987 involving vehicle CNO 71738
July 18, 1986	Assessed 10 demerits for leaving work station without permission.[2]

[15] Under the Brown System, 20 demerits per year are removed from the accumulated total of demerits incurred by the employee. Between January 21 of 2003 and April 18 of 2003, the disciplinary record of Mr. Legros showed a total of 55 demerits. However, the effect of the written reprimand of September 29, 2003 was to

extend the existence of the 55 demerits for a further period of 1 year and, thus, at the date of the culminating incident of April 12, 2004, the grievor had an existing total of 55 demerits. More importantly, while the demerits are reduced at the rate of 20 per year, the record of the disciplinary incidents is not. Obviously, Mr. Legros' employment history, over a substantial period of time, was far from exemplary and his long service with the company cannot be reasonably considered a mitigating factor.

[16] The employer contends that the grievor was aggressive in his actions and words towards his supervisor and thus had to be removed from the work site by the CN police. A summary of the incident as contained in the police report states:

> CST.LEONARD: 04-04-12 AT 15:36 RECEIVED A CALL FROM MECHANICAL SERVICES' SUPERVISOR GABRIEL BELANGER REQUESTING ON POLICE TO EXPULSE AN EMPLOYEE.
>
> ON SITE AT 15:38. SPEAK TO M.BELANGER WHO REQUESTS THAT CN CARMAN M.CLAUDE LEGROS BE EXPULSED OFF CN PROPERTY. HE REFUSED TO FOLLOW SUPERVISOR'S ORDERS. HE'S AGGRESSIVE VERBALLY SPITTING WHILE TALKING NOSE TO NOSE TELLING M.BELANGER "VA CHIER".
>
> M.BELANGER HAD ASKED M.LEGROS TO PERFORM WORK AT REPARATION TRACK MA-02 AND HE REFUSED.
>
> LATER WHILE QUESTIONED BY WRITER HE ADMITTED REFUSING TO WORK AS WELL AS INSULTING HIS SUPERVISOR.
>
> WRITER SPOKE TO TASCHEREAU DIRECTOR OF MECHANICCAL SERVICES M.REAL DE CARUFEL AND AGREED WITH EXPLUSION.
>
> AT 15:45 M.LEGROS WAS ESCORTED OFF PROPERTY TO SOUTH GATE AND ADVISED NOT TO COME BACK FOR WORK UNTIL M.DE CARUFEL CALL HIM TOMORROW.
>
> […]
>
> CST.DANIEL LEONARD.
> CN POLICE, #668
> TASCHEREAU YARD.[3]

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[2] Pp 21-23 Company Submission.
[3] Union Submission, tab 5.

[17] Mr. Legros admits using the reported profanity and of gesticulating with his arms while talking loudly. He insists, however, that did not threaten Mr. Bélanger and he was not charged with any criminal offense. Nevertheless, I am satisfied that Mr. Bélanger felt threatened by Mr. Legros' aggressiveness. Whether his reaction of calling the police constituted an over-reaction, I am not prepared to say, since I have not had the opportunity of hearing evidence viva voce as to the evolution of the incident. However, the calling of the police was not, in my view, a determining factor as to whether the imposition of a sanction, was justified. Clearly, as admitted by the union, it was. The incident also certainly merited the assessment of more than the remaining limit of 5 demerits resulting in the automatic dismissal of Mr. Legros under the Brown System.

[18] As an additional mitigating factor, the union submits that Mr. Legros is a recovering alcoholic whose condition had been diagnosed shortly prior to the incident and that his irrational behavior and errors on judgment should be considered in the light of that illness. The employer claims to have been unaware of this condition although Mr. Legros had been questioned by the employer in July of 2003 as to his absences and had produced a contract with a centre for treatment of his alcohol dependence in support of his application for a CN interest free loan in part payment of the cost of treatment. The treatment period itself was foreseen from June 20, 2003 to July 7, 2003. It appears, however, that the record of the alcohol dependency problem of Mr. Legros was maintained in a separate file and it was not considered by the employer when it dismissed Mr. Legros.

[19] The difficulty I have with the tacit suggestion that the employer had a duty to accommodate this illness is that there was no proof the rehabilitative potential of Mr. Legros. Nor was a link established between his absences and insubordinate behavior and the alleged alcohol problem. Furthermore, can it really be said that he recognized the severity of his problem when the treatment period was for a duration of only 2 weeks and he sustained an apparent relapse less than 1 month thereafter which resulted in a written reprimand for repeated absences between August 1 and September 29, 2003. I think not. Simply put, the acceptance of a lack of assiduousness and inappropriate work behavior on a continuing or repeated sporadic, basis would constitute an undue hardship for the employer who is entitled to rely on the performance of work on a regular basis in accordance with reasonable instructions and assignments issued by its supervisors.

[20] Finally, the union asks that I consider the disastrous economic impact which the dismissal had upon the grievor. The letter describing the pitiful situation in which Mr. Legros found himself (Union Submission, tab 6) was not accepted into proof, having being remitted to the employer more than one year after the dismissal. The existence of the letter itself took the employer by surprise, being divulged on the very day of the he4aring. Obviously, the employer had no opportunity of verifying the veracity of the facts alleged. But even if these facts had been disclosed at an earlier date, it certainly was not apparent at the time of the dismissal that Mr. Legros, age 50, a mechanic who had also worked as a painter could not have found himself reasonable employment following his dismissal had he made the necessary effort. I, therefore, see no

compelling reason to diminish the disciplinary measure on this basis. In fact, it is likely that Mr. Legros is still prone to behavioral problems and it is noted that the union seeks his reinstatement "[…] under conditions which protect the legitimate interests of both the grievor and of the employer." (Union Submission, p. 8).

DECISION

[21] Having examined the evidence and considered the respective arguments of the parties, the inevitable conclusion is that Mr. Legros refused without reason a directive to assume a valid work assignment. He did so in a profane and aggressive manner for which there are no mitigating circumstances. His abysmal work record does not hold out hope that a reduced sanction would result in a modification of his proclivity towards unacceptable behavior when faced with directives or obligations which are not convenient to him.

[22] His behavior on April 12, 2004 admittedly merited the imposition of a disciplinary sanction and the number of demerits was, in my opinion, (and in accordance with the precedents cited by the employer), commensurate with the offense. In the result, his accumulated demerits far exceeded the accepted limit of 60 under the Brown System and his dismissal was automatic and fully justified.

[23] Accordingly the grievance of Mr. Claude Legros is dismissed.

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MARK ABRAMOWITZ
Arbitrator

For the union : Mr. Abe Rosner

For the employer : Mr. Ross Bateman

Deliberation : July 6, August 9, 10, 11, 12 & 15, 2005