

*Case Name:*

**Harrison v. Canadian National Railway Co.**

**IN THE MATTER OF Complaint of Alleged Unjust  
Dismissal -- Adjudication under  
Division XIV -- Part III of the Canada Labour Code  
Between  
Douglas Harrison, Employee, and  
Canadian National Railway Company, Winnipeg, Manitoba, Employer**

[2010] C.L.A.D. No. 239

Human Resources and Social Development Canada File No. YM2707-8206

Canada  
Labour Arbitration

**Panel: Professor Bryan P. Schwartz (Adjudicator)**

Heard: May 5, 6, 2010, June 15, 16, 17,  
2010, Oral Closing Arguments - June  
30, 2010 (via teleconference).  
Award: August 13, 2010.

(72 paras.)

*Employment law -- Discipline and termination of employment -- Termination by employer, with cause -- Incompatibility.*

*Employment law -- Wrongful dismissal -- Dismissal without cause.*

The employee complained that he had been unjustly dismissed. The complainant had 25 years of service in various positions with the employer. A supervisor met with the complainant regarding the complainant's treatment of junior employees and some attendance issues. At a follow-up meeting, the supervisor concluded that the complainant was not willing to perform that part of his job that involved supervision of employees and suspended the complainant with pay. The employer attempted to find positions suitable for the complainant. When the employer was unable to find a position that did not involve supervision of employees, it dismissed the complainant. The employer

also argued that the complainant was a manager under the Canada Labour Code.

HELD: Complaint allowed. The complainant was not a manager. He did not have sufficient managerial autonomy. The employer was unable to demonstrate that the complainant was absent without valid medical cause. There was no reasonable basis for the employer to conclude that the complainant would not have been reasonably successful, despite his lack of comfort with one aspect of the job. The supervisor misinterpreted the complainant's comments about his comfort supervising employees. The fact that the complainant held a disciplinary approach that was not to his supervisor's subjective taste was not grounds for dismissal. The suspension without pay and the dismissal were unwarranted.

**Statutes, Regulations and Rules Cited:**

Canada Labour Code, Division XIV -- Part III, s. 167(3)

**Appearances:**

Employee: Douglas Harrison.

Counsel for the Employee: Richard M. Beamish, Tapper Cuddy LLP.

Employer: Canadian National Railway Company, Prairie Division.

Counsel for the Employer: Simon-Pierre Paquette, CN Law Department.

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**AWARD**

**Introduction**

1 Douglas Harrison ("Mr. Harrison"), an employee with Canadian National Railway Company ("CN"), was dismissed from his position in October, 2008. He was in his twenty-fifth year of employment and had no prior record of discipline. He had, as the Employees witnesses agreed, a vast range of skills. Throughout his career with CN Mr. Harrison held various positions and in 2006 Mr. Harrison was transferred to a position in train reporting services which was the position he held at the time of his dismissal. His year-end performance evaluations in that capacity were positive.

2 On August 7, 2008, Mr. James Thompson ("Mr. Thompson"), Assistant Superintendent -Transportation, met with Mr. Harrison to go over concerns he had with Mr. Harrison and to suggest several specific steps for improvement. Mr. Thompson made it clear that Mr. Harrison was not there

to have "a discussion or debate". Mr. Thompson's principle issues concerning Mr. Harrison's performance related to attendance and holding junior employees responsible for failures in accurate reporting with respect to train operations. Mr. Thompson proposed a follow-up meeting on September 7, 2008. The latter meeting did not take place as Mr. Thompson was too busy with other concerns. Mr. Thompson did meet again with Mr. Harrison on October 10, 2008. Mr. Thompson concluded that Mr. Harrison was not willing to perform the part of his job involving the supervision of employees, and Mr. Thompson suspended him with pay.

3 Mr. Harrison met on October 14, 2008 with Ms. Tracey Halls ("Ms. Halls"), a Human Resources Officer with CN. Ms. Halls discussed some positions that might be available for Mr. Harrison's consideration. She concluded, however, that Mr. Harrison was not interested in jobs that involved a demotion or in managing employees. On October 25, 2008, Mr. Andrew Martin ("Mr. Martin"), the General Superintendent -- Southern Region, wrote to Mr. Harrison advising that "given the unreasonable limitations you have imposed on any potential reassignment within CN, you can no longer remain employed. In the circumstances, you are hereby permanently relieved of your duties as TRS supervisor effective immediately."

4 At the hearing, CN took the position that it had sufficient grounds to dismiss Mr. Harrison from his position on October 10, 2008, the date on which he was suspended with pay. CN believed it went beyond the call of its legal duty by continuing to pay Mr. Harrison during his suspension and in seeking another position for him, but in so doing did not prejudice the justice of the eventual dismissal of Mr. Harrison from his position with CN.

5 CN also took the view that the unjust dismissal provisions of the *Canada Labour Code* cannot be invoked by Mr. Harrison. He was, CN submits, disqualified by the exemption in s. 167(3) for employees who are managers.

6 Mr. Harrison's submission at the hearing was that Mr. Thompson's criticisms of his performance were in most respects based on a misapprehension of the facts. Any deficits in his performance, he argued, fell far short of what is required to justify dismissal. Mr. Harrison further contended that he was merely candid about the fact that discipline was not his strong suit and did not say that he would not or could not perform the job capably. Mr. Harrison agreed that there is a necessary place for discipline, although he felt it should be used only when encouragement and coaching is not appropriate. He admitted that he did not like confrontation. He was amenable to rebalancing his duties with a colleague, Ms. Van Gils, who was ready and willing to take on more of the disciplinary work. A similar arrangement had proven effective with a Mr. Dube prior to the latter's departure in 2006. Mr. Harrison was also amenable to a lateral transfer. In the meantime, he was prepared to continue to carry on with the status quo in terms of his duties, and was capable of doing so effectively.

7 Mr. Harrison argued that the jurisdiction of the adjudicator under the *Canada Labour Code* is not ousted by the "manager" exemption. He argued that the case law had adopted a narrow

construction of that phrase, and that he did not exercise the kind of role that warranted interpreting the *Canada Labour Code* as excluding him from its remedial regime for unjust dismissals. For reasons to be explained below, I agree with Mr. Harrison's position in this regard and I do have jurisdiction to address the merits of the dispute.

**8** With respect to the justification for the dismissal, evidence was presented over the course of five full days in this case. Counsel for both sides were thorough and effective in their presentation of the facts and law. I took virtually verbatim notes, which I have reviewed carefully. In elaborating the conclusion I have reached, I will focus on my key conclusions of fact and law. The fact that I have not referred to a particular case law authority or piece of evidence does not mean I have failed to consider it.

**9** Before elaborating, I will briefly state the key elements of my decision.

**10** CN unquestionably has powerful and legitimate interests in the effective performance of the TRS department. Not only commercial success, but compliance with the law and respect for public safety in cases of emergency require accurate reporting of the composition and contents of trains. Mr. Harrison's performance as of October, 2008, did not warrant dismissal even in this demanding context. It is clear from Mr. Thompson's testimony that he did view Mr. Harrison's suspension as being justified on the basis of Mr. Harrison's perceived deficiencies in performance alone. In his own mind, as Mr. Thompson made very clear at the hearing, the overriding issue was Mr. Harrison's perspective on his abilities and attitude going forward. The letter of dismissal from CN, dated October 25, 2008, invokes concerns about absences and performance, but states that "more importantly" Mr. Harrison had advised that he was "no longer able to manage employees" and "would prefer not to continue" in his current position.

**11** Mr. Thompson's conclusions, however, were not warranted by what Mr. Harrison intended to say and the words that he actually used. Many employees, perhaps most, have some aspect of their job they do not like. That does not mean they are not willing or able to carry it out. Until some rebalancing of his duties or satisfactory lateral transfer could be arranged, Mr. Harrison was prepared to do his best to meet the company's authoritative expectations of him -- that is, its official policies and directions from his supervisors. The objective realities of Mr. Harrison's past performance did not provide CN with a reasonable basis for presuming he would not be reasonably successful, despite his lack of comfort with one aspect of the job.

**12** There can be circumstances where the employees' misapprehension of the employees' performance or attitude is due to the culpable failure of the employee to properly explain his past acts or future intent. The facts here, however, do not show that Mr. Harrison was at fault in the misunderstanding about his views about continuing to work in the TRS department. Rather, I conclude that Mr. Thompson, in his anxiousness to make sure the TRS department was meeting company goals, his unease over some aspects of Mr. Harrison's perceived attendance and performance issues, and perhaps the press of time in carrying out his responsibilities with respect to

so many other concerns and employees, arrived in haste at an interpretation of Mr. Harrison's remarks that was not warranted by what Mr. Harrison actually said or intended to say.

**13** The suspension of Mr. Harrison with pay on October 10, 2008, therefore, was not warranted. Mr. Harrison's claim of unjust dismissal must therefore prevail regardless of any issues concerning his alleged refusal to consider alternate positions after the suspension.

**14** CN decided to change Mr. Harrison's suspension with pay to a dismissal because, in its view, Mr. Harrison was not reasonably open to moving to another position at CN. When he met briefly with Ms. Hills at personnel, Mr. Harrison expressed a reluctance to accept a job at less pay or at a lower status in the hierarchy. But his main point was that there was no use in his investigating options with Ms. Hills until the results of his medical diagnostics came in. Mr. Harrison had been feeling serious joint pain for months. He was concerned that the cause might be serious. At his meeting with Ms. Hills, he produced a doctors note stating he would be incapacitated until October 20, 2010. He believed it would not be fair to CN as well as to himself to take on a new position if it turned out he was not physically capable of carrying out the associated tasks with that particular job. He expected CN to process the appropriate forms in order to begin receiving short term disability payments and not to take any definitive steps in his case until the nature of his condition was further assessed. Mr. Harrison did not place unreasonable limits on options for alternate employment within the company. He needed some time for a diagnosis to be made before pursuing reassignment.

**15** I will arrange with the parties for a further hearing on the appropriate remedy if they cannot agree on one. Due to the unexpected length of the hearing on the jurisdictional and merits issues, I had directed that the hearing on the remedy issue be postponed to a later date.

### **The Jurisdictional Issue - Was Mr. Harrison a Manager?**

**16** Human Resources and Skills Development Canada ("HRSDC") has issued an interpretive bulletin on the managerial exclusion, it notes -- correctly in my view -- that "adjudicators and judges have interpreted the term ["manager"] narrowly, thus limiting the extent of its exclusionary effect". The bulletin then explains that a series of job responsibilities are typically looked at and weighed -- no single factor necessarily being determinative -- in order to arrive at the overall determination of whether the exclusion applies. The bulletin then provides a useful review of the case law and factors identified.

**17** In *Island Telephone Company Limited v Canada (Minister of Labour)*, 1991 CarswellNat 761, McKay J., provided an influential analysis of the meaning of the managerial exception. He noted that:

- \* a narrow interpretation of "manager" is supported by the distinction between s. 167(3), which excludes "manager" and s. 167(2)(a), which refers to employees who are managers or are superintendents or who exercise management functions. The implication is that merely exercising

some management functions does not necessarily make one a "manager";

- \* the case law on "management functions" itself adopts a narrow approach; lower tier managers were found not be excluded from eligibility for collective bargaining;
- \* *"the case law on "managers" in 167(3) has determined that the word has a narrow meaning, and includes only those in senior management positions, who are not included in a collective agreement...and who act as administrators, having power of independent action, autonomy and discretion..."; (emphasis added)*
- \* "the Court of Appeal has. ..upheld decisions of adjudicators narrowly construing the word "managers" in section 167(3). As a result, among those not included as manager was the chief administrative office responsible for day-to-day operations of a harbour but reporting regularly to the general manager whom he replaced when the latter was temporarily absent [*Canada (Procureur général) c. Gauthier*, [1980] 2 F.C. 393]... Again one who served as the chief inspector and chief engineer and maintenance manager of an aviation company who had substantive authority and discretion, even affecting employment relationships with other staff, but who has not found to have the necessary degree of autonomy in making decisions of significance to the company was found to be a "manger" within the meaning of s. 167(3) [*Avalon Aviation Ltd. v. Desgagne* (1981) CarswellNat 568,42 N.R. 337 (FCC A.D.)];

**18** The editors of the CarswellNat, in their annotation, adding the following observations in support of the conclusion of Justice McKay:

- \* the *Canada Labour Code* uses the word "directeur" as the equivalent of "manager", and "directeur" was construed in *Canadian Broadcasting Corporation v. Lessard*, (1984). Réf. No. 309-Que (M. Boisvert, Adjudicator), as meaning the "real leaders" of an enterprise, not those merely exercising some management functions in the performance of their duties. A counterpart Quebec statute, Quebec's Act respecting Labour Standards, used the term "cadre", which has been interpreted as meaning all those involved in the management of an enterprise;
- \* The same editors also argue that the decision of Justice McKay is

consistent with the character of the *Canada Labour Code* as a "remedial statute", not quite constitutional, but more than ordinary and adjudicators should "not be finding ways to enfeeble it".

**19** While it is important for arbitrators to respect Parliaments objectives in protecting employees, adjudicators must of course also not seek to "enfeeble" Parliaments decision to provide for employer flexibility in the composition of management teams. In *Canadian Imperial Bank of Commerce v. Bateman* [1991] 3 F.C. 586 (F.C.T.D.), Cullen J. overturned an adjudicators decision finding that the manager of a regional data centre was indeed excluded by s. 167(3). It was a mistake, held Cullen J., to hold that s. 167(3) applies only when an employee has the chairman of the board of a large corporation must answer to a board of directors.

**20** In *Bateman*, the regional manager was the senior representative of CIBC management in Vancouver, and at the fourth level of the management hierarchy. He had authority in respect of two hundred employees, could hire and promote without central office approval 85% of the staff positions; made recommendations in respect of the other 15% that were almost always accepted and fixed salaries within ranges provided by central office. He could impose discipline short of dismissal without prior head office approval and his decisions were almost never overridden or pre-empted by head office. Among the contrasting facts here is that Mr. Harrison was not the senior manager at the yard he worked at and was at about the ninth level in the overall managerial hierarchy. He had no real discretion on filling positions -- he could only appoint the most senior qualified applicant. Mr. Harrison could only make recommendations with respect to discipline and in the three specific cases where he recommended a particular penalty, found that his proposals were overridden by more senior managers.

**21** CN argued that the approach in *Island Telephone Company Limited* has been modified by *Leontsini v. Business Express Inc.*, [1997] F.C.J. No. 26 (F.C.T.D.). Noël J. states - consistently with *Island Telephone* - that "as a general rule it is true that a senior manager is more likely to have the decision-making autonomy required to be a manager within the meaning of subsection 167(3)". Noël J. cautions, however, that "this does not mean that a lower-ranking manager cannot also have such autonomy". Noël J. cites the *Lee-Shanok v. Banca Nazionale Del Lavoro* [1987] 3 F.C. 578, decision to the effect that the formal ranks, titles and trappings are not necessarily indicative of the employees functions. This focus on substance over form is consistent with the rest of the case law in the area. To the extent that these specific doctrinal comments in *Leontsini* are effectively taken as qualifying more general statements in *Island Telephone Company Limited*, they in no way affect the outcome in this case.

**22** The actual facts of *Leonstini* draw the line in a manner consistent with the rest of the case law. The employee in that case "had the power to hire, discipline and dismiss employees, prepare operating budgets, change staff assignments based on aircraft movements, etc." In fact, according to the evidence accepted by the adjudicator, the applicant was the person responsible for the respondents operations at Dorval International Airport and had all the managerial attributes required

for that purpose. I have no difficulty reconciling the result in *Leonstini* with the other cases. As in *Bateman*, the manager in *Leontsini* was the senior local manager at a site with a large number of employees and had, in theory and practice, very considerable discretion in matters that included discipline.

**23** The approach in *Island Telephone Company Limited* continues to be followed by adjudicators under part III of the *Canada Labour Code*. While not referring to the case specifically, in *Big Freight Systems Inc. and Ferris Limited*, 2008 C.L.B. 16112, Adjudicator Deeley provides the following distillation of the approach to be followed:

"A review of the relevant case law suggests that the following factors have been considered in determining whether an employee falls within the definition of classification of" manager:

1. The authority to make final decisions in matters of consequence to the employer. If an employee only makes recommendations to the ultimate decision-maker he or she is probably not a manager. Similarly, if the activities of an employee are mainly governed by established work practices and procedures that require only a relatively small amount of independent decision-making such persons are not usually considered to be managers under the Code.
2. The power to act independently and autonomously on the basis of his or her own discretion. An employee who is required to obtain the approval of a higher authority before making any decision with significant consequences to the employer is usually not a manager. However, for example, an employee who has a substantial amount of control over staff, resources, budget, and who has responsibility for implementing the main goals of an organization may be found to be a manager, even though they are ultimately accountable to a higher authority.
3. A job title or position description does not automatically make a person a manager. It is necessary to conduct an investigation and analysis into what the employee actually does, including whether, and to what extent, the employee is empowered to promote, demote, evaluate, establish company policy, participate in budgetary decisions, and represent management in the processing of grievances and the negotiation of Collective Agreements.
4. The power to actually formulate company policy in important matters may



be an indication of managerial responsibilities, but mere participation in policy formulation does not necessarily make a person a manager.

5. The power to hire, fire, and discipline subordinate employees is an important aspect of management.
6. Persons who only supervise other staff, and who do not exercise other elements of managerial authority, are not managers.
7. The power to commit the employer to the payment of specific sums of money for services rendered. Similarly, participation in the negotiation of contracts on behalf of the employer usually indicates managerial responsibility.
8. The size and structure of an organization may help to determine the level of authority given to an individual, and therefore whether they may be considered to be a manager under the Code. For example, some similar degrees of authority possessed or exercised in a branch office of a large highly organized bureaucratic national or international organization might conceivably lead to different conclusions than if similar powers were vested in an individual working in a small independent organization.
9. A failure to exercise, or only sporadic and occasional exercise of the authority of a position, should be taken in consideration, but does not necessarily mean that a person is not a manager."

**24** Applying these factors, Arbitrator Deeley found that the employee in the case before him was excluded by s. 167(3). The employee reported either directly to the company president or one of three vice presidents; had input into the setting of his budget; was involved in meetings on corporate policy and strategy; and by his own admission was "responsible for the hiring, evaluation, discipline and termination of members of his own department."

**25** The conclusion that Mr. Harrison is not excluded by s. 167(3) is, in my view, solidly supported by both the general principles stated in the case law and a compare-and-contrast exercise with their specific facts and outcomes. The overall weight of the factors would remain in favour of Mr. Harrison even if several of the factual nuances were more favourable to CN.

**26** In evaluating the evidence in general, including with respect to the s. 167(3) dispute, I have

adopted the following approach.

**27** There are no respects in which I believe any of the witnesses for either side were doing anything other than attempting to answer questions honestly to the best of their recollection.

**28** I found Mr. Harrison to be a very credible witness. He displayed a detailed knowledge of the work environment and has a very broad understanding of CN technical issues and corporate culture arising from his decades of service. His powers of recall were impressive, but not implausibly so. His accounts and explanations were reasonably specific and precise. When there were limits to what he knew or could recall, he acknowledged them. The honesty and accuracy of his account was not undermined on extensive cross-examination. There were minor matters on which he was mistaken -- e.g., he was not aware that the highest possible score on a performance evaluation is a 5.0, but this is understandable as in practice this score was almost never issued. To the extent that Mr. Harrison's evidence was tested on cross-examination, in all essential respects, it stood up very well. His testimony was not shown to be exaggerated, mistaken or self-contradictory.

**29** Mr. Thompson, the principal source of evidence for CN, was also an impressive witness. His answers on cross-examination were responsive and forthright. There are some important respects in which I have adopted Mr. Harrison's account and evaluation of situations over Mr. Thompson's. This is partly because Mr. Harrison had a more detailed understanding of the actions and circumstances than Mr. Thompson. The latter was unaware, for example, of some of the actions that Mr. Harrison took in dealing with problems that he was directed by Mr. Thompson to address. Mr. Harrison was more aware of, and better able to recall, many of the details of situations involving himself than was Mr. Thompson, who had to deal with a very large number of employees and situations and did so under time pressure.

**30** Before suspending or disciplining Mr. Harrison, CN had some obligation to take reasonable steps to ensure its apprehension of the facts was correct. What matters is what is reasonable and fair in all the circumstances. There is no rigid rule that the burden of getting the facts straight rests solely on the employer. Employees can have responsibilities, arising from company policies, instructions from superiors, or common sense and reasonableness, to communicate important facts to their superiors. The inquiry under the *Canada Labour Code* invites an examination of whether a dismissal is just in all the circumstances. On the particular facts of this case, however, CN's misapprehension was not due to failures that can be fairly attributed to Mr. Harrison. For example, Mr. Thompson did not invite, or even permit, feedback from Mr. Harrison during the August 7, 2008 meeting when he confronted Mr. Harrison with alleged failures in holding junior employees accountable. In determining Mr. Harrison's attitude towards performing the job in the future Mr. Thompson seems to have arrived at a conclusion too quickly rather than exploring the nuances of Mr. Harrison's situation. A similarly rushed and simplistic approach was adopted by Ms Hills in concluding that Mr. Harrison was not reasonably open to alternative positions.

**31** With respect to the s. 167(3) issue, the witnesses were not identical in their submissions, but

some key facts are confirmed by evidence from both parties:

- \* Title: Formal titles are not decisive; the substantive role played by an employee is what is decisive. There was some dispute at the hearing about the precise title Mr. Harrison was holding at the time of his dismissal. Mr. Thompson took the view that Mr. Harrison was a TRS Manager; a TRS Supervisor is a development position for someone who is being trained to be a TRS Manager. Mr. Thompson said that Ms. Van Gils was a TRS Supervisor. Mr. Harrison says he was a TRS Supervisor, and that he listed his occupation as "Supervisor TRS" under Job Title In the complaint he filed in this matter. Official CN performance evaluations forms and Record of Employment used the term "Supervisor", and I would hold that to be decisive in the absence of convincing evidence that another title is more appropriate in determining the s. 167(3) issue. The result in this regard, however, would be the same regardless of whether "supervisor" or "manager" is the applicable format title;
- \* Position in the hierarchy: Mr. Harrison's position was at the level immediately above that of the employees currently unionized at CN, including unionized supervisory ranks such as lead hand. He was a level 9 in a managerial hierarchy of which 1 is the top position. The next step above Mr. Harrison included, in ascending order, Assistant Superintendent, Superintendent for the Territory, General Manager, Senior Vice President, then President;
- \* Authority with respect to operations: Mr. Harrison's department was responsible for properly recording tasks to be performed and successes and failures in doing so. Mr. Thompson confirmed that Mr. Harrison did not determine what assignments had to be carried out each day, e.g., which cars had to be added to which train, what contents were to be placed in which cars. He was responsible for supervising more junior employees in carrying out their tasks;
- \* Strategic planning: Mr. Harrison was not involved in corporate strategy;
- \* Budgeting: Mr. Harrison had no input on the budget of his department;
- \* Spending: Mr. Harrison, according to Mr. Thompson, had authority to sign

expense vouchers for up to several thousand dollars. Mr. Harrison never actually did so;

- \* Payroll records: Mr. Harrison was responsible for ensuring that employees' time was properly entered. This involved no discretion;
- \* Creating positions: Mr. Harrison had no authority to do so;
- \* Filling positions: Mr. Harrison was required to fill a position by ensuring a bulletin was issued and filling it with the most senior person who was qualified. He had no significant discretion;
- \* Employee evaluation: Mr. Harrison filled in the employee evaluation forms for the employees that reported to him;
- \* Discipline: Mr. Harrison has some discretion as to whether an incident should be dealt with by coaching or recommending discipline. He had no authority to impose discipline. He could recommend discipline, such as the imposition of demerits, but his recommendation would be passed up the management chain, with recommendations along the way, until a senior executive made the final decision. In the three instances Mr. Harrison did recommend discipline, his recommendation as to quantum of demerits was not followed. All were increased;
- \* Involvement with collective bargaining: no one suggested he was involved in any way in planning for negotiations or carrying them out;
- \* Size and structure of organization: Mr. Harrison was responsible for supervising about thirteen junior employees at Symington Yards. The yard operates 24/7, and there are about 150 employees working during any given time of the day. Mr. Harrison had some responsibilities as well -- such as payroll and providing advice on recording - for approximately some ten employees -- in two other locations.

**32** The implications of these factors are clear. Mr. Harrison was not a manager for the purpose of the section 167(3) exemption. The overall level of managerial autonomy and authority of Mr.

Harrison is comparable to the employee who was found in *Island Telephone Company Limited* to not be a "manager". The factual nuances are different with various individual factors compared to this case, but the overall level of managerial autonomy and authority is comparable. In *Island Telephone Company Limited* the employee managed about seventeen employees. He had the authority to issue warnings and reprimands, but had not done so in two years. Promotions were largely governed by the collective agreement and serious discipline was undertaken by more senior levels of management. He had the authority to purchase tools and equipment to a value of about a thousand dollars. Mr. Harrison had in many respects less authority than the employee found to *not* be excluded by the "manager" exception in *Avalon Aviation Ltd. v Desgagne*, supra, the employee had the power to hire and dismiss employees. As noted above, Mr. Harrison had far less authority than managers found to be excluded in cases such as *Bateman*, *Leontsini* and *Ferris*.

**33** Mr. Harrison was not anything like the top manager at his train station, his authority in hiring was limited to appointing the most senior qualified applicant, he could not create new positions, he could only recommend discipline and his recommendations were in every case rejected, he was subject to the direction of senior managers at the yard, he had no mandate to establish budgets, recommend strategy or participate in collective bargaining.

### **The Attendance Issue**

**34** In the August 7, 2008 meeting, Mr. Thompson criticized Mr. Harrison with respect to attendance issues. Mr. Thompson prepared a letter dated August 8, 2008t recalling the gist of those criticisms. Whether that letter was actually received or not is in dispute. Mr. Thompson recalls delivering it by hand, Mr. Harrison says he never received it. I have no doubt that on this matter, as in all circumstances, each witness was testifying honestly. It is not necessary for me to decide whose recollection is correct on this point. Either way, the letter is consistent with Mr. Thompsons recollection of what he said verbally, and Mr. Harrison does not dispute that recollection.

**35** Mr. Thompson condemned Mr. Harrison for having in April "phoned in sick numerous times" and having left the TRS position vacant for "days at a time". Mr. Harrison was told that if he could not come into work in the future, he should provide a note within fifteen days as per the *Canada Labour Code*.

**36** Mr. Thompson admitted that a person in Mr. Harrison's position did not have to keep strict and regular work hours. He had to be there when needed by the work circumstances. CN did not keep attendance sheets for Mr. Harrison or provide any documentation to confirm Mr. Thompsons allegations. While I do not doubt the sincerity of Mr. Thompsons report of his perceptions, I accept the testimony of Mr. Harrison, which casts a very different light on the absenteeism issue. Mr. Harrison's account was detailed; consistent with his testimony as a whole, supported at the later stages by the submission of notes from a doctor, and was not in any way undermined by cross-examination.

**37** Mr. Harrison acknowledged that he had missed some time in the spring while he was

hospitalized for diverticulitis. He had continued to come into work in pain until his wife finally was able to succeed in persuading him to seek medical attention. He returned to work earlier than doctors recommended. He believed that his wife had phoned in to alert CN as to his absences. On his return to work the validity of his reasons for absence was not questioned by anyone at CN. It is clear that when Mr. Thompson criticized him during the August 7th, 2008 meeting, Mr. Thompson was not interested in hearing any "defensive" explanations from Mr. Harrison on the aspect of the absenteeism issue, the issue generally or concerning his record of holding employees accountable. Indeed, Mr. Thompson cut off any attempt by Mr. Harrison to explain.

**38** Mr. Harrison recalls very few other absences in 2008. He missed one day when his father-in-law was hospitalized after an accident, and two days for a colonoscopy. He covered for Ms. Van Gils when she was on vacation, and this involved his working for prolonged stretches -- 12 days or more -- without a break. Any time he was way, he called in to alert CN, and there were no circumstances when Ms. Van Gils did not provide cover for him. He is confident he did not miss any days in August or September. He acknowledged that he missed some time in early October. Mr. Thompson's note to Tracey Hills about the meeting of October 10, 2008 alleges that Mr. Harrison provided a note covering absences of October 7th and 8th, 2008, but he had missed five days altogether in the "previous weeks". There are no documents to support Mr. Thompson's contention that there were several days missed and unaccounted for by medical notes. There is also no evidence or specific oral testimony by Mr. Thompson to support any contention that the days Mr. Harrison supposedly missed in "previous weeks" occurred more than fifteen days prior to the October 10, 2008 meeting. I infer from the series of notes that Mr. Harrison did produce in October -- to Mr. Thompson and later to Ms. Hills -- that he was in fact careful to obtain notes in respect of missed days after the instruction received from Mr. Thompson in August, 2008.

**39** As 2008 progressed, Mr. Harrison felt more and more pain in his joints. He missed some days in October, 2008, when the pain became intolerable. A note from a physician, dated October 14, 2008, stated that he was incapacitated and would not be able to return to work until October 24, 2008.

**40** I found no instance where it has been demonstrated that Mr. Harrison was absent without valid medical cause, where he failed to provide advance notice to CN, or where Ms. Van Gils did not cover for him. On the contrary, I accept Mr. Harrison's evidence that he worked through pain and discomfort as much as possible, that he had sincere and reasonable grounds for taking off any time that he did, and that his practice was to ensure that he phoned in sick to one of his work colleagues or superiors before missing days. Doctors would later tell him that he had arthritis, and a long course of treatment brought the pain under control. CN is of course not accountable in respect of a diagnosis that had not yet been made. However, CN had no good reason at the time of Mr. Harrison's absences to have any doubt about his bona fides or reasonableness in being away from work.

**41** Mr. Thompson says that Mr. Harrison was away more than most employees. That might have

been the case, but was not demonstrated by any records or testimony concerning specific dates, as opposed to Mr. Harrison's impression. Furthermore, the fact that an employee in a given year misses more days than most does not mean that his absences warranted any negative action by the employer. Even if all employees have reasonable grounds for missed days, and none are missing an unreasonably number of days, about half the employees will miss more days than most, and some will necessarily be among the most absent. In any event, the appropriate response to disruptive absences may be to grant a leave while an employee is on short or long term disability, rather than removing an employee from his position. There is no convincing basis in the evidence that any discipline or negative action against Mr. Harrison was warranted on the basis of any issues concerning inadequate cause for missing days, excessive aggregate days missed, failure to provide notice in advance or failure to produce doctors notes when called upon to do so.

**42** The fact of the matter is that Mr. Thompson himself, even in his unduly negative view of the facts concerning Mr. Harrison's absences, did not consider that the absentee issue warranted suspension or dismissal on its own. He acknowledged that absent the alleged confession by Mr. Harrison that he could not do his job, the conversation on October 10, 2008 would have been a very different conversation.

#### **Alleged Failures to Hold Employees Accountable**

**43** Mr. Thompson explained the importance of the proper reporting of cars included in a train and their contents which is highly important to CN's successful operation. In a competitive market, part of CN's branding is its reliability in meeting the undertakings it makes to customers to deliver a load on time. Government regulations and public safety also require that the company avoid mistakes with respect to forming trains and journaling them. If there is an accident, it can be essential for those handling the emergency to know the location and identity of hazardous materials, I accept Mr. Thompson's testimony entirely in this regard.

**44** Mr. Thompson acknowledged that human error cannot be entirely avoided and managers are not held to a standard of perfection. According to Mr. Thompson, the expectation of Mr. Harrison is that he would adequately hold employees accountable for mistakes and thereby decrease the likelihood of recurrence. Mr. Thompson acknowledged that Mr. Harrison had some discretion in how he held employees accountable. If coaching solved a problem, rather than discipline, that could be acceptable, even preferable. CN's official policies on management set out as the ideal a manager who is both effective and has good people skills; one who achieves the best performance out of employees without being unduly authoritarian or abrasive.

**45** At the same time, it is clear that Mr. Thompson did not personally agree with Mr. Harrison's management style -- which Mr. Harrison characterized as "kinder and gentler" than what Mr. Thompson would have preferred. Mr. Harrison's view was that he was working with experienced and capable staff in his small department. Discipline had a place, sometimes a necessary one, but as a last resort. In addressing an issue it was necessary to have a genuine dialogue with an employee.

Sometimes the supervisor might be mistaken in his appreciation of what happened or how to fix it.

**46** Mr. Harrison could be legitimately disciplined from CN for not following standing policies or instructions from his superiors; but not, in my view, merely for having an approach that was not to the subjective taste of a superior, even if it was consistent with official norms, including directions from that superior himself.

**47** At the hearing Mr. Thompson introduced some statistical information about how many acts of discipline, including dismissals, take place at CN in a year over a large sample of employees. He said that he would have expected to see far more impositions of discipline in Mr. Harrison's department, whereas there were only three impositions of demerits. The statistical data was not referred to by CN in its closing argument and I do not believe it proves anything detrimental to Mr. Harrison. His department was a small fraction of the CN workforce, and large-scale statistical patterns may not be apparent in very limited samples. Furthermore, there was credible testimony that quite apart from any attitude of Mr. Harrison towards discipline, the workers in his department were experienced and skilled. It is entirely possible that even a sterner disciplinarian would have found a less-than-average basis for imposing penalties.

**48** CN's case primarily rested on an attempt to show Mr. Harrison's poor performance in addressing junior employee error in several specific instances. I will not attempt to exhaustively explore every detail of the email exchanges involving Mr. Harrison and his superiors. I will, however, explore the ones on which CN placed particular emphasis.

**49** The "taxi incident" involved a delay in getting a crew on board the 111. Mr. Andy Martin, Superintendent (and Mr. Thompson immediate superior) explained that this was the "hottest train" at CN. It was a non-stop express train going all the way from eastern Ontario to the west coast, and its reliable speed was a selling point with customers and a point of pride with CN as a whole. The highest levels of management at CN would take an interest in any delays, in the "taxi incident", the train was delayed in Winnipeg while a crew waited for a taxi to drive them to the train. Mr. Martin ordered Mr. Harrison to carry out an investigation. Mr. Harrison reported back by email that the taxi never showed up or the crew was not outside when it did. Errors by the crew were not within his jurisdiction. He suggested in the email that an improved communication system with the taxi company - such as a dedicated line - be set up. The email reported to Mr. Martin that Mr. Harrison felt that "no further investigation is warranted (on my side)". There is no evidence of a similar recurrence afterwards.

**50** Mr. Martin at the hearing called Mr. Harrison's handling of the case "lacklustre" and Mr. Thompson expressed a similar view. But neither were aware of all the steps that Mr. Harrison actually took, such as speaking directly to the taxi company. Mr. Harrison could have done a better and more thorough job of detailing what he did, but it was also entirely open to Mr. Martin and Mr. Thompson, if they were concerned or dissatisfied, to say so and query him further. They did not. When Mr. Thompson confronted Mr. Harrison on August 7, 2008, no defence of his actions on this



or any matter was permitted.

**51** Another important incident in the eyes of Mr. Thompson was Mr. Harrison's handling of a particular incident involving the mistaken addition of cars. Mr. Harrison investigated, spoke to the person in his department involved, determined that the fault lay elsewhere, and reported back to Mr. Thompson. The latter acknowledged in an email that he could accept the decision not to institute discipline as long as the interaction with the employee was documented on the employees dashboard.

**52** The employee dashboard is a feature of CN's human resources system. According to Mr. Thompson, interactions with unionized employees of a substantial nature, such as coaching or formal investigations, should be noted on a computer file associated with the individual unionized employee. When asked why he did not make a dashboard entry in the incident just mentioned, Mr. Harrison stated that he did not know what a dashboard was or how to make an entry. When he had been transferred to the TRS department, his training was focused on some narrow reporting issues. After about a week of that, he was not given any substantial time off for further training. When he told Mr. Thompson he did not know how to use the dashboard system, Mr. Thompson simply expressed puzzlement as to how he did not know and offered no assistance.

**53** Ms. Tracey Hills from personnel at CN reviewed the various courses that Mr. Harrison took over the years. While he was undoubtedly given some general training in CN's general management approach -- which focuses on defining expectations, observing performance, and providing appropriate consequences - there is nothing in the evidence to contradict Mr. Harrison's statement that he was never trained in the dashboard system.

**54** It may be that Mr. Harrison should have been more proactive about getting himself trained on the dashboard system, especially after Mr. Thompson sent him an express instruction to use it in one particular case. It may also be that he did not have time to do so in the press of other responsibilities. Even if Mr. Harrison were held to be partially at fault on this issue -- and the evidence is not clear enough to convince me that this is the case -- the blame would be shared. Furthermore, in none of the key incidents under discussion has it been shown that discipline of a junior employee was warranted or that the same employee was involved in a similar incident. If there was culpability on the part of Mr. Harrison on dashboarding issues, it felt far short of warranting severe discipline, and certainly not dismissal.

**55** A third incident involved a situation where a car was mistakenly released when it should have been held in place for customs purposes. I accept that Mr. Harrison investigated and determined that the error was not on the part of any of his employees in his department. His own employee had in fact displayed commendable ingenuity in finding a way to record the incident. Had Mr. Thompson reviewed the incident in any depth with Mr. Harrison during their meetings on August 7, 2008 or October 10, 2008, he could have reviewed the facts and allocation of responsibility.

**56** My conclusion, upon review of these incidents and the record as a whole, including the entire

set of email exchanges between Mr. Thompson and Mr. Harrison, is as follows. There were no issues of attendance that warranted criticism by CN. With respect to holding employees accountable, Mr. Harrison's "kinder, gentler" approach was not entirely consistent with Mr. Thompson's personal preferences, but was within the scope of the discretion permitted to him by CN policies and Mr. Thompson's instructions. Mr. Thompson concerns about the actual quality of Mr. Harrison's performance in holding employees accountable was in many important respects unfounded *or* exaggerated. Mr. Harrison did not master the dashboard system for recording interaction with employees, but this was at least partly the fault of CN in not providing appropriate training. The reality is that Mr. Harrison did not suddenly go from being a long serving employee with an unblemished disciplinary record, an impressive skill set, and very positive evaluations in 2007, to someone who warranted dismissal by the end of 2008.

**57** Mr. Thompson suggested that Mr. Harrison's performance deteriorated in 2008 because prior to that time one of his colleagues, Mr. Dube, had assisted him in handling discipline issues, allowing Mr. Harrison to focus on his areas of strength. Mr. Harrison himself, at the hearing, stated he actually discussed with Ms. Van Gils, Mr. Dube's replacement, the possibility of her taking over employee discipline issues while he concentrated on matters within his greatest expertise. Ms. Van Gils had indicated she would be happy to do so. It is speculative and unnecessary for me to decide here whether this arrangement would have been acceptable to CN had Mr. Harrison been given the opportunity to propose it. I do find that while employee discipline was an area in which Mr. Harrison was less experienced and comfortable compared to his other assignments, his performance did not justify his dismissal.

**58** Mr. Thompson himself testified that he did not approach the August 7, 2008 meeting as an exercise in discipline, but one aimed at defining expectations and securing a desired level of performance. At the meeting on October 10, 2008, Mr. Thompson did not state how Mr. Harrison had fallen short of the action plan laid out at the August 7, 2008 meeting or offer Mr. Harrison an opportunity to explain his more recent performance. The principle factor, in Mr. Thompson's own eyes, was his arriving at the conclusion that Mr. Harrison had expressed an unwillingness to do the job in accordance with company expectations in the future.

### **The Meeting of October 10, 2008**

**59** Mr. Thompson testified that he approached the meeting of October 10, 2008, with the expectation not of suspending or dismissing Mr. Harrison, but as continuing the effort to coach him, including following up on the August 8, 2008 letter. Mr. Thompson testified that Mr. Harrison told him that "he did not feel his job as TRS Manager was suitable employment" and that by his own admission "he was not good at dealing with people...not good at confrontation...taking statements and disciplining people". Mr. Thompson says that he then concluded that Mr. Harrison had to be suspended.

**60** Mr. Harrison says Mr. Thompson's decision to suspend him was about the second thing out of

Mr. Thompson's mouth. He says that he never told Mr. Thompson or any other official at CN that he would not and could not do the job as TRS Supervisor. On the contrary, he had done so for two and half years. Nor did he acknowledge that he was not effective at it. The problem was that he realized that Mr. Thompson, and several other CN officials, did not like his management style. Mr. Harrison disliked confrontation and believed that most problems could be solved by dialogue and coaching. Discipline had a place, but as a last resort.

**61** Mr. Martin, the Superintendent, had a conversation in late September with Mr. Harrison. The cross-examination of Mr. Martin in this respect included the following exchange:

Q. He said in so many words that he was not so good at managing people - not his strength?

A. Correct

Q. "You understood he had been there for 25 years, had a strong skill set in terms of railroads, but was candidly saying that supervising and managing was not my strength?"

A. Correct.

Q. He wasn't saying he wasn't willing, just not his strongest suit?

A. Correct.

**62** Mr. Martin did not testify that this exchange gave Mr. Martin any cause to think that Mr. Harrison should be suspended or terminated. It is probable that Mr. Harrison's intended message early in the October 10, 2008 meeting was similar. He was identifying the aspect of the job that he was not comfortable with and which was not his area of greatest strength. He was not acknowledging that he would not or could not do it effectively. Many employees -- probably most -- in any job encounter aspects of their employment that they are less skilled at or which make them uncomfortable. A physician might enjoy meeting patients but not filling out paperwork. A professional in a government department might be enthusiastic and skilled about analysis and projection, but not enjoy staff meetings or bureaucratic infighting.

**63** The honest recollection by witnesses of what they personally said or heard is often imprecise or mistaken -- just as with testimony of what people believe they saw. The accounts of Mr. Thompson and Mr. Harrison converge on the broad point that Mr. Harrison expressed discomfort

with carrying out disciplinary tasks. But it is not consistent with the evidence as a whole that Mr. Harrison meant to say, or did say, that he would not or could not continue in his job indefinitely. Here was someone who had spent almost all of his life at CN who came to work in pain and against doctors' recommendations and who had done nothing to line up alternate opportunities at the company or elsewhere. He testified in other contexts that he did not feel comfortable speaking with Mr. Thompson, and felt it necessary to talk to him diplomatically. He knew that Mr. Thompson was unhappy about his performance. It is not plausible that he intended to say, or actually did say, anything prior to Mr. Thompson's decision to suspend him that amounted to carte blanche to Mr. Thompson to take drastic measures, such as suspending or dismissing him.

**64** If there was some misunderstanding, I find that here again it was not Mr. Harrison's fault. I accept his testimony that Mr. Thompson arrived quickly at the decision to suspend him. Even if Mr. Harrison was less than precise in what he said, Mr. Thompson did not take a few minutes to explore with Mr. Harrison exactly what Mr. Harrison's attitude and intentions were.

**65** Mr. Thompson's haste at arriving at a conclusion likely had several sources. He is a hard-driving executive who is determined to secure the achievement of company objectives and felt that Mr. Harrison was underperforming and thereby jeopardizing CN's success. While I find that Mr. Thompson's assessment of Mr. Harrison's performance was not justified by the facts, Mr. Thompson, in his own eyes, saw a situation that had to be set right and was determined to do so. Furthermore, there were aspects of Mr. Harrison's management style that were permissible under company policy, and Mr. Thompson's own directions, but were not to Mr. Thompson's personal taste. These considerations likely contributed to the swiftness with which Mr. Thompson seized on what Mr. Harrison said and suspended him.

**66** Another contributing factor of haste on Mr. Thompson's part was that in his own mind, and that of Mr. Harrison, he was not terminating Mr. Harrison altogether from his longstanding relationship with CN. He was merely deciding that Mr. Harrison could no longer work at the TRS position.

#### **The Aftermath -- Mr. Harrison's Termination After His Alleged Refusal to be Open to Alternative Job Placements at CN**

**67** At the hearing, CN argued that merely suspending Mr. Harrison with pay and exploring alternate positions for him was beyond the call of its duty. It had reason as of October 10, 2008 to dismiss Mr. Harrison, and CN's legal position should not be jeopardized by the fact that it tried to find him some other position in the corporation before ending the relationship altogether.

**68** My view is that CN did not have reasonable grounds to dismiss Mr. Harrison on October 10, 2008. Accordingly, his ultimate dismissal is not just. It is not decisive, therefore, whether CN's "beyond the call of duty" theory is correct. I would observe, however, that in my view CN was again hasty and in error when it concluded that Mr. Harrison was not reasonably open to pursuing another position at CN.

**69** At the October 10, 2008 meeting, after suspending him, Mr. Thompson indicated that he would arrange for Mr. Harrison to meet with Ms. Hills and discuss alternate job possibilities at CN. Mr. Harrison testified that he expected Mr. Thompson to call him about the meeting with Ms. Hills and that Mr. Thompson would participate in the meeting. The call never came. Instead, Mr. Harrison recalls, he went in to the offices at CN on October 14, 2008 to provide Mr. Thompson with a note from his doctor saying he was unable to work for several weeks. The secretary outside of Mr. Martin's office said that Ms. Hills wanted to see him.

**70** The meeting was brief. Ms. Hills said it lasted somewhere between "five and ten minutes" and "half an hour". She agreed that she was not in a position to "offer" any jobs to Mr. Harrison. The most she could do was alert him to openings that might be suitable. She mentioned two options in this regard. She said that Mr. Harrison was not interested in considering jobs that involved a lowering of grade or salary, and that more generally he would not consider any position that involved managing people. Ms. Hills mentioned her perception to her superiors and Mr. Thompson and Mr. Martin concurred that in view of his unreasonable inflexibility, he should be dismissed altogether. They did not speak to Mr. Harrison directly to make sure they understood his approach to alternate employment and the rationale for it.

**71** Mr. Harrison's account of the meeting was more specific and detailed than that of Ms. Hills and was consistent with his testimony as a whole, and I accept it. According to Mr. Harrison, he explained, along with providing the medical note, that he could not consider seriously another position at CN until he had a clear picture about his medical position. It would not be fair to CN for him to take a position not knowing if he could meet its physical demands and not knowing whether he would have to start it by booking time off and thereby requiring someone to cover for him. Mr. Harrison indicated that one of the positions was "probably something he could consider" once his health situation was clarified. Indeed, it sounded like it might be a "good fit". He agreed that he mentioned to Ms. Hills that he was not comfortable managing people. He also allowed that he felt he should not be required to accept a demotion. But he recalled specifically telling Ms. Hills that given time to decide, "anything was possible". CN was not attentive to what Mr. Harrison was telling them about not being in a position to decide pending clarification of his health situation and rushed to an overstated conclusion about his amenability to exploring other positions.

### **Next Steps in These Proceedings**

**72** The onus is on CN in these proceedings to show, on the civil standard of proof through clear and convincing evidence, that its dismissal of Mr. Harrison is justified. My conclusion would be the same, however, even if the onus were on Mr. Harrison to affirmatively prove his case. My conclusion is that in all the circumstances, it was not just for CN to dismiss Mr. Harrison from his position in TRS services. I retain jurisdiction for all purposes connected with completing the adjudication of this case. I will be contacting the parties about scheduling a further hearing about remedies in the event that the parties cannot come to an agreement.

DATED at the City of Winnipeg, in Manitoba, this 13th day of August, 2010.

BRYAN P. SCHWARTZ-Adjudicator

qp/s/qlspi

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