CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2304

Heard at Montreal, Tuesday, 8 December 1992

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Trainman R.A. Ellerbeck, Niagara Falls, Ontario, effective 24 April 1992.

JOINT STATEMENT OF ISSUE:

On 16 March 1992, Mr. R.A. Ellerbeck provided an employee statement for alleged fraudulent submission of maintenance of earnings claims. The employee statement concluded on 18 March 1992. Subsequent to the employee statement, Mr. R.A. Ellerbeck was discharged from the service of the Company effective April 24, 1992 for ``Fraudulent Submission of Maintenance of Earnings Claims in Pay Periods 3-4, 5-6 and 11-12 of 1991."

The Union appealed the discharge of Mr. Ellerbeck on the grounds that: 1. There were mitigating circumstances. 2. The Company entrapped Mr. Ellerbeck. 3. The dismissal of Mr. Ellerbeck was unwarranted. The Company declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) M. P. GREGOTSKI	(SGD.) A. E. HEFT
GENERAL CHAIRPERSON	FOR: VICE-PRESIDENT, GREAT LAKES REGION

There appeared on behalf of the Company:

J. M. Kelly	–Senior Project Officer, Labour Relations, Toronto
A. E. Heft	– Manager, Labour Relations, Toronto
D. Brodie	– Labour Relations Officer, Montreal
S. Valcourt	– Assistant Manager/Administration Crew Management Centre, Toronto

And on behalf of the Union:

M. P. Gregotski	– General Chairperson, Fort Erie
G. J. Binsfeld	– Secretary Treasurer, G.C.A., Fort Erie
B. J. Lennox	– Local Chairperson, Niagara Falls
R. A. Ellerbeck	– Grievor

AWARD OF THE ARBITRATOR

On a review of the evidence the Arbitrator is satisfied that the grievor, Trainman R.A. Ellerbeck, knowingly and repeatedly submitted fraudulent maintenance of earnings mileage claims in three separate pay periods. Specifically, he booked off for miles when in fact the trips which he had worked in the given mileage month were well short of the miles which would entitle him to do so. In the result he claimed, and wrongfully received, payments totaling $4,621.63.

Mr. Ellerbeck maintains that he did not intend to wrongfully appropriate the monies in question. He states that he made the claims in the belief that he was entitled to do so, by a strict interpretation of articles 28.4(a) and 28.5 of the collective agreement. The provisions are as follows:

> **28.4** In the application of this Article, employees will be governed as follows:
>
> (**a**) they will maintain a record of the total accumulated mileage for which paid commencing with their mileage date and report to the designated officer when the maximum mileage has been made so that relief can be provided;
>
> **28.5** In the application of this Article, mileage paid for as:
>
> (**a**) general holidays (Article 77);
>
> (**b**) travel allowance (Article 23);
>
> (**c**) bereavement leave (Article 76);
>
> (**d**) payment for examinations (Article 71);
>
> (**e**) annual vacation (Article 78); and
>
> (**f**) held-away-from-home terminal (Article 18);
>
> will not be charged against an employee's mileage records. However, employees will not be permitted to stipulate the period off duty on account of mileage limitations as their annual vacation period. When the annual vacation dates allotted in advance (as provided in paragraph 78.11 of Article 78 [Annual Vacation]) coincides with the time an employee is off duty because of mileage limitations, the date will not be changed and employees will be allowed to commence annual vacation on the allotted date.

According to Mr. Ellerbeck, once he became entitled to incumbency payments, when those incumbency payments were expressed in terms of miles on his statement of earnings, referred to as a "blue slip", provided to him by the Company, he included the incumbency miles in the calculation of "accumulated mileage for which paid" under article 28.4(a) of the collective agreement. This, he says, he did on the basis that there was no specific exclusion of those miles for the purposes of the calculation found within article 28.5 of the collective agreement.

The evidence, however, does not support that explanation of the grievor's understanding or overall intent. As the Company argues, if his interpretation of the articles in question were to be consistently followed, he would soon have reached a point in time at which his accumulated mileage would be such that he would no longer be required to do any work whatsoever, while remaining fully entitled to incumbency payments. Indeed, the evidence discloses that the grievor's accounting of his "accumulated mileage for which paid" began to approach the point at which in the beginning of a mileage month he would have an opening balance of total accumulated mileage which would exceed the monthly maximum. That would lead to the startling result that he would have to claim the right to full payment without any work in a given pay month. However, he then changed his method of calculation, so that the total of his accumulated miles was reduced to zero, and the process of accumulation began once again. This allowed him to continue to book off for miles at a point well short of the monthly mileage limitation, without detection by the Company. In other words, Mr. Ellerbeck temporarily suspended his convictions as to the operation of the articles of the collective agreement when to do otherwise would have lead to the discovery of his "interpretation" of article 28.4(a) by the Company.

There is a difference between an honest disagreement as to the interpretation of a provision, sometimes referred to as a claim made under a colour of right, on the one hand, and sharp practice on the other. In the Arbitrator's view, notwithstanding the explanation offered by Mr. Ellerbeck, the regrettable conclusion is that he knowingly engaged in a scheme to reduce his working time and increase his incumbency pay in a manner which he knew, or reasonably should

have known, was inconsistent the collective agreement and in violation of his obligation of trust in the reporting of his miles worked for pay purposes. The material discloses that Mr. Ellerbeck engaged in a repeated pattern of extracting funds from the Company by the application of an interpretation and an accounting system of his own making, confirmed neither with his union nor with his employer, the application of which he suspended when the accumulation of his miles would have led to the inevitable detection of his system. In the Arbitrator's view what is disclosed is, on the balance of probabilities, a calculated attempt to misappropriate wages by the false accounting of miles paid under article 28.4(a) of the collective agreement, and the knowing manipulation of the recorded figures to avoid detection. In the circumstances I cannot accept that what the grievor did was the result of a misinterpretation, in good faith, of the terms of the collective agreement.

The jurisprudence dealing with the appropriate disciplinary consequences for fraudulent wage or benefits claims and other forms of theft are legion, and need not be repeated here (*see e.g.* ***CROA 1835, 2184***). In the circumstances of the case at hand the Arbitrator has difficulty seeing mitigating factors which are compelling in the grievor's favour. The evidence discloses that he pursued his course of action for a considerable period of time before making any inquiry of either the union or the employer with respect to its propriety. For the reasons touched upon above, I am satisfied that the reason for that failure is that Mr. Ellerbeck was well aware of what the answer would be. Significantly, the offer of restitution which he made to the Company did not come until after his disciplinary investigation. It cannot be construed as a voluntary admission of wrongdoing or remorse, as much as an attempt to buy back his employer's favour upon the discovery of a cynical and indefensible scheme. The Arbitrator is driven to the conclusion that the course of action pursued by Mr. Ellerbeck has irrevocably severed the relationship of trust which is implicit the service of an employee who is responsible for his or her own wage claims, in a largely unsupervised setting. In the Arbitrator's view the discharge of the grievor was justified.

For the foregoing reasons the grievance must be dismissed.

December 11, 1992 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR