

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2792

Heard in Calgary, Wednesday, 13 November 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

DISPUTE:

Appeal of the decision to hold out of service Conductor D.C. Timms of Thunder Bay, Ontario for allegedly being declared medically unfit for duty in a safety sensitive position on November 25, 1992 and his subsequent discharge on November 18, 1995 for allegedly failing to: 1.) undergo an assessment to ensure compliance with the Company's Employee Assistance Program; 2.) be medically examined by the Company's Occupational Health Services; 3.) appear for an investigation; and 4.) make himself available.

JOINT STATEMENT OF ISSUE:

The Union states that the Company had no justification for holding Conductor Timms out of service in November, 1992 or for holding him out of service for an extended period of time. Despite this, Conductor Timms signed a letter agreeing to certain conditions regarding his reinstatement on July 2, 1993 but the Company refused to reinstate him, insisting that he sign another, more restrictive letter dated July 8, 1993. The Union asserts that the Company's actions are unreasonable and a violation of the collective agreement.

The Company asserts that it had information that mandated Conductor Timms be held out of service in November, 1992. Further, the Company asserts that the letter signed by Conductor Timms on July 2, 1993 was only a letter outlining Occupational Health Services' conditions for his reinstatement and was not intended to replace the Company's standard conditions for employees in Conductor Timms' situation. He continued to be held out of service for refusing to sign the letter dated July 8, 1993 and agreeing to these standard conditions. The Company denies that its actions were unreasonable or a violation of the collective agreement.

The Union also states that the Company did not have reasonable cause to terminate Conductor Timms. In letters dated August 25 and 30, 1995, the Company set out certain conditions regarding Conductor Timms' reinstatement which, if not fulfilled by October 31, 1995, would result in his termination. The Union's position is that the Company's conditions and deadline were unreasonable. Despite this, Conductor Timms made efforts to satisfy these conditions by the deadline but was unable to do so. In addition, the Union states that Conductor Timms did not fail to appear for an investigation as he requested it be re-scheduled in advance, which request was granted. The Union also states that Conductor Timms did not fail to make himself available and remains available.

The Union asserts that the Company's actions are unreasonable and a violation of the collective agreement, including a violation of article 117.1 as Conductor Timms was discharged without an investigation. The Union requests Conductor Timms be reinstated with full compensation for all wages and benefits and no loss of seniority or such other remedy as considered appropriate by the Arbitrator.

The Company states that the conditions and deadline imposed were fair and appropriate and the reasons given by Conductor Timms for failing to meet this deadline were unacceptable. In addition, the Company states that Conductor Timms cancelled his investigative interview scheduled for November 10, 1995 and subsequently failed to make himself available.

The Company denies that its actions were unreasonable or a violation of the collective agreement and denied the Union's request.

FOR THE COUNCIL:

(SGD.) M. ELDRIDGE

FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA

FOR: SENIOR VICE-PRESIDENT, CN WEST

There appeared on behalf of the Company:

- S. Blackmore – Labour Relations Officer, Edmonton
- S. Michaud – Labour Relations Officer, Edmonton
- R. Remy – Measurements Officer, Edmonton
- J. Dixon – Assistant Manager, Labour Relations, Edmonton

And on behalf of the Council:

- D. Ellickson – Counsel, Toronto
- M. Eldridge – Vice-General Chairman, Edmonton
- D. Timms – Grievor

AWARD OF THE ARBITRATOR

Upon a review of the material filed the Arbitrator is satisfied that the Company did have valid concerns which justified the grievor being held out of service from November 25, 1992. The record of the grievor's treatment for alcohol related problems, his periodic medical testing as required by the Company, and conditions placed upon his continued employment at various times is extensive, and need not be reviewed in detail for the purposes of this award. The Arbitrator is satisfied, on balance, that the Company did have legitimate concerns, both with respect to the grievor's possible abuse of alcohol, and his apparent failure or unwillingness to meet certain procedural conditions established by the Company, at various times, so as to legitimately question the safety of his continuation in active service. To put it simply, the Company had substantial concerns as to the grievor's medical condition, which concerns are shown to have been reasonable, both in respect of the grievor's response to his employer's apprehensions, and his admitted breach of his own attempts to control his alcohol consumption, in July of 1994.

The grievor is an alcoholic. The record of his involvement with the Company since his condition has become known reflects a less than ideal level of communication between himself and his employer. The Arbitrator is satisfied that a substantial part of that failure is attributable to the grievor's own actions and his medical condition. On the whole, therefore, the Company did have legitimate concerns for keeping him out of service until such time as he was eventually terminated.

There are, however, mitigating factors which must now be taken into account, particularly as regards the issue of whether the Arbitrator's discretion should be exercised for the purposes of substituting a penalty less than discharge. In March of 1996 the grievor did undergo a thorough assessment by a professional service previously approved by the Company. The conclusion of that assessment, made by Family Services Thunder Bay, reflects that the grievor shows "no real problem" with respect to current alcohol use. It acknowledges that he presents as a recovering alcoholic with ongoing participation in support group meetings of Alcoholics Anonymous. Based on that information the Arbitrator is of the view that it is not inappropriate, having regard to the grievor's twenty years of prior service, to fashion a conditional reinstatement with a view to balancing the interests of the Company to ensure that the grievor remains alcohol free while performing the safety sensitive duties of a yardmaster, with the grievor's own interests in returning to productive employment.

The Arbitrator therefore directs that the grievor be reinstated into his employment as a yardmaster, without compensation or benefits, and subject to the conditions described hereafter. As a condition of reinstatement Mr. Timms must agree to abstain from the consumption of alcohol at any time. Further, he must agree to attend meetings of Alcoholics Anonymous, or some other mutually agreed support group, for a period of not less than two years from the period of his reinstatement, with written confirmation of an appropriate officer of that organization to the Company, on a quarterly basis, to confirm his ongoing participation. For the period of two years the grievor shall also be subject to random alcohol or drug testing, to be conducted in a non-abusive manner. Finally, Conductor Timms' return to active employment shall be conditional on his passing such appropriate medical fitness examination as may be required by the Employer, as well as any rules qualifications or other tests as would, in the normal course, be required.

November 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR