# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2813

Heard in Montreal, Wednesday, 15 January 1997

concerning

## ONTARIO NORTHLAND RAILWAY

and

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

### DISPUTE:

Dismissal of Track Maintainer T. Onolack.

### JOINT STATEMENT OF ISSUE:

On May 9, 1996, the grievor was notified by the Company that effective May 24, 1996, he was terminated for physically assaulting a foreman.

The Union contends that: **1.)** no physical assault ever in fact occurred; **2.)** The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into his former position forthwith without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

| FOR THE BROTHERHOOD: | FOR THE COMPANY: |
|---|---|
| (SGD.) R. F. LIBERTY | (sgd.) K. J. WALLACE |
| SYSTEM FEDERATION GENERAL CHAIRMAN | PRESIDENT |

There appeared on behalf of the Company:

| | |
|---|---|
| M. J. Restoule | – Manager, Labour Relations, North Bay |

And on behalf of the Brotherhood:

| | |
|---|---|
| P. Davidson | – Counsel, Ottawa |
| R. F. Liberty | – System Federation General Chairman, Winnipeg |
| D. Brown | – Sr. Counsel, Ottawa |
| S. Tache | – Trackman, Witness |
| F. Gagnon | – Trackman, Witness |
| T. Onolack | – Grievor |

## AWARD OF THE ARBITRATOR

The Company maintains that Track Maintainer T. Onolack physically assaulted Track Maintenance Foreman Clifford Roy during an altercation which allegedly occurred on March 19, 1996 when the grievor's crew returned to the bunkhouse at Island Falls at the end of their day's work. A complaint filed by Mr. Roy alleges that during the course of a conversation between the two employees about the method used to do track lining they became engaged in a heated argument during which the grievor voiced a number of serious threats to Mr. Roy, culminating in his grabbing him by the neck and thrusting him against the wall of the bunkhouse living room. Mr. Roy then left the camp and proceeded to make a complaint, both to the Company and to police authorities, resulting in a charge of assault and uttering threats against Mr. Onolack.

The criminal charges against the grievor were dismissed on the basis of the evidence presented at trial. It appears that the evidence at the criminal trial is somewhat similar to the record of the Company's investigation. There was only one eye witness, Mr. Stephen Tache, also present in the bunkhouse living room during the altercation between the two individuals. Mr. Tache denies that there was any physical assault on Mr. Roy by Mr. Onolack. While two other employees, Mr. Fred Gagnon and Mr. Floyd Job, overheard the verbal argument from their nearby rooms, they did not observe what occurred.

It is well established that in proceedings before the Canadian Railway Office of Arbitration, extensive reference may be made to hearsay evidence contained in the record of a company's disciplinary investigation. However, where there is a substantial conflict in the account of events given by two or more persons, direct evidence in the form of *viva voce* evidence offered at the arbitration hearing is generally preferable, and of greater weight, than the hearsay evidence of statements made by an individual during the course of a company's investigation, where that individual is not present at the arbitration hearing to counter the direct testimony of the opposite party or to be cross-examined. (*See, e.g.,* **CROA 1241, 2419, 2667** *and* **2689**.) In the instant case, for reasons which he may best appreciate, Mr. Roy did not attend at the arbitration hearing to give his account of the altercation between himself and Mr. Onolack, and to be cross-examined. Mr. Onolack, however, was present and denied any physical assault upon the foreman. Moreover, two of the other employees who were in the bunkhouse at the time, including Mr. Tache, were present to give direct testimony in support of the grievor.

In these circumstances the Arbitrator cannot find that the Company has discharged the burden of proof which is upon it. When, as in the case at hand, this Office is left with no direct testimony or evidence whatsoever with respect to an alleged assault, and that is counterbalanced by credible direct testimony from the grievor, supported by other employees denying any such action, a board of arbitration has little alternative but to give weight to the direct evidence, and to allow the grievance.

For the foregoing reasons the grievance is allowed. The Arbitrator must conclude that the Company has not established just cause for the grievor's termination. The Company is directed to reinstate the grievor into his former position forthwith, without loss of seniority and with compensation for all wages and benefits lost.

January 20, 1997

**(signed) MICHEL G. PICHER**
**ARBITRATOR**