

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2853

Heard in Calgary, Wednesday, 14 May 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]**

DISPUTE:

Appeal the discharge of Locomotive Engineer B.A. Shaw of Kamloops, B.C. effective July 04, 1996.

JOINT STATEMENT OF ISSUE:

Effective July 04, 1996, Mr. Shaw was discharged for conduct unbecoming and harassment of a fellow employee during his tour of duty on train 817, May 25, 1996 and subsequent telephone calls on June 06, 1996 and June 07, 1997.

It is the Brotherhood's position that the discharge of Mr. B.A. Shaw was unwarranted and that he be compensated for all wages and benefits lost.

The Company does not agree.

FOR THE COUNCIL:

(SGD.) M. W. SIMPSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Officer, Edmonton
J. Torchia	– Manager, Labour Relations, Edmonton
T. J. Brenner	– Witness
S. Michaud	– Assistant Manager, Labour Relations, Edmonton
D. Van Cauwenbergh	– Labour Relations Officer, Edmonton
K. Morris	– Labour Relations Officer, Edmonton
D. Lanthier	– Labour Relations Officer, Edmonton
J. Dixon	– Assistant Manager, Labour Relations, Edmonton

And on behalf of the Council:

D. J. Shewchuk	– Senior Vice-Chairman, Saskatoon
D. E. Brummund	– Vice-Chairman, Kamloops
B. A. Shaw	– Grievor

AWARD OF THE ARBITRATOR

The Arbitrator accepts the evidence of Conductor T.J. Brenner, given at the arbitration hearing. His testimony establishes that on May 25, 1996 the grievor and Conductor Brenner operated train 817 from Kamloops to Boston Bar. Conductor Brenner relates that early in the trip Locomotive Engineer Shaw objected to the manner in which he was calling signals, telling him that he was yelling. At another point, when Conductor Brenner was utilizing his lantern to look for a lost glove in the darkened cab Mr. Shaw shouted at him: "Shut the fucking light out now!" When Mr. Brenner responded with words to the effect that he had a job to do, Locomotive Engineer Shaw shouted, still more intensely: "If you want fucking trouble I'll give you fucking trouble!" Those words were uttered as the conductor was exiting the locomotive to perform a roll by inspection of another train. When Mr. Brenner re-entered the locomotive unit and attempted to inquire as to what was disturbing Mr. Shaw, the grievor, in the words of the conductor, "Screamed out in a very menacing manner that I was just to 'Fuck off, you just fuck off.', and repeated it twice."

At Boston Bar Mr. Brenner was sufficiently disturbed that he booked four hours rest in an effort to avoid working homewards with Mr. Shaw. Upon his return to Kamloops, in fact by a deadhead taxi shared with Mr. Shaw, Mr. Brenner contacted Manager Train Service, Sherman at Kamloops, to report the incident. It also appears that his concern for his own safety prompted the conductor to make a report of the incident later to the RCMP, following a comment made by another employee, apparently a friend of Mr. Shaw, to the effect: "I would be scared if I were you."

Having regard to the evidence given by Mr. Brenner, and his demeanour as a witness, the Arbitrator accepts the account of events given by Conductor Brenner as accurate. I am further satisfied that Mr. Brenner did feel genuinely threatened by Mr. Shaw, and that there was nothing in the conductor's actions which can fairly be characterized as provoking or otherwise justifying the outbursts and threats uttered by the locomotive engineer.

Unfortunately the matter does not end there. Conductor Brenner further relates that he received two telephone calls from Mr. Shaw at his residence, following the issuing of the Company's notice to the grievor of a pending investigation. Mr. Brenner relates that when he answered the telephone on the first call from Mr. Shaw, the grievor asked whether he had turned him in for what had happened. Conductor Brenner merely hung up. Some six hours later the grievor called again and stated, in part "Just remember, I know where you park your van at work."

Mr. Shaw denies having said words to Mr. Brenner to the effect "If you want trouble I'll give you fucking trouble", although he does admit that he may have used harsh words in telling him to turn off his light. He also denies having made any threat to Mr. Brenner, although he does not dispute that he made two separate telephone calls to his home. These, he states, were merely for the purpose of determining the nature of the report provided to the Company by Mr. Brenner.

The Arbitrator does not believe Mr. Shaw. With respect to the telephone calls, it is not disputed that eventually Mr. Brummund, the Council's local chairman, was compelled to telephone Mr. Shaw and to instruct him to stop telephoning Conductor Brenner. There is nothing in the evidence to suggest any reason why Conductor Brenner would invent false allegations against Mr. Shaw. As noted above, the Arbitrator found Mr. Brenner's evidence to have been given in a candid measured fashion, and to be credible overall. I am satisfied that he felt threatened, and had legitimate feelings that he could not work in an environment in which Mr. Shaw caused him not to feel safe. In the result, the Arbitrator finds, on the balance of probabilities, that Mr. Shaw made threatening statements to Mr. Brenner both during the course of their tour of duty on train 817 on May 25, 1996 and in at least one of the phone calls, made on June 7, 1996.

The issue then becomes the appropriate measure of discipline. Unfortunately, Mr. Shaw has an extensive disciplinary record, including incidents of abusive and threatening language toward other employees, at least one of which occasioned a prior hearing in this Office. In **CROA 1707** it was found that Mr. Shaw, then working as a yard foreman at Kamloops, threatened a yardmaster, holding a lantern in his hand and shouting "If you ever turn me in again, you fucking cocksucker, I'll break every fucking bone in your body, and I'll do it on the job, at the job, or wherever I can find you." In that case the Arbitrator took into account the grievor's prior fifteen years of service, and that he had never previously been disciplined for such conduct, which was characterized as "... an isolated and momentary fare-up which, with the appropriate rehabilitative discipline, should not be expected to recur. Needless to say, if it should, the most serious of disciplinary consequences may ensue." Later, in **CROA 2028**, Locomotive

Engineer Shaw contested his own alleged resignation, apparently made in the face of a disciplinary investigation concerning an allegation that he had again threatened a lead hand labourer with physical violence on March 8, 1989. The issue of the threats did not come into evidence before the Arbitrator as the case proceeded entirely in relation to the issue of whether the grievor had voluntarily resigned, or had properly rescinded his resignation, in the circumstances disclosed. The record, however, does confirm the assessment of fifteen demerits for conduct unbecoming an employee, registered March 8, 1989.

Clearly, the grievor cannot claim a solid disciplinary record. He was disciplined some seventeen times over the period of his employment, which commenced in November of 1975. Most significantly, both in March 1986 and March 1989 he was assessed discipline for incidents involving physical threats to other employees. The evidence disclosed in the case at hand confirms that Mr. Shaw did not heed the admonition of this Office as to the gravity of the disciplinary consequences that might result from conduct similar to that exhibited in **CROA 1707**. Unfortunately, the prior discipline assessed against Mr. Shaw has had little long-term rehabilitative effect. Further, when consideration is given to mitigating factors, the Arbitrator is not inclined to disturb the Company's decision in light of his lack of candour and a complete absence of remorse exhibited by Mr. Shaw during the Company's investigation, and indeed at the arbitration hearing.

For all of the foregoing reasons the grievance must be dismissed.

Dated at Montreal, May 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR