

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3021

Heard in Montreal, Tuesday, 12 January 1999

concerning

ST. LAWRENCE & HUDSON RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)**

DISPUTE:

The dismissal of Locomotive Engineer Serge Couture, Montreal, Quebec.

JOINT STATEMENT OF ISSUE:

On February 14, 1997, Locomotive Engineer Serge Couture was issued five (5) Form 104s, one of which stated that he had been dismissed from Company Service for the accumulation of in excess of sixty (60) demerits in accordance with the Brown System of discipline.

The particulars of these Form 104s are as follows:

Form 104 A;

On February 14, 1997, in respect of a tour of duty in TCS service on January 10th and 11th, the following Form 104 was issued;

... your record has been debited with 45 Demerits for the submission of a wage claim artificially enhancing your time on duty and the time of your crew members so as to procure compensation to which you were not entitled while employed as a Locomotive Engineer on TCS Train 301-21 on January 10 and 11, 1997 between St. Luc Yard and Quebec City, Quebec. For reporting late for duty unequipped to perform Company Service, for deliberately delaying departure from St. Luc Yard during the deadhead portion of the TCS trip and for undue delay as a result of improper stops at various highway locations enroute to Quebec City resulting in delay to the departure of your train from Quebec City and the inability of the Company to change crews at Decarie account the expiration of 12 hours on duty causing undue delay to Company traffic and the requirement of the Company to pay a penalty payment to the TCS crew as a result of being on duty over 12 hours. For providing false and misleading information at the formal investigation and for employing abnormal and obstructionary process during the formal investigation procedures on January 20, 21, 24, and 28, 1997, at Montreal Quebec.

In regard to Form 104 - A, the Union submits that the investigation related to this incident clearly established that Mr. Couture's wage claim was not artificially enhanced. The Union further states that the investigation established that Mr. Couture arrived at work prepared for his tour of duty, and that any delays to the train operating from Quebec City to Montreal resulted from factors other than those cited in the Form 104.

The Union denies both that Mr. Couture provided false and misleading information at the investigation, and that he employed abnormal and obstructionary processes during said investigation. The Union submits that the employer failed to comply with the investigation procedures, and displayed blatant disrespect for the Union Representative who was assisting Mr. Couture.

Form 104 B;

On February 14, 1997, in respect of the same tour of duty in TCS service on January 10th and 11th, the following Form 104 was issued;

... your record has been debited with 45 Demerits for the submission of a fraudulent wage claim while employed as Locomotive Engineer on TCS Train 301-21 between Quebec City and St. Luc Yard on January 10 and 11, 1997, when you presented a wage claim indicating that a Locomotive Engineer Trainee had accompanied you between Quebec City and St. Luc Yard and requested payment in accordance with Article 26 of the BLE Collective Agreement when in fact no Locomotive Engineer Trainee accompanied you and the Locomotive Engineer for whom you claimed payment was completing a familiarization trip of which you were aware and for which there is no reimbursement and NOT Locomotive Engineer Trainee trips for which the BLE Collective Agreement provides payment. For providing false and misleading information during the formal investigation and for employing abnormal and obstructive process during the formal investigation conducted on January 29, 30, 31, and February 4th, 1997, at Montreal, Quebec

The Union submits that the investigation relating to the incident clearly established that Mr. Couture did not submit a fraudulent wage claim on January 10th and 11th, 1997. The investigation revealed that the computer system automatically generated the subject claim, and that the subject trainee had specifically asked Mr. Couture not to make any changes in the computer so as to avoid the trainee being penalized for a change which had been made by the managers at Quebec City. It is the position of the Union that the investigation revealed that the managers were fully aware of the situation, and that Mr. Couture was never paid for the time as the system had made a correction two days later.

The Union denies both that Mr. Couture provided false and misleading information at the investigation, and that he employed abnormal and obstructionary processes during said investigation. The Union submits that the employer failed to comply with the investigation procedures, and displayed blatant disrespect for the Union Representative who was assisting Mr. Couture.

Form 104 C;

On February 14, 1997, in respect of Mr. Couture's tour of duty on December 31, 1997, the following Form 104 was issued;

... your record has been debited with fifteen demerits for improper radio communications in violation of CROR Rule 12.2 and GOI, Section 4, Item 7.0, during your tour of duty on Assignment 402 on December 31, 1996. For providing evasive and misleading answers and for employing abnormal and obstructionary process during the Formal Investigation procedures on February, 4, 5, 7 and 11th, 1997, at Montreal, Quebec.

The Union submits that the investigation relating to this incident clearly established that the subject radio communication practice was widespread and often tolerated, particularly on days such as New Year's Eve, at which time crews traditionally communicated more flexibly with one another. The Union further submits that during the investigation, it was further revealed that the Managers who observed the radio communication practice did so for over an hour, and did not attempt to intervene to correct the situation.

The Union denies both that Mr. Couture provided evasive and misleading answers during the investigation process, and abnormal and obstructionary process during the investigation.

Form 104 D;

On February 14, 1997, in respect of Mr. Couture's tour of duty in TCS service on January 10th, and a tour of duty on January 4, 1997, the following Form 104 was issued;

... your record has been debited with a Caution for submitting a Form 1409 to file a complaint on the bad condition of the taxi, in two instances, and for voluntarily placing himself in an uncomfortable position, January 4 and 10, 1997; A violation of CROR Rule C, paragraph A.

The Union submits that the investigation relating to this incident clearly established that the forms had been submitted to report a physical condition due to an employment issue in accordance with the Act Respecting Industrial Accidents, and not for the purpose of filing a complaint. The Union submits that Mr. Couture should not be penalized for complying with the Company policy requiring the completion of 1409 Forms for incidents that compromise the safety and well-being of its employees.

Form 104 E;

As a consequence of the issuance of Forms 104, noted above as A to D, Mr. Couture was issued another Form 104, as follows:

... you have been DISMISSED from Company Service for the accumulation of in excess of 60 Demerit marks in accordance with the Brown System of Discipline to which the St. L&H Rly. Company subscribes.

With respect to all of the aforementioned Forms 104, and for the reasons given, the Union has requested that the discipline received and noted on the Forms 104 be expunged from Mr. Couture's work record and that he be immediately reinstated. Additionally, the Union has requested that Mr. Couture be reimbursed for all lost earnings, including interest, seniority and benefits, that he would have qualified for, during the period of his dismissal which resulted from the issuance of the said Forms 104. The Union has also submitted, in the alternative, that the discipline imposed in each of the Forms 104 is excessive and that a lesser penalty should be substituted.

The Company has declined the Union's appeals.

FOR THE COUNCIL:

(SGD.) R. S. MCKENNA
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) G. CHEHOWY
FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

G. D. Wilson	– Counsel, Edmonton
G. Chehowy	– Manager, Labour Relations, Toronto
S. Bromley	– District General Manager, Toronto
K. Fleming	– Counsel, Edmonton
R. Martel	– Labour Relations Officer, Toronto
J. Blotsky	– Manager Operations, Quebec
C. Westcott	– Field Operations Analyst, Toronto
B. Butterworth	– Labour Relations Officer (ret'd)
J. Cuin	– Assistant Superintendent (ret'd)

And on behalf of the Council:

J. Yach	– Counsel, Ottawa
R. S. McKenna	– General Chairman, Calgary
G. Hallé	– Vice-President, Canadian Director, BLE, Ottawa
T. G. Hucker	– Vice-President, National Legislative Representative, Ottawa
D. C. Curtis	– General Chairman, Calgary
B. Brunet	– Local Chairman, Montreal
A. Verner	– Local Chairman, Montreal
B. Suffel	– Local Chairman, Smiths Falls
S. Couture	– Grievor

AWARD OF THE ARBITRATOR

The grievor was assessed a total of 105 demerits, in addition to a caution, for events which occurred on January 10 and 11, 1997 and December 31, 1996. Forty-five demerits were assessed the alleged submission of a fraudulent wage claim in respect of the tour of duty of the grievor and his crew on January 10 and 11, 1997. A further forty-five demerits were assessed for an alleged fraudulent claim indicating that a locomotive engineer trainee had accompanied the grievor between Quebec City and St. Luc on January 10 and 11, when in fact no trainee was aboard his movement. Fifteen demerits were assessed for irregularities in radio communications between the grievor and his crew while in service on December 31, 1996. Finally, a caution was registered relating to complaints made by the grievor on form 1409, concerning the condition of a taxi in which he deadheaded from Montreal to Quebec City.

The record of the investigation of the grievor is extensive, and has been carefully examined by the Arbitrator. Upon a review of the materials I am satisfied that the grievor was unjustifiably late for his assignment on January

10, and that he unduly delayed the departure of his crew from the St. Luc yard in a number of respects. These included the fact that he needed a delay to change his clothes, that he unnecessarily obtained a copy of his crew's daily operating bulletin at the yard office, and that he further took time to deal with the submission of an unrelated personal wage claim. I am also satisfied that over the course of the trip to Quebec City the grievor contributed to the slow progress of his crew's trip by taxi by engaging in a number of excessively long stops, requiring in excess of four hours to travel to Quebec City, a period being 1 hour and 10 minutes longer than the average for that trip.

The evidence also discloses to the Arbitrator's satisfaction that Mr. Couture did artificially inflate the time claims of his crew with respect to their arrival back and time off duty at St. Luc yard. He unduly added time to the tickets of his crew members, and still greater time to his own trip ticket. It is not disputed that the tickets so submitted resulted in substantial wage premiums for the grievor and his crew, as they were able to gain considerably more payment for their deadhead time, by reason of their having been on duty in excess of twelve hours.

Upon a careful review of the record I am satisfied that the Company has established, on the balance of probabilities, that the grievor did deliberately and unduly delay his crew in their progress from Montreal to Quebec City. The delay contributed in the Company's decision to change the order of trains departing Quebec City, which in turn caused still further delay in the tour of duty worked. I come to that conclusion, in part based on material differences in the account of events given by the grievor and members of his crew, as well as the taxi driver responsible for carrying them. Taken together those accounts do confirm that the grievor was dilatory in his actions and was less than candid in his version of events during the course of the Company's disciplinary investigations.

There are some mitigating factors with respect to the separate allegation that the grievor fraudulently claimed payment for having a locomotive engineer trainee on his movement. It would seem that a supervisor was apparently instrumental in conveying to Mr. Couture a message from the trainee, who in fact worked another train, that he was to nevertheless process a claim for the trainee's benefit. However, even if the grievor is given the benefit of the doubt with respect to that aspect of the grievance, and even if he should succeed in respect of the separate issue of the improper radio communications, for which fifteen demerits were assessed, he would nevertheless remain in a dismissable position if, as I am satisfied, his actions in respect of his tour of duty of January 10 and 11, 1997 were in fact tantamount to deliberate fraud. In my view the grievor has provided no good answer to the allegation that he deliberately slowed the progress of his crew enroute to Quebec City, and that he falsely entered the times at which both he and his crew members went off duty upon their return to St. Luc yard. Bearing in mind that the grievor had a prior disciplinary record of twenty demerits, and that he had previously been discharged by the Company, to be reinstated only upon compassionate grounds, the conclusion that forty-five demerits was an appropriate response to the events of January 10 and 11, 1997 cannot be disturbed by the Arbitrator. In the result, the grievor would, in any event, have accumulated sixty-five demerits, placing him in a dismissable position. In all of the circumstances, I do not see mitigating factors which would justify a reduction in that penalty.

Nor is the Arbitrator satisfied that the Council has made out its claim that the disciplinary investigations conducted by the Company were in violation of the obligation to conduct a fair and impartial hearing. While I would agree that the record does not reflect a model of efficiency, and may be a textbook example of the perils of repeated and sometimes self-serving questions by an investigating officer, there was in the end no fundamental prejudice to the grievor or his union representative.

For the foregoing reasons the grievance must be dismissed.

January 18, 1999

(signed) MICHEL G. PICHER
ARBITRATOR