

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3065

Heard in Montreal, Tuesday, 14 September 1999

concerning

ST. LAWRENCE & HUDSON RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The issue in dispute involves the discipline assessed Mr. L. Turner (emp #618987), of Smiths Falls, Ontario on June 16, 1998. In particular, Mr. Turner was notified by form 104 that he was dismissed from company service.

COUNCIL'S STATEMENT OF ISSUE:

Mr. Turner was notified by form 104 that he was dismissed from company service. The form 104 reads as follows:

Please be informed that you're **DISMISSED** from Company service for submission of a fraudulent wage claim for yourself and crew members; and for submission of enhanced off duty times so as to improperly inflate time off on rest for yourself and other crew members, while employed as a Conductor on the Dorion Turn Assignment, May 8, 1998, Montreal, Quebec.

The Union has argued with respect to the allegation that Mr. Turner submitted a fraudulent wage claim intended to enhance his wages, what really occurred was a clerical error inherent in a past practice of topping up to eight hours on duty and a schedule change.

The Union contends that: **(1)** the Company's investigation was not concluded in a fair and impartial manner; **(2)** the discipline was issued without just cause; and **(3)** the discipline assessed was unwarranted. Therefore, the penalty of discharge ought to be rescinded by the circumstances of the instant case. The Union requests that the grievor be reinstated into service with a clear record and full seniority with compensation for lost earnings and benefits.

The Company has declined the request.

COMPANY'S STATEMENT OF ISSUE:

On May 20 and May 29, 1998, investigations were conducted with Mr. Turner in connection with his wage submission in CMA at 22:41, May 8, 1998, for his tour of duty on RS#3, Dorion Turn on May 8, 1998.

Based on the facts adduced at the above-mentioned investigations, Mr. Turner was advised, on June 16, 1998, that he had been dismissed from the St. Lawrence & Hudson Railway for submission of fraudulent enhanced wage claims for himself and crew members; and for submission of enhanced off duty times so as to improperly inflate time off on rest for himself and other crew members, while employed as a conductor on the Dorion Turn assignment, May 8, 1998, Montreal, Quebec.

The Council progressed a grievance contending that **(1)** the investigation was not conducted in a fair and impartial manner; **(2)** the discipline was issued without just cause; and **(3)** the discipline assessed was unwarranted.

The Council requested that Mr. Turner be reinstated into service with a clear record and full seniority with compensation for lost earnings and benefits.

The Company has declined the Council's request.

FOR THE COUNCIL:

(SGD.) D. A. WARREN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) C. M. GRAHAM
FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

J. Dragani – Labour Relations Officer, Calgary
R. M. Andrews – Manager, Labour Relations, Calgary

And on behalf of the Council:

D. A. Warren – General Chairman, Toronto
B. Caron – Local Chairperson
L. Turner – Grievor

AWARD OF THE ARBITRATOR

In this matter the burden of proof is upon the Company to establish that the grievor knowingly and deliberately sought to fraudulently obtain overtime wages for himself and his crew members when booking off his tour of duty of May 8, 1998. Given the gravity of the offence alleged against Mr. Turner, and the severe consequences which result, the standard proof in such a case must be on the basis of clear and cogent evidence.

Upon a review of the record, the Arbitrator is not persuaded that the Company has discharged the onus which is upon it. The objective facts relating to this matter are not in substantial dispute. On May 8, 1998 the grievor was assigned as conductor on the Dorion Turn, scheduled to work from 16:00 to 23:59. It is common ground that on the completion of their work, Mr. Turner signed onto CMA and entered tie up information into the computer for himself and also on behalf of his crew. It is common ground that he completed that task at 22:41. He then entered an off duty time of 00:40 hours, May 9, for himself and his crew, which resulted in an effective claim of forty minutes of overtime which, it is not disputed, the employees did not work.

Following a formal investigation conducted on May 20 and 22, 1998 the Company concluded that the grievor sought to fraudulently claim overtime. On that basis it concluded that he was no longer fit for employment in a position which involves unsupervised timekeeping, as a result of which he was dismissed.

When the facts are examined as a whole there are reasons to question the Company's interpretation of what transpired. Prior to May 8, 1998 the grievor's assignment had been ordered for 18:00. The eight hour assignment so commenced would have been completed at 02:00 of the following morning. The evidence establishes that as a general rule the work of the Dorion Turn was less than eight hours in duration. To regulate the flow of spare employees, crews were instructed that they should, notwithstanding their actual hours worked, register a full eight hours of work on the computer for the purposes of payroll and spareboard regulation. It also appears, however, that the computer in question could only accept an entry of an additional two hours beyond the hours actually worked by the crew. In other words, it would seem that if a tour of duty commencing at 18:00 completed its work at 23:00, the crew could only enter an additional two hours into the computer, which would then register 01:00 as their completion time, even though they would be fully paid to 02:00. It does not appear disputed that it was common for crews working the Dorion Turn to register an additional two hours in the computer at the conclusion of their work assignment.

Mr. Turner relates that that is precisely what he did on the evening of May 8, 1998, but that he forgot that his starting time was in fact 16:00, rather than the accustomed 18:00. It is not disputed that the Company bulletined a change in the ordering time of the Dorion Turn for 16:00, and that the change went into effect for the first time on May 8, 1998. The grievor, who had considerable experience on the Dorion Turn, explains that when he proceeded to book himself and his crew out on the computer at 22:41 he mechanically entered the additional maximum of two hours, resulting in an entered off duty time of 00:40, rounded down by one minute. He states, and the Arbitrator accepts, that he then believed he was simply filling out the maximum amount of time possible on the computer, to the eight hour limit, as had been his long standing practice and that of others, pursuant to Company instructions. It is

not disputed that an entry of 00:40 would not be a claim of overtime based on the traditional starting time of 18:00. Mr. Turner relates that he inadvertently entered the time he did on the basis of his habit of assuming a start time of 18:00. His explanation in that regard is not unlike the difficulty many people have in properly writing down the correct year in the first few days of January. To that extent, his explanation suggest a probable and plausible scenario.

The Company obviously does not accept the grievor's explanation. It's view in that regard is coloured, in part, by its interpretation of a telephone conversation between the grievor and Road Manager Guido De Ciccio, which occurred on or about May 18, 1998. A memorandum prepared by Mr. De Ciccio gives, in part, the following account of that conversation:

On May 19 Larry Turner called me back on my cellular phone and asked me what I wanted (the assistant manager gave him the message to call me) and I asked him why he claimed 40 minutes overtime when in fact the computer shows he booked off CMA at 22:41 HRS.

Larry Turner stated that he did a good job and the company owed him overtime. In addition, he said that he was doing more work than he normally should be doing and that the 40 minutes overtime should not be a problem. In fact and I quote, he said "don't tell me that with all the work I am doing the company will make an issue on this matter".

Lastly he mentioned that he claimed 2 hours so that the crew can book rest.

In its submission to the Arbitrator the Company questions the grievor's theory that he in fact simply added the usual two hours to top up the logged time of his crew to the eight hour maximum. It argues that in that circumstance he should have entered 23:59 or 00:01 as the time off duty. That interpretation, however, disregards the fact that the grievor was, for the first time, working a tour of duty which in fact commenced at 16:00. It also appears to disregard the fact that if the tour had commenced at 18:00 Mr. Turner could not have entered any additional hours at 22:41 beyond 00:41.

When regard is had to the memorandum of Mr. De Ciccio two things emerge. Firstly, it is clear that Mr. Turner did tell his supervisor that he was claiming two hours according to the normal practice so the crew could book rest. Therefore, upon initial contact, albeit some ten days after the event, he recalled his action as being consistent with the Company directive to top up the time logged to eight hours, insofar as possible. Based on an 18:00 starting time that would have been an innocent gesture entirely consistent with his prior practice. Secondly, as indicated by the grievor at the hearing, Mr. Turner felt at the time that the Company did owe him overtime, to the extent that he had previously been involved in some tours of duty during which he was responsible for training other employees, and in respect of which he had not claimed the premium payment to which he was entitled. It is not clear to the Arbitrator that in his exchange with Mr. De Ciccio he was not simply adverting to the fact that, on balance, the Company might well owe him some unclaimed premiums, and that that should be taken into consideration in forgiving what he viewed as a clerical error.

On the whole the Arbitrator is inclined to accept the evidence of Mr. Turner. The incident which led to his discharge was isolated. There is no evidence before me to suggest that his incorrect claim of May 8, 1998 was part of a pattern of fraud or even colourable claims in respect of his work on the Dorion Turn, or any other work performed for the Company as a conductor. The fact that the day in question was the first day of the new starting time lends plausibility to Mr. Turner's explanation that he simply did not advert to the possibility of overtime being claimed, but rather intended only to maximize the shift by entering the full additional two hours, as had previously been done. Nor can I interpret anything within his conversation with Mr. De Ciccio as an admission of fraud or wrongdoing on his part. It was, more realistically, an argument to the effect that, whatever the merits, the incident should simply be allowed to pass without disciplinary ramifications. On the whole, I am satisfied, on the balance of probabilities, that the explanation provided by Mr. Turner is truthful, and that he did not intend to fraudulently claim overtime for himself and his crew on May 8, 1998. Given that conclusion it is unnecessary for me to deal with the collateral issue of the Council's allegation that the grievor was denied his right to a fair and impartial disciplinary investigation.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with full compensation for all wages and benefits lost, and without loss of seniority.

September 17, 1999

(signed) MICHEL G. PICHER
ARBITRATOR

