

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3118

Heard in Montreal, Wednesday, 14 June 2000

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Appeal of discharge of N. Pietrantonio, Yard Foreman, Toronto for an incident occurring on 16 February 2000.

JOINT STATEMENT OF ISSUE:

On 16 February 2000, Mr. N. Pietrantonio was discharged for "Failure to comply with instructions of a Company Officer, while employed as Yard Foreman on assignment L 57731."

The Union filed an appeal contending the discipline was too severe.

The Company declined the Union's appeal

FOR THE COUNCIL:

(SGD.) R. J. LONG
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) F. O'NEILL
FOR: SENIOR VICE-PRESIDENT, EASTERN CANADA

There appeared on behalf of the Company:

F. O'Neill	- Labour Relations Associate, Toronto
P. Sutor	- Transportation Supervisor, Toronto
R. J. Hayes	- Risk Management Officer, Toronto

And on behalf of the Council:

R. J. Long	- General Chairperson, UTU, Brantford
S. Tipton	- Local Chairperson, Toronto
N. Pietrantonio	- Grievor

AWARD OF THE ARBITRATOR

The Company alleges that the grievor was insubordinate towards his supervisor on February 16, 2000, and therefore merited removal from service followed by his summary dismissal. The Company's position is that the grievor's actions during the course of an incident involving himself and Transportation Supervisor Paul Sutor on the occasion in question constituted a culminating incident which, given the grievor's prior record, justified his termination.

The Arbitrator has substantial difficulty with the position so advanced by the Company. In this matter of discipline, as in any, the Company bears the burden of proof of establishing, on the balance of probabilities, that the grievor violated an obligation to his employer, that his actions were deserving of discipline, and that termination is the appropriate penalty, in all of the circumstances.

The evidence before the Arbitrator confirms that at the commencement of his tour of duty on February 16, 2000 Mr. Pietrantonio approached Transportation Supervisor Paul Sutor in the trainmaster's office at MacMillan Yard. His purpose for doing so was to obtain his cheque for employee gain-share payments, said to be in the amount of \$915.21. It is common ground that the cheques were available for distribution to employees by the transportation supervisor, and that in fact Mr. Pietrantonio had received deductions against his pay stub in reduction of the gross amount of his gain-share payment.

It does not appear disputed that what transpired was a conversation between Mr. Pietrantonio and Mr. Sutor of some six to seven minutes' duration. During that time Mr. Sutor was also engaged in sending a fax and receiving at least one telephone call on his cell phone, of approximately one minute's duration. Both participants to the conversation agree that the gain-sharing cheques of employees were held in a box in the office, and that they were apparently somewhat out of alphabetical order, which caused Mr. Sutor some delay in looking through the cheques, an exercise in which he was joined, in part, by Mr. Pietrantonio. It would appear that Mr. Pietrantonio expressed some frustration that there was a delay in finding his cheque, and gave some indication that he preferred to get his cheque before proceeding to his train to commence his tour of duty. Mr. Sutor relates that at some point he indicated to Mr. Pietrantonio that he would continue to look for the cheque, and that the latter should proceed to work. While the precise words of the two participants to the conversation are not recalled, Mr. Sutor acknowledges that he did not give the grievor any direct indication that if he failed to immediately go to work he would be removed from service or be made subject to disciplinary action. As the conversation unfolded, therefore, to an objective observer it may fairly have appeared that the grievor was being insistent on exhausting the effort to find his gain-sharing cheque before commencing his assignment, while his supervisor was of the view that he should let the matter pass, and that he would bring the cheque to him later in the day if he should be able to find it. It seems that it was during the course of that conversation that Mr. Sutor abruptly advised Mr. Pietrantonio that he was removed from service for failing to go to his work assignment when told to do so.

The Company characterizes Mr. Pietrantonio's refusal as having occurred some three times, in response to three separate requests on the part of Mr. Sutor for him to proceed to the commencement of his assignment. However, the Company, which bears the burden of proof, has not provided evidence through Mr. Sutor of any expression of refusal to go to work on the part of Mr. Pietrantonio, nor even any statement on his part that he would not go to work until his cheque was found.

The evidence reveals that the grievor had been previously disciplined for failing to carry out his assignments as requested, and for low productivity (see, e.g., **CROA 3102**). In that regard he had suffered a suspension in relation to an incident on October 30, 1999. While that record, and prior similar incidents, may explain a degree of impatience on the part of his supervisor, it does not, in the Arbitrator's view, substantially alter the nature of the conversation which took place. The mere failure to return to work promptly when told to do so does not, of itself, necessarily constitute an affront to authority amounting to insubordination (see, e.g., **CROA 901**). Obviously, whether a particular verbal exchange amounts to insubordination is a matter to be determined on the facts of each case.

In the case at hand the supervisor did not make it clear to Mr. Pietrantonio that he would be removed from service if he did not immediately comply with Mr. Sutor's request that he go to work while he made further efforts to locate his cheque. While it is arguable that the grievor was more insistent than he need have been, there is in evidence no statement on his part to the effect that he would not work until his cheque was produced or that he would not obey his supervisor's direction. It would appear that it is only when Mr. Pietrantonio stated that he wished

to make a telephone call to his union representative before going to work that Mr. Sutor advised him that he was removed from service.

In the circumstances the Arbitrator is compelled to agree with the Council's representative that the case at hand reflects an unfortunate overreaction on the part of the supervisor. While there may have been prior incidents which gave cause for concern about the grievor's responsiveness and productivity, those matters were dealt with on their merits by other discipline. They cannot serve to justify arbitrary treatment of the grievor in circumstances such as those described as having unfolded in the supervisor's office on February 16, 2000. Obviously, if the evidence disclosed a one-person strike instigated by the grievor on the basis that he would not work until he received his cheque, a very different result would quite properly flow. The evidence, however, is far short of that.

On a review of the material before me, I must conclude that the Company has not established, on the balance of probabilities, that the grievor was deserving of any discipline, beyond a possible verbal counselling for his encounter with Transportation Supervisor Paul Sutor, and that he was not insubordinate in his dealings with Mr. Sutor on the occasion under consideration. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, with his record to be purged of any reference to the incident in question, without loss of seniority and with compensation for all wages and benefits lost, subject to normal principles of mitigation.

June 16, 2000

(signed) MICHEL G. PICHER
ARBITRATOR