

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3169

Heard in Calgary, Thursday, November 16, 2000

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS OF CANADA**

DISPUTE:

Dismissal of Equipment Operator D.A. Lakas, Vancouver Terminal, Surrey, British Columbia.

JOINT STATEMENT OF ISSUE:

On January 28, 2000, Canadian National Railway held an investigation of Equipment Operator Dan. A. Lakas in connection with: "failure to properly secure containers on DTTX 6403 which departed VIT on train Q1045 13, on January 13, 2000."

According to the Company discipline form, on February 25, 2000, the Company debited Dan Lakas' record with 30 demerits effective January 13, 2000 for: "failure to ensure proper securement of container."

According to a subsequent Company discipline form, on February 25, 2000, the Company discharged Dan Lakas for: "... accumulation of 80 demerits and 2 written reprimands."

It is the contention of the Union that: (1) the Company did not establish the responsibility of Equipment Operator D.A. Lakas in regard to the matter at hand and therefore had no cause to discipline Equipment Operator D.A. Lakas. (2) the Company treated Equipment Operator D.A. Lakas in an arbitrary, discriminatory and excessive manner in regard to his dismissal.

Therefore, with regard to the foregoing, it is the position of the Union that Equipment Operator D.A. Lakas should be returned to duty forthwith without loss of seniority, with full redress for all lost wages, benefits and losses incurred as a result of his dismissal, including, but not limited to, interest on any moneys owing.

The Company disagrees with the Union's position.

FOR THE UNION:

(SGD.) R. JOHNSTON
PRESIDENT, COUNCIL 4000

FOR THE COMPANY:

(SGD.) K. MORRIS
FOR: VICE-PRESIDENT, LABOUR RELATIONS

Appearing on behalf of the Company:

K. Thorne	– Counsel, Vancouver
J. Raynard	– Terminal Manager, Vancouver Intermodal Terminal
A. Villella	– Operations Officer, Vancouver

Appearing on behalf of the Union:

B. McDonagh	– National Representative, Vancouver
B. Kennedy	– Regional Representative – Mountain Region, Council 4000

L. Colby – Witness
D. Lakas – Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns the assessment of thirty demerits against the record of Equipment Operator D.A. Lakas, and his discharge for the accumulation of a total of eighty demerits. The Company maintains that the grievor negligently failed to inspect containers loaded at the Vancouver Intermodal Terminal (VIT), resulting in the travel of an unsecured container from Vancouver to Edmonton. The Union maintains that the Company has not adduced evidence to disclose any wrongdoing by the grievor, and that no discipline is justified in the circumstances.

Operations at the VIT involve the loading of containers onto container cars. Containers are occasionally double-stacked, with the top container being secured to the bottom container so as to prevent its being moved or falling off the car in transit. The securing of the top container is effected by the use of an inter-box connector (IBC), a knuckle shaped piece of steel which is anchored into each corner of the bottom container, and then fits into the corresponding corner of the top container. Once in place it is locked by the turning of a locking handle mechanism.

Equipment operators who load the double-stacked containers are responsible for ensuring that the IBC at each corner of a double-stacked container is properly locked. Following a change of policy in May of 1999, after a serious container accident in the U.S., the Company introduced a further procedure whereby trains are to be fully inspected by one employee prior to departure, ensuring that all IBCs are properly placed and locked. The checking process involves driving around the train on a tractor and filling out a form, whereby the checker signs his name in relation to each car inspected.

On January 13, 2000 the grievor worked a tour of duty from 15:19 to 21:34. His duties involved the loading of train Q10451 13, a train some 5,275 feet in length scheduled for departure for Edmonton. The grievor was specifically assigned to do the final verification and inspection of the train to ensure that all containers on the train were properly secured. This he did by the normal process, driving the length of both sides of the train on a tractor, performing a visual inspection.

On January 15, 2000 the train in question arrived in Edmonton and, according to the submission of the Company's representatives, was found to contain a double-stacked container which had none of its four IBCs properly locked. Based on that information the Company conducted a disciplinary investigation of the grievor and concluded that he was responsible for failing to properly inspect the container in question. That resulted in the assessment of thirty demerits against him, and his discharge for the accumulation of demerits in excess of sixty, as his record previously stood at forty-five demerits.

The Arbitrator has considerable difficulty with the factual conclusion drawn by the Company, and also with the process which was followed. Neither at the disciplinary investigation, nor at the arbitration hearing, did the Company table any written report, or evidence of any kind, specifically describing the circumstances in which the container was observed, or indeed by whom it was observed, in the allegedly unlocked state when it arrived in Edmonton. There are also no particulars provided with respect to how long the container may have been in Edmonton before its discovery, where it was located or how it was discovered.

The evidence confirms that the only document presented by the Company at the grievor's disciplinary investigation, as well as at the arbitration hearing, was an incorrect report relayed by Edmonton Operations Officer Cliff Coon. That report erroneously states, in part: "... two of the three double-stacks arrived not locked. Do not have the numbers involved." It does appear, however, that the erroneous report of Mr. Coon identified the flat car on which the double-stack container was located. That admittedly sketchy and incorrect document is the sole evidence of the Company to establish the grievor's alleged error and to justify his discharge.

In a proceeding of this kind the Company bears the burden of proof. It must establish, on the balance of probabilities, that the grievor's negligence caused the container in question to be unlocked at all four corners upon its arrival in Edmonton. In the Arbitrator's experience the Company is not unsophisticated in the thorough investigation and documentation of incidents of this kind. Unfortunately, as noted above, no memorandum or document directly describing the circumstances in which the container was found, or by whom it may have been found, was presented in evidence either at the disciplinary investigation or before the Arbitrator. There are no particulars provided with respect to whether the IBCs utilized were of a particular type, it being agreed that there

were a number of options possible in that regard. Whether the IBCs were new, old or in partial disrepair is a matter upon which no information has been provided.

In addition, it is common ground that the train in question made three stops en route from Vancouver to Edmonton, being stationary in Kamloops, Blue River and Jasper for periods of fifty minutes, fifteen minutes and forty minutes, respectively. The Company's representatives could not confirm that in each of those circumstances the train was in a fully fenced off or secure location where it could not, for example, be accessed by vandals.

In sum, the thrust of the Company's case is that on January 15, 2000, in Edmonton a fully unsecured double-stacked container was discovered, although no clear document to that effect was adduced in evidence, nor any witness called. By that fact alone the Company asks the Arbitrator to conclude that if a container was in that state it was due to the negligence of Mr. Lakas during his inspection of the train in Vancouver two days earlier. With respect, the Arbitrator does not find sufficient evidence in the case at hand to responsibly sustain that inference, on the balance of probabilities.

Setting aside obvious concerns that no real and specific evidence of an unsecured container was adduced, if the Company's theory is accepted, it would be necessary for the grievor to have not observed the open handles on two IBCs on two separate passes of the container unit, as he did his final inspection, proceeding along both sides of the train. While inadvertence or inattention might explain the failure to identify one or two open IBCs, greater implausibility attaches to the likelihood that they were missed in both sides of the grievor's inspection of the train. Additionally, as touched upon above, there are a number of equally possible explanations for the state of the container when it was observed in Edmonton, including vandalism or the movement of old or loose IBCs by reason of vibrations during travel. Those suggestions were substantiated by the presentation of sample IBCs by the Union, including testimony which went unrebutted by any Company evidence. As stressed above, little or nothing is known about the circumstances of discovery, whether an unloading crew member at Edmonton might have dealt with the container without the knowledge of the person who made the report, or indeed anything else of any real substance. When all of the evidence is assessed, with particular regard to the lack of any real documented report from the Company officers at Edmonton who observed the irregular state of the container, the Arbitrator cannot conclude that the burden of proof has been discharged.

The grievance must therefore be allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for wages and benefits lost, with his disciplinary record to be restored by the elimination of the thirty demerits assessed against him.

November 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR