

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3282

Heard in Montreal, Tuesday, 10 September, 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The discharge and suspension of D.E. Atamanchuk of Winnipeg, Manitoba for failure to follow instructions of the Yard Traffic Coordinator and Company officer, disrespect, insubordination, unnecessary delay to train Q11851-03 and subsequent delays to yard assignments 1530 Extra and 1555 Fort Rouge on 2002 June 5 at Fort Rouge and Symington Yard.

EX PARTE STATEMENT OF ISSUE:

On June 5, 2002, Dennis Atamanchuk was working as Conductor on Train Q11851-03 operating between Melville, Saskatchewan and Winnipeg, Manitoba.

Train 118 had traffic set off at Fort Rouge Yard in Winnipeg. Conductor Atamanchuk contacted the Fort Rouge yard office for instructions. Due to background noise on the radio, Conductor Atamanchuk was unable to understand the instructions. Conductor Atamanchuk went into the yard office to deliver documentation for his set off and to receive his instructions. After his telephone conversation with Supervisor Rutherford, Conductor Atamanchuk believed he was to set off but not required to make a lift. On his return to the engine, Conductor Atamanchuk was informed via radio by Supervisor Rutherford that the pick up must be made. Conductor Atamanchuk did the work as instructed.

On completion of their work, Train 118 depart Fort Rouge Yard en route to Symington Yard. On arrival at Symington the train and engine were secured. Conductor Atamanchuk was transported to the diesel shops by crew van.

While in the booking in room, Conductor Atamanchuk was approached by Supervisors Rutherford and Bourgonje. Conductor Atamanchuk was repeatedly asked questions pertaining to delay to Train 118. Conductor Atamanchuk told the officers that there was no delay. He also informed the officers that he was tired due to the fact he was on duty in excess of 12 hours, the maximum allowed by law, and that he wanted to go home. Supervisor Bourgonje removed him from service.

Following an investigation, Mr. Atamanchuk was discharged effective June 25, 2002. The time held out of service from June 5 to June 24, 2002 was a suspension.

The Union contends that the discharge was unwarranted. The Union requests that Mr. Atamanchuk be reinstated into his employment and his record to be make whole.

The Company disagrees.

FOR THE UNION:**(SGD.) B. J. HENRY**
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

- J. A. Coleman – Counsel, Montreal
- G. Séguin – General Supervisor, Transportation, Winnipeg
- T. Bourgonje – General Superintendent, Winnipeg
- M. Rutherford – Transportation Supervisor, Winnipeg
- D. VanCauwenbergh – Human Resources Manager, Winnipeg
- R. Dixon – Vice-President, Human Resources, Montreal
- J. Torchia – Director, Labour Relations, Edmonton

And on behalf of the Union:

- H. F. Caley – Counsel, Toronto
- R. A. Hackl – Vice-General Chairman, Edmonton
- B. R. Boechler – Vice-General Chairman, Edmonton
- G. Conrad – Local Chairman, Winnipeg
- D. Atamanchuk – Grievor

AWARD OF THE ARBITRATOR

Upon a review of the material and evidence filed, the Arbitrator is satisfied that the grievor did engage in a course of conduct which resulted in the delay of the movement of his train through Fort Rouge yard on June 5, 2002. It appears that upon approaching Fort Rouge yard Mr. Atamanchuk did not fully understand switching instructions provided to his movement by the yard traffic coordinator. Rather than re-communicate by radio with the traffic coordinator the grievor stopped his train at the western extremity of the yard and proceeded to the yard office. The Arbitrator is satisfied that he then had a two-fold purpose: to get clarification of the switching assignment which was given to him and, secondly, to register by telephone a protest at being required to lift cars from Fort Rouge yard for furtherance to Symington.

It is common ground that there was a pick-up to be performed. That task is the subject of a system policy grievance concerning the limitations of conductor-only operations in Western Canada, an issue which is pending at arbitration, which was in the course of being heard at the time of the incident here under consideration.

While the Arbitrator accepts, as argued by counsel for the Union, that an employee is entitled to register his or her protest against a Company directive which the employee believes to be contrary to the collective agreement, that right must operate in a purposive way, and should not be abused. The purpose of the right to register a protest is obviously to give notice to the Company of the employee's view that the collective agreement is being violated, allowing the employer an opportunity to correct its action if it deems it appropriate to do so. However, that principle had no application whatsoever in the case at hand. It is common ground that at the time Mr. Atamanchuk sought to register his protest the very action which he would complain of was the subject of a high level dispute between the Company and his Union, as he was aware. The transferring of segments of cars from Fort Rouge yard to Symington, and similar transfers elsewhere in Western Canada, was the specific issue which had been progressed to arbitration and was pending resolution at the time of the incident of June 5, 2002. Mr. Atamanchuk knew, or reasonably should have known, that the Company was aware that the Union did not approve of the assignment which he was being given, and that the parties had progressed the matter before an arbitrator at the national level. He knew, or reasonably should have known, that the Company disputed the Union's interpretation, and was fully on notice as to the bargaining agent's position. In that context there was no purposive value whatsoever to Mr. Atamanchuk stopping the progress of his train to utilize as much as fifteen minutes to proceed to the yard office to make a telephone call of protest to a supervisor of the Company. It is, in my view, understandable that an employer faced with such a gesture might consider it as an attempt to create nuisance value, rather than to impart information in good faith with a view to helping the Company redress a perceived violation of the collective agreement. To the extent that the very issue which Mr. Atamanchuk sought to protest was then being resolved at arbitration, the exercise of his right of protest was without purpose. To that extent, it did constitute an unnecessary delay in the handling of his assignment. He could, moreover, have recorded his objection by simply observing the "work now, grieve later" rule by filing a timely grievance.

The evidence indicates that there was some confusion arising from Mr. Atamanchuk's telephone conversation concerning the pick up assignment, which he had with Transportation Supervisor Miles Rutherford. The grievor claims that he gathered from Mr. Rutherford's remarks that he would not be required to do the pickup in question. When he related that fact to the traffic coordinator, a double check was made with Mr. Guy Séguin, the General Supervisor Transportation, who was then on a conference call with Mr. Rutherford and newly appointed General Superintendent Tom Bourgonje. That resulted in Mr. Rutherford again contacting the grievor on the radio to confirm that he was required to perform the controversial pick up. Even after he had been provided with the switch list for the required pick up by the traffic coordinator, the grievor telephoned Mr. Rutherford and expressed his belief that a different transportation supervisor had told him not to do the pickup. When Mr. Rutherford confirmed that he had been the person that he had first spoke with, the grievor expressed his disbelief, causing Mr. Rutherford to then put an ultimatum to Mr. Atamanchuk, indicating that he would be subjected to a formal investigation if he did not bring the pick up into the Symington yard. The Arbitrator must agree that at that point the good faith of the grievor's conduct was highly in question.

Sometime later, when it appeared to Mr. Rutherford that the grievor's train was still at the Fort Rouge yard, he inquired of the situation with the traffic coordinator. It appears that the traffic coordinator, a member of the Union, then indicated to him that Mr. Atamanchuk was not being cooperative, and that his train was still blocking two yard assignments from performing their duties. Mr. Rutherford then proceeded to Fort Rouge yard, arriving at the point in time when the grievor's train was departing for Symington. He then arranged for the grievor and his locomotive engineer to speak with him before they left Symington yard. Shortly thereafter Mr. Rutherford and Mr. Bourgonje proceeded to the diesel shop to meet with Mr. Atamanchuk and Mr. Tucker. While there is some conflict in the evidence as to when they first encountered each other, the resolution of that evidence is not material to the merits of what transpired. It is common ground that the grievor did meet with and speak to Mr. Rutherford and Mr. Bourgonje in the locker room located at the diesel shop.

The Arbitrator is satisfied that during the encounter among the three individuals the grievor was openly disrespectful of Mr. Rutherford and Mr. Bourgonje. When Mr. Bourgonje was introduced to the grievor as the new superintendent Mr. Atamanchuk replied "So what?" When it was indicated that the two gentlemen wanted to question Mr. Atamanchuk about the delay to his train at Fort Rouge, he summarily replied that there was no delay, and effectively ignored the two supervisors attempting to elicit information from him. Notwithstanding that the two supervisors obviously wished to obtain information from him, the grievor busied himself at his locker, and when he was finished he simply stood up and walked away. The two Company officers followed the grievor outside where a heated conversation transpired concerning Mr. Bourgonje's attempt to understand why Mr. Atamanchuk had not followed the original instruction of the traffic coordinator to switch out cars at Fort Rouge yard. Discussion then ensued as to whether another transportation supervisor had given him contrary instructions, with some apparent disagreement as to whether Mr. Atamanchuk had spoken with Mr. Rutherford or with some other transportation supervisor, as he claimed. Whatever Mr. Atamanchuk's intention, he was apparently willing to dismiss out of hand Mr. Rutherford's earlier clarification of that question. When Mr. Atamanchuk then again turned to leave, ignoring Mr. Bourgonje's call to him that they were not finished, the superintendent advised the grievor that he was being taken out of service.

Following a disciplinary investigation held at Winnipeg on June 11, 2002, the grievor, whose record then stood at ten demerits, was discharged for "failure to follow instructions of the yard traffic coordinator and company officer, disrespect, insubordination, unnecessary delay to train Q11851-03 and subsequent delays to yard assignments 1530 extra and 1555 Fort Rouge on 2002 June 05 at Fort Rouge and Symington yard."

Upon a close review of the evidence the Arbitrator is satisfied that there was an element of undue delay occasioned by the actions of Conductor Atamanchuk, although I am not persuaded that the company has discharged the burden of demonstrating that the entire period of the delay of his train, which it characterizes as being one hour in excess of time normally required at Fort Rouge, is established on the evidence before me. As noted above, there was obviously no useful purpose served by Mr. Atamanchuk stopping his train to proceed to the yard office to make a telephone call of protest concerning the pick up assignment at Fort Rouge yard. As Mr. Atamanchuk then knew, the very issue which he wished to protest had matured into a system policy grievance which was then pending at arbitration. There was, therefore, no useful purpose in holding up his train for the time required to register a protest with a member of supervision. During the time of that delay the grievor's train was stopped at the western extremity of Fort Rouge yard, extending onto the main line in a way that would prevent the progress of other train movements.

The evidence, however, concerning the alleged “slow rolling” of the grievor’s movement while performing the assigned switching in Fort Rouge yard is less conclusive. The precise location and status of the cars which were required to be dropped and picked up could obviously influence the time which would be required to perform the work in question. It appears, for example, that a certain number of cars had to be coupled before being handled. Nor does it appear disputed that the location and placement of cars might have had an impact on the time required. On the whole, therefore, I am not satisfied that the evidence establishes, on the balance of probabilities, deliberate slowness on the part of Conductor Atamanchuk in the performance of the switching assignments given to him at Fort Rouge yard once he had commenced the work.

The Arbitrator can readily understand the suspicion of the Company to the effect that Conductor Atamanchuk was being deliberately mischievous in his apparent failure to understand the radio communication from the traffic coordinator, and then the telephone instruction given to him by Mr. Rutherford with respect to picking up cars in Fort Rouge yard, as well as his apparent insistence that he had not spoken with Mr. Rutherford. It may well be, as the Company suspects, that the grievor was engaging in a deliberate course of conduct designed to frustrate the Company as a means of protesting an issue which was already at arbitration. However, given the seriousness of the conduct which followed, I find it unnecessary to make a finding on that issue.

The Arbitrator has grave concerns with respect to Mr. Atamanchuk’s conduct upon the completion of his tour of duty at Symington yard. It is evident to the Arbitrator that Mr. Atamanchuk had no interest in speaking with Mr. Rutherford or with Superintendent Bourgonje. Whatever his personal feelings, and even allowing for the fact that he may have been tired at the end of his assignment, he was nevertheless on duty and under an obligation to be courteous and responsive to the clear questions being put to him by his supervisors. I have little alternative but to share the view of counsel for the Company that in his encounter with Mr. Rutherford and Mr. Bourgonje both in the locker room, and thereafter outside the diesel shop, Mr. Atamanchuk was evasive, dismissive and ultimately disrespectful to his supervisors in a manner that did amount to insubordination.

On the whole, I am satisfied that Mr. Atamanchuk did make himself liable to a serious degree of discipline. The issue then becomes whether the summary dismissal of an employee of thirty years’ service is justified in the circumstances of this case. I do not think so. In addition to being an employee of thirty years’ service, Mr. Atamanchuk has recorded only one prior incident of discipline in the last twelve years, that being the assessment of ten demerits for missing calls. There is no record of discipline for insubordination or the deliberate delay of work anywhere to be found in his record. In the circumstances, it is hard to square the Company’s decision to discharge Mr. Atamanchuk for the events of one evening with generally accepted principles of progressive discipline. Further, for the reasons noted above, the Arbitrator is satisfied that the Company has not fully established the degree of the delay to his train which apparently contributed to its decision to terminate his services. On the other hand, it is clear to the Arbitrator that to a considerable degree Mr. Atamanchuk contributed to the delay of his train. He also deliberately frustrated the ability of his supervisors to properly perform their function, in a manner which was disrespectful and insubordinate. In the whole of the circumstances I am satisfied that it is appropriate to reinstate the grievor into his employment, but without any order of compensation.

For the foregoing reasons, the grievance is allowed, in part. The Arbitrator directs that Mr. Atamanchuk be reinstated into his employment forthwith, without loss of seniority and without compensation. The period between his termination and his reinstatement shall be registered as a suspension for the delay of his assignment and insubordination.

September 13, 2002

(signed) MICHEL G. PICHER
ARBITRATOR