

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3321

Heard in Montreal, Wednesday, 15 January 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

The imposition of a 30 day suspension given to Mr. Dale Corfield for failure to comply with the instructions of a supervisor, for conduct unbecoming an employee and for violating CN/GO operating manual items 1.23 and 4.22 while employed as locomotive engineer on GO assignment #27 on October 3, 2002.

JOINT STATEMENT OF ISSUE:

Mr. Corfield was assessed with 30 days' suspension for "failure to comply with the instructions of a supervisor and for conduct unbecoming an employee and for violating CN/GO operating manual items 1.23 and 4.22 while employed as Locomotive Engineer on GO assignment #27 on October 3, 2002."

The first issue is "failure to comply with the instructions of a supervisor". The Union contends that this is completely false; the car was cut back in as stated in Mr. Corfield's statement. Second, for conduct unbecoming an employee, Mr. Corfield has stated quite clearly in his statement that he never said that to Mr. Tulipano. As for CN/GO operating manual item 1.23 and 4.22 the EDR was not submitted as the problem was rectified, item 4.22, this switch was never touched as stated in Mr. Corfield's statement, the thermostat was the only thing adjusted.

The Brotherhood contends that the assessment of 30 days' suspension is simply outrageous and based on a completely biased investigation with the only purpose to set Mr. Corfield up for a fall; this is in violation of article 71.2 of the collective agreement.

The Company contends that Mr. Corfield displayed conduct unbecoming an employee by directing foul language at Supervisor Tulipano after being approached for isolating cab control car on GO assignment #27 on 03 October 2002. The Company further submits that Locomotive Engineer Corfield was making an unauthorized adjustment in the hearing/cooling panel contrary to CN/GO operating manual items 1.23 and 4.22.

The assessment of a 30 day suspension was reasonable and justified in this instances given the grievor's prior disciplining history.

FOR THE BROTHERHOOD:

(SGD.) R. DYON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. KRAWEC
FOR: SR. VICE-PRESIDENT, EASTERN DIVISION

There appeared on behalf of the Company:

J. P. Krawec	– Manager, Human Resources, Toronto
Wm. McMurray	– Counsel, CN Law, Montreal
D. Barard	– Assistant Superintendent, Commuter Operations, Toronto
F. Tulipano	– Commuter Services Officer, Toronto

And on behalf of the Brotherhood:

C. Morrison	– Counsel, Ottawa
R. Dyon	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

The first issue to be dealt with in this grievance is the conclusions of fact to be drawn. The grievor, Locomotive Engineer Dale Corfield, was assessed a thirty day suspension for conduct unbecoming an employee, failure to comply with the instructions of a supervisor and certain operational rule violations. The discipline arose as a result of a verbal confrontation between Mr. Corfield and a Company supervisor, Commuter Central Officer Franco Tulipano.

Mr. Tulipano and the grievor give substantially differing accounts of their confrontation, based on the content of the documents to be found in the Company's investigation. However, at the arbitration hearing the grievor was not present while Mr. Tulipano was in attendance and was available to be cross-examined under oath. For reasons touched upon in prior awards, in such a circumstance on matters of factual difference the Arbitrator has little alternative but to find that the evidence of the Company is to be preferred. (**CROA 938, 1122, 1241, 1575, 2419, 2667, 2689, 2813, 2839, 2985, 2994**) Consequently, as regards the merits of this grievance the Arbitrator is compelled, on the balance of probabilities, to accept the account of the fact provided by the Company.

On Mr. Tulipano's version of what occurred it would appear that during the operation of GO train no. 929 enroute to Burlington on October 3, 2002 Mr. Tulipano was advised by the conductor, Mr. Jerome Moreau, that the cab car had been cut out from passenger service, apparently against Conductor Moreau's own wishes and contrary to what he believed was the proper procedure. It appears that Mr. Tulipano was advised of this situation at Union Station. He then boarded the train and made his way to the cab car as the train was proceeding westward. He found the cab car to be isolated, with a curtain across the door and the interior lights turned off. At the east end of the car he came upon Mr. Corfield making adjustments to the heating system of the car in the heating/air conditioning cabinet, located on the mezzanine level. He relates that he asked Mr. Corfield why the coach was isolated and requested that it be put back into service.

A heated exchange then occurred between the two individuals, during which Mr. Corfield ultimately told Mr. Tulipano to "go fuck yourself", and that the car would stay isolated. Mr. Tulipano, a relief supervisor, then left the car to obtain instructions from his own supervisor as to how to proceed. It appears that at or about the same time the car was restored to service, and that Mr. Corfield reported to the rail traffic control centre that he believed that he had detected the smell of alcohol on Mr. Tulipano's breath and that based on that and his observation of Mr. Tulipano's agitation, he believed that he might be in violation of CROR rule G. That concern was communicated to Supervisor John Zarowny who then arranged for Mr. Tulipano to be given a breathalyser test administered by CN police at the Mimico Crew Centre. That procedure was conducted and Mr. Tulipano was found to have no discernible blood alcohol content.

The Company subsequently conducted an investigation and assessed a thirty day suspension against Mr. Corfield for his refusal to follow the instructions of Mr. Tulipano, for his insubordinate and disrespectful language as well as the violation of Company procedures respecting the adjustment of the heating system in the cab car.

For the reasons touched upon above, given that the grievor was not present at the arbitration hearing to be cross-examined on his version of the events while Mr. Tulipano was available, the Arbitrator is compelled to find that the incident did occur as described by Mr. Tulipano. The issue then becomes the appropriate measure of discipline in the circumstances.

Before dealing with that issue the Arbitrator turns to certain procedural objections raised by the Brotherhood. Its counsel submits that the Company failed to adhere to the standard of a fair and impartial investigation in the manner in which the disciplinary investigation was conducted. The Arbitrator cannot sustain that submission. It appears that the objections to fairness deal with the overruling of certain objections by the investigating officer, including the refusal to admit evidence of a prior incident involving a confrontation between Mr. Tulipano and another employee. It also appears that the investigating officer declined the Brotherhood's request to question the CN police officer who conducted the breathalyser test on Mr. Tulipano. In the Arbitrator's view the Brotherhood's objections do not go to establishing the failure of a fair and impartial investigation. The purpose of the investigation was to determine whether the grievor did improperly confront Mr. Tulipano and use unduly abusive language towards him. The merits the grievor's suspicion as to whether the supervisor was impaired are of no probative value for the purposes of assessing what transpired between them. Even if it can be argued that the collateral issue of Mr. Tulipano's sobriety was important to credibility, it is not disputed that Mr. Zarowny, who was present at the time the breathalyser test was administered, was at all times available to the Brotherhood by telephone to be questioned on this aspect of the

evidence. Bearing in mind that it is well established that such investigations should not be held to the standard of a civil trial, or even of an arbitration, the Arbitrator is satisfied that the Company did not violate the standards of a fair and impartial investigation in the case at hand.

An employee of long term service, initially hired in 1974, Mr. Corfield does not possess a record that is without blemish. Over the years he has received discipline on a number of occasions, most recently on March 29, 1999 when he was assessed thirty demerits for the failure to comply with the instructions of a Company officer. His record is therefore of limited mitigating value. The fact remains, however, that the assessment of a thirty day suspension is, by any account, an extreme form of discipline, particularly in an industry which generally adheres to the Brown System of discipline and the assessment of demerits to deal with employee misconduct. While it is obviously open to the Company to resort to a suspension, the assessment of a thirty day suspension for what appears to be a first infraction of verbal insubordination is, on its face, an arguably extreme level of sanction. In the Arbitrator's view a more moderate level of suspension would have been appropriate, and an adjustment should be made accordingly.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the penalty assessed against the grievor be reduced to a fifteen day suspension, with the grievor to be compensated for the difference in wages and benefits lost.

January 17, 2003

(signed) MICHEL G. PICHER
ARBITRATOR