CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3340

Heard in Montreal, Thursday, 15 May 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Conductor D. Bondy for wilful misuse of Part II of the Canada Labour Code and the assessment of a 60 day suspension for abandoning train 924 and its passengers.

JOINT STATEMENT OF ISSUE:

On July 10, 2002, Conductor Denise Bondy was required to provide a formal statement into her alleged misuse of Part II of the Canada Labour Code resulting in subsequent delay and inconvenience to GO Transit and its passengers while employed as Conductor on GO-930, May 26, 2002.

Subsequent to the formal investigation, the grievor was dismissed from service for her alleged misuse of Part II of the Canada Labour Code.

The Union submits, in part, that the discipline is unwarranted or at the very least excessive. The Union requested the reinstatement of Conductor Bondy with full wages and benefits and without loss of seniority.

The Company declined her request.

As a separate and distinct matter the parties further require the arbitrator to render a decision in the following dispute.

On March 26, 2002, Ms. Bondy was required to attend a formal statement in connection with the alleged withdrawal of her services while employed as a Conductor on GO Assignment No. 75 on March 16, 2002. Subsequent to the statement, Ms. Bondy was issued a 60-day suspension for allegedly abandoning Train 924 and of the passengers at Mimico Station by withdrawal of services.

The Company declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. BEATTY	(SGD.) B. HOGAN
GENERAL CHAIRPERSON	CN LABOUR RELATIONS

There appeared on behalf of the Company:

Wm. McMurray	– Counsel, Montreal
B. Hogan	– Manager, Work Force Strategy
J. Krawec	– Manager, Labour Relations
A. Hawkins	– Operating Manager
R. Chorkawy	– Senior Manager, Commuter Operations

And on behalf of the Union:

M. Church	– Counsel, Toronto
G. Gower	– Local Chairman, Toronto
W. G. Scarrow	– Vice-President, Ottawa
D. Bondy	– Grievor

AWARD OF THE ARBITRATOR

This grievance concerns two incidents, one of which involves a conductor stopping a passenger train by claiming an unsafe condition under the **Canada Labour Code**.

The material before the Arbitrator confirms that on March 16, 2002, the grievor was removed from service by her supervisor. She was then in the early part of her tour of duty, having operated her train in GO Transit service as conductor from Mimico to Oakville and return. She stopped her train at Mimico to discuss with her supervisor a concern which she had regarding the state of rest and alertness of the assistant conductor working on her train. Ms. Bondy had concerns about the state of rest of Assistant Conduct Bill Hoy, who was assigned to her train notwithstanding that he had just completed a full tour of duty on the day shift. It is common ground that Mr. Hoy had commenced work at or about 5:30 a.m. and that the grievor's tour of duty commenced at our about 3:30 p.m. Concerned that Mr. Hoy would eventually work as assistant conductor on the GO train for more than twelve hours, she contacted the Commuter Central desk by radio to ask whether there could be relief provided for Mr. Hoy when the train passed through Mimico Station, the normal location of crew changes. She was then informed that there would be no relief available for Mr. Hoy until 6:56 p.m. It appears that Ms. Bondy then advised CN Commuter Central Supervisor Frank Tulipano about her concerns, indicating her own belief that there would be a violation of the Company's rest rules if Mr. Hoy worked beyond twelve hours and that she had concerns about the safety of proceeding. According to the grievor's account, the response of Mr. Tulipano was to the effect that he had an arrangement with the local Union chairperson which would allow for an individual in Mr. Hoy's circumstances to continue working, and that he was prepared to show it to her when her train reached Mimico Station. It is common ground that Ms. Bondy did express her own concern that she would not operate the train past Scarborough Station in conditions which she considered to be unsafe.

Upon arrival at Mimico the grievor advised her passengers that there might be a slight delay, engaged the hand brake on her passenger car and exited onto the platform to meet with Mr. Tulipano. In doing so it does not appear disputed that she took her packsack with her, but that she left her keys in the operating panel of the car.

The evidence discloses that when the train reached Mimico Station Mr. Tulipano first spoke with Mr. Hoy, receiving assurances that he felt fit to work. Seeing the grievor on the platform with her personal packsack in her hand he apparently concluded that she had stopped her train and was refusing to proceed any further. On that basis, without any discussion with Ms. Bondy, Mr. Tulipano advised her that she was out of service. He thereupon boarded the train and operated as conductor in her place. It does not appear disputed that the entire event caused no more than a four minute delay in the movement of the GO train in question. Following a disciplinary investigation Ms. Bondy was assessed a suspension of sixty days. The first issue to be determined is whether there was just cause for that penalty.

Upon a careful review of the evidence the Arbitrator has some difficulty sustaining the position of the Company. Firstly, it is true that Ms. Bondy communicated by radio that she had concerns about proceeding past Scarborough by reason of Mr. Hoy's state of rest. However, the evidence does not sustain the submission of the Company to the effect that the grievor had effectively abandoned her train at Mimico. It was her understanding that Mr. Tulipano would meet with her there and explain the arrangement whereby employees could work beyond twelve hours. The Arbitrator accepts the evidence of Ms. Bondy to the effect that she simply secured her train, as that is what she was trained to do when leaving her train even for a few moments, and that she placed the handbrake on her car and went to the platform with her personal bag in her possession simply for its security. For reasons he best appreciates, however, Mr. Tulipano never met with the grievor. He spoke only with Mr. Hoy, and seeing the grievor on the platform at a distance communicated with her by radio to tell her that she was out of service.

The abandonment of one's train is a serious charge. As with any major disciplinary offence, the Company, which bears the burden of proof, must provide evidence of a standard commensurate with the gravity of the misconduct alleged.

Would the grievor have changed her view of the permissible hours of service and the fitness for work of Mr. Hoy if Mr. Tulipano had presented her with some evidence of a written understanding between the Company and the Union concerning hours of service? Would she, in fact, have stopped her train at Scarborough when Mr. Hoy would have reached the limit of twelve hours in service? Could she have been persuaded that Mr. Hoy was, in any event, not overly fatigued and suitably fit to work? None of these questions can be answered, given what the Arbitrator views as the premature action taken by Mr. Tulipano. As a general rule, employees are liable to be disciplined for what they have done, not for what they might or might not do. In the circumstances the Arbitrator is satisfied that

there was no basis for any discipline to be assessed against Ms. Bondy. The Company has not established, to use the language of the notice of discipline, that the grievor "… abandon[ed] train 924 and it's passengers at Mimico station by your withdrawal of services while employed as Conductor on GO Assignment #75, on March 16, 2002." The Arbitrator therefore allows the grievance as it relates to the incident of March 16, 2002 and directs that it be struck from the grievor's record, and that she be fully compensated for all wages and benefits lost.

The incident of May 26, 2002 is considerably more problematic. On that day the grievor reported for work at Willowbrook at 16:20 for a shift commencing at 16:40 as conductor on GO Transit assignment 924. Prior to commencing her shift she learned that the assistant conductor assigned to her train was Mr. Don Miller, an employee who had been on duty since 08:30 that morning. Given that her tour of duty would involve operating the train from 16:40 to 02:00 the following morning, Ms. Bondy formed an immediate concern as to the fitness for work of Mr. Miller. A careful review of the evidence would appear to confirm, as the Company alleges, that she appears to have been under the belief that it would be "illegal" in any event for Mr. Miller to work beyond a total of twelve continuous hours on that day.

The grievor relates that as the train proceeded from Mimico, eastward bound towards Pickering Station, she became concerned about the fitness to work of Mr. Miller. She states that she did not see Mr. Miller on the station platform on any stop in the operation of train no. 924 towards Pickering or on the initial return journey from Pickering to Port Credit. She relates that upon approaching Port Credit she attempted to contact Mr. Miller by radio and asked why he was not on the platforms, as is normal for an assistant conductor. It is common ground that the assistant conductor's duties involve placing a ramp for the disabled at the 5A/5B doors of the train at certain stations, as well as detraining onto the platform at each station stop to signal the all clear to the conductor who then closes the doors before the train proceeds onwards. Additionally, the assistant conductor is expected to patrol the train, to the extent possible between stations, for purposes of general security. The grievor relates that she did not observe Mr. Miller patrolling the train, or detraining onto the platforms, as noted above.

At or about 19:30 the grievor communicated by radio with Commuter Central Dispatcher Mike Cameron, and asked if Mr. Miller would be replaced or temporarily relieved at any point. Mr. Cameron responded that there would be no relief for Mr. Miller, and that he would work up to eighteen hours if need be. It does not appear disputed that during that conversation Ms. Bondy indicated to Mr. Cameron that she believed that working Mr. Miller beyond twelve hours would be a violation of the "hours of service act". It is common ground that there is no such statute, but that the phrase is used in workplace parlance to refer to the general operating instructions which govern hours of work and rest rules.

At or about 20:42 Ms. Bondy's train arrived at Rouge Hill station. At that point Mr. Miller had reached what she viewed as the maximum hours of service allowed under the Company's rest rules. She then communicated with Mr. Cameron by radio and indicated that she was invoking her right to refuse unsafe work under Part II of the **Canada Labour Code**. She then demanded to speak to a Health and Safety representative, and made an announcement to the passengers that there would be a delay in the train. In fact the train proceeded no further, and the Company had to make arrangements to transport the passengers onward by bus. Over the next several hours the process for invoking the right to refuse unsafe work unfolded as contemplated under the **Code**, whereby Company and Union safety representatives attended at the site along with a safety inspector from Transport Canada.

The evidence discloses that at no time prior to invoking her right to refuse unsafe work did Ms. Bondy speak with Mr. Miller as to his condition, or indeed observe him at close range. Her conclusion as to his condition was based entirely on her knowledge that he had worked a full tour of duty before commencing to work on her train, and the apparent neglect of his duties in the early part of the tour of duty, until she communicated with him by radio to tell him to do his job. It is not disputed that thereafter Mr. Miller did detrain onto the platforms, although he did not deploy the ramp for disabled passengers at every station. The evidence indicates, however, that that does not appear to be required at all stations unless there is an actual need for it.

The material confirms that the process of the investigation of the grievor's refusal to work consumed several hours of time. According to the report of the safety inspector dispatched by Transport Canada to the site, Mr. André Lalonde, the work refusal commenced at 20:46 on May 26, 2002, and notification to Transport Canada was received at 01:00 on May 27, 2002. His report relates that he attended at the site and conducted his investigation commencing at 01:38.

A review of the report made by Mr. Lalonde, dated June 5, 2002, confirms that Ms. Bondy related to the Transport Canada inspector the facts concerning Mr. Miller's apparent neglect of his duties and the confirmation

that she had received from Dispatcher Mike Cameron to the effect that Mr. Miller would be allowed to work a full eighteen hours.

The report also contains the employer's description of events as related to the inspector. It appears that the Company officer in attendance related that he had spoken with assistant conductor Don Miller, had observed his condition and asked him whether he felt fit to continue on duty, to which Mr. Miller replied in the affirmative. The report contains the following quote of the Company officer's statement:

> After considering all the information related by the employees involved, and after discussions with the assembled group, Richard Chorkawy and I felt that Denise Bondy was misinterpreting the company instructions regarding hours of service. With that in mind, it was our position that the concerns of Denise Bondy did not meet the definition of "Danger" as prescribed by the Code.

The report of Mr. Lalonde explains the apparent delay in the attendance of the Transport Canada inspector at the site. He relates that he was first contacted by the Company's Director of Commuter Operations at 22:00. He then determined that the steps and procedures contemplated in section 128 of Part II of the **Code** had not been completed, and advised the Company that Transport Canada would respond only when all procedures were properly complete. It appears that the procedures were then followed, and that Mr. Lalonde was so notified at 01:00 on the morning of the 27th, whereupon he promptly attended at the Rouge Hill GO Station.

As Mr. Lalonde's report reflects, he learned that Ms. Bondy had never observed Mr. Miller at close quarters to be able to judge his physical condition or his ability to do his job safely. During the interview Ms. Bondy related to the inspector that she felt that in the event of an emergency Assistant Conductor Miller would not be able to react and that his "… cognitive thinking would not be there or would be distorted."

The report then indicates that Mr. Lalonde interviewed Mr. Miller who confirmed that it was common for him to "double" his tours of duty, and that he did not feel too fatigued to perform his duties safely. The inspector's interview with CN Supervisor Dave Berard and Health and Safety Representative Pierre Labbée of the Union involved some discussion of the Company policy with respect to hours of service. The report contains the statement:

> CN always maintained that at no time are employees who are assigned to commuter service required to work in excess of the requirements of those found in CN GOI Section 4.

The report also contains the statement of Mr. Labbée to the effect that he felt that employees working in excess of twelve hours would be tired and that that could impact on their ability to perform their duties effectively.

The Transport Canada inspector concluded that there was not any danger which justified a refusal of alleged unsafe work under section 128(1) of the **Canada Labour Code, Part II**. At p. 7 his decision in that regard reads as follows:

> **III. DECISION OF THE HEALTH AND SAFETY OFFICER**
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> By definition of danger the potential dangerous condition provoked by the refusal must be an "existing or potential hazard or condition or any future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in chronic illness, in disease or in damage to the reproductive system."
>
> The evidence offered by Ms. Denise Bondy was based on her opinion of Assistant Conductor Don Miller's potential inability to perform his duties safely in the event of an emergency. The refusing employee provided no other evidence to support this opinion. Additionally, at no time was Ms. Bondy close enough to personally observe Mr. Miller's condition in order to visually assess any level of fatigue impairment. Ms. Bondy based her opinion solely on her perception of Mr. Miller's job performance.
>
> The refusing employee also raised her concern that there had been a violation of company and federal regulations pertaining to hours of service. After review of all applicable regulations, including *Maximum Hours of Service*, and *Mandatory Time Off Duty*, I found no such violation with respect to Mr. Miller and his tours of duty on May 26, 2002.

> Moreover, as stated by Ms. Bondy, she reported to company supervisors that she would continue to refuse to operate the train in revenue service, but she would operate the train as equipment. The ambiguity of Ms. Bondy's stance with respect to Mr. Miller [sic] condition, and for which class of service his condition would constitute a danger, did not substantiate her claim that a "danger" existed.
>
> It was my conclusion that there was "no danger" within the purview of Section 128(1) of the Canada Labour Code, Part II to support Ms. Bondy's right to refuse dangerous work because the potential hazard was based on speculation of her fellow employee's condition and the employee's ability to perform his duties safely in the event of an emergency.
>
> The employee and the employer's representative were notified of my decision at 04:35 May 27, 2002.

The evidence of the Company, unchallenged by the Union, is that the actions of the grievor in effectively taking her train out of service had substantial negative impacts on GO Transit and its passengers. A letter to the Company's Director of Commuter Operations from GO Transit's Director, Services Greg W. Percy, dated May 1, 2003, relates that Ms. Bondy's invoking of her right to refuse unsafe work resulted in substantial cost and disruption, including the cancellation of Lakeshore trains, 930, 933, 936 and 937, as well as the cancellation of Richmond Hill Train 830, for an estimated loss in passenger revenue of some $25,000. Mr. Percy estimates that some 7,600 GO passengers would have been affected in some way by her actions, by reason of the ripple consequences spread over a two day period. In addition, he notes that some $3,000 in additional costs were incurred for such factors as providing GO buses and paying the cost of additional crews to reposition the train consist.

Following a disciplinary investigation concerning the events of May 26, 2002 the grievor was discharged effective July 25, 2002 "… for the Wilful Misuse of Part II of the Canada Labour Code, resulting in significant inconvenience to GO Transit and its Passengers while employed as a Conductor, May 26, 2002."

Apart from the disciplinary consequences of the grievor's actions, the record further discloses that Ms. Bondy has been effectively barred by GO Transit from any further work as a conductor or assistant conductor in GO Train service. It appears that GO Transit has a contractual entitlement to invoke such a sanction under the Master Operating Agreement governing the use of CN running trades employees in GO service. To that effect, on May 28, 2002 the Company's Director, Commuter Operations, Mr. R. Chorkawy, received a letter from GO Transit's Manager, Railway Corridors, Terry K. Cattani. That letter reads, in part, as follows:

> GO Transit views Ms. Bondy's actions as unreasonable, unwarranted, unacceptable, and inconsistent with her obligations to provide service to GO Transit. Her actions directly resulted in serious adverse GO Transit service disruptions and substantial customer inconvenience. Please consider this letter a formal request to exclude Conductor Denise Bondy from further participation with the Commuter Services as per article 2.16, "Excluding a Designated Employee from the Commuter Services", within the Master Operating Agreement between Greater Toronto Transit Authority and Canadian National Railway Company (effective date June 1, 2002).

For completeness, it is necessary to refer to other parallel proceedings which were commenced before the Canada Industrial Relations Board by Ms. Bondy, or on behalf of Ms. Bondy by her Union. On May 10, 2002 the Union filed a complaint with the CIRB under section 133 of the **Code** alleging violations of articles 147, 147(1) of the **Code**. In essence, the complaint alleged that the two month suspension assessed against the grievor in relation in to the incident of March 16, 2002 constituted an unlawful reprisal against her in relation to the possible exercise of her right to refuse unsafe work under section 128(1) of the **Code**. A similar complaint was filed by the Union in Ms. Bondy's name with the CIRB on July 5, 2002 in relation to the incident of May 26, 2002. At the time that complaint was filed the grievor was not yet discharged, although she was being held out of service with pay, according to the text of the complaint. That complaint similarly alleges that the actions of the Company in dealing with the grievor concerning the incident of May 26, 2002, are in violation of sections 147 and 147(1) of the **Code**.

In addition, Ms. Bondy herself filed an appeal against the ruling of Transport Canada Inspector Lalonde to the effect that there was no danger on the occasion of her invoking section 128(1) of the **Code** on May 26, 2002. That appeal took the form of a letter addressed to Transport Canada by Ms. Bondy dated June 1, 2002. Ms. Bondy's letter of appeal generated a response from the Canada Appeals Office on Occupational Health and Safety in the form of a letter dated June 7, 2002. That letter signed by Ms. Jocelynne Paris, Assistant to the Appeals Officer, acknowledges

receipt of the grievor's appeal under subsection 129(7) of the **Canada Labour Code, Part II**. It further directs, in part:

> In order to ensure the efficiency of the appeals process, we request that you provide this Office, no later than June 28, 2002 with reasons and all documentations that you intend to submit in support of your appeal, and that you also provide this information to the other party involved in the matter.

It is common ground that the grievor has not responded to the request so made and, to that extent, has not "perfected" her appeal, to use the term employed by counsel for the Company, notwithstanding the passage of close to one year.

It is against the background of the foregoing facts that I turn to consider the merits of this dispute. While the issue before the Arbitrator is whether the Company had just cause for the termination of the grievor, including the related question of whether this is an appropriate case for a substitution of penalty, the dispute also involves consideration of certain provisions of the **Canada Labour Code**. They are as follows:

> **Refusal of work if danger**
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> **128. (1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> > **(a)** the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> >
> > **(b)** a condition exists in the place that constitutes a danger to the employee; or
> >
> > **(c)** the performance of the activity constitutes a danger to the employee or to another employee.
>
> **128. (2)** An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
>
> > **(a)** the refusal puts the life, health or safety of another person directly in danger; or
> >
> > **(b)** the danger referred to in subsection (1) is a normal condition of employment.
>
> **Complaint to Board**
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> **133. (1)** An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.
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> **General prohibition re employer**
>
> **147** No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
>
> > **(a)** has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
> >
> > **(b)** has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
> >
> > **(c)** has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

Abuse of rights

147.1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.

147 (2) The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.

As can be seen from the recitals above, the grievor was discharged by the Company following the May 26, 2002 incident for what the Company characterizes in her notice of termination as "the Wilful Misuse of Part II of the Canada Labour Code". While the Company has not used the phrase "wilfully abused" found in section 147.1 (1) of the **Code**, there appears to be little difference in substance between the language of that section of the **Code** and the reason for the grievor's discharge.

As noted above, a substantial part of the grievor's concern, as reflected in the radio communications on the night of May 26, 2002 and her subsequent statements, involves her view that the hours being worked by Mr. Miller were in excess of the legal limit. It is common ground that there was a dispute between her and the Company with respect to the maximum hours of service provisions (Minister of Transport Notice and Order August 1993) contained in section 4.3 of the CN General Operating Instructions. The provisions in question, generally entitled "Hours of Work, Operating Employees Canada" include the following:

(f) Maximum Hours of Service

(Minister of Transport Notice and Order August 1993)

(i) General Guidelines

(a) This Notice and Order will remain in effect until a new rule is issued.

(b) The Order applies to all operating employees in road service, whether or not covered or non-covered service (assigned or unassigned service).

(c) The order applies to all employees of foreign railways operating on CN lines.

(d) The order does not apply to operating employees in yard service.

(e) The "Mandatory off-duty Time Rules" (also known as Mandatory Rest Rules) effective August 5, 1993 remain in force.

(f) It is the joint responsibility of management and employees to ensure that they are in compliance with the order and do not accept a call for duty in violation hereof.

(ii) Maximum 12 Hours per Tour of Duty

(a) No operating employee in road service who has been on duty in excess of 12 hours will be allowed to operate a train, however, non-operating duties may be performed after the expiration of 12 hours (i.e. booking off, completing journal, dead heading and as detailed below).

(b) Employees that are off duty for at least 8 hours are considered fit for another 12 hours tour.

(c) Deadheading:

– Employees may be deadheaded subsequent to the expiration of the 12th hour.

– Deadheading to the work location will be used in the calculation of the 18 hour restriction, unless the employee has had 8 hours off duty between the deadhead and time required to report for duty.

(d) Exemption to 12 hours maximum per tour of duty:

– In an emergency, employees total time on duty must not exceed 16 hours.

Definition of Emergency: An emergency is where a casualty, potential for loss of life or unavoidable accident occurs, an Act of God or where delay is as a result of a cause not known to the railway or its officers at the time employees left a terminal and which could not have been foreseen. Even where an extraordinary event or combination of events occurs which, by itself, would be sufficient to permit excess on-duty time, the railway must still employ due diligence to avoid or limit such excess service.

(g) Maximum 18 Hours in a 24 Hour Period

(i) No operating employee in road service will be permitted to work in excess of 18 hours in any 24 hour period.

(ii) The calculation of a 24 hour period commences when the employee first reports for duty following an off-duty period of at least 8 hours.

(iii) Employees are allowed to double back from the away from home terminal, but will be subject to the 18 hour in 24 hour restriction. Requirement for 30 minutes off duty between tours of duty has been rescinded.

(iv) Employees may be deadheaded subsequent to the expiration of the 18th hour.

(v) Example: When 8 hours off duty must be taken after working a total of 18 hrs.

On duty	9’30”
Off duty	6’00”
Then available for	8’30”
Total on duty time	18’00”

(emphasis added)

It is not for this Office to make a determinative interpretation of the foregoing provisions of the GOI. It is, however, necessary to examine them to some degree to understand the state of mind of the grievor as that may bear on whether she “wilfully” misused or abused the provisions of section 128(1) of the **Code**. There is an obvious difference between the grievor and the Company with respect to the relationship between the provision stipulating a maximum of twelve hours in the operation of a train and the allowance of a maximum of eighteen hours of on duty time in a twenty-four hour period. It does not appear disputed from the material before the Arbitrator that the Company has adopted an interpretation of the maximum hours of service provisions whereby an employee might, for example, operate a train for a period of twelve hours, take a short rest period, and then operate for a further period to a maximum of eighteen hours. Counsel for the Union submits that this notional concept of “split tours” of duty, which appears to be embraced by number of employees who are desirous of working overtime, is not supported by the Union. He submits that the approach whereby, on the evening of May 26, 2002, Mr. Miller completed his tour of duty and, without leaving his train, continued to work overtime up to an beyond the twelve hour limit, presumably on the notion that he was working two separate tours of duty, is an unduly technical and incorrect application of the intent and purpose of the hours of service regulation. Nothing in this award should be taken as confirmation by this Office of the correctness of the interpretation of these regulations advanced by the Company, by Ms. Bondy or by the Union. For the purposes of this award it is sufficient to note that arguments can credibly be marshalled in support of their differing interpretations.

As regards the state of mind of any employee who invokes section 128.1 of the **Canada Labour Code**, however, a distinction must be made between legality and safety. It may be illegal to jaywalk, but it is plainly not unsafe to do so where it can be shown that there is no moving vehicle for miles around. Similarly, while the GOI may stipulate that an employee is not to operate a train beyond twelve hours, it does not follow that it is necessarily unsafe for a given employee who feels sufficiently rested and alert to do so for more than twelve hours. That much seems implicit from the regulation that allows an operating employee to work 16 hours in an emergency. The physical capacity of an employee to safely perform work is subjective to that individual, and can only be determined on a case by case basis. It cannot be determined by reference to a general rule or regulation. Nor can there be any suggestion that in GO train service working overtime, of itself, is dangerous. As asserted by counsel for the Company, the grievor has herself worked overtime on occasion, although the record does not indicate whether she did so beyond the twelve hour limit found in section 4.3(f)(ii)(a) of the GOI.

The ability to refuse unsafe work is an extremely important right under the **Canada Labour Code**. It must, however, be exercised carefully, with due restraint and with the fullest regard to all relevant factors. The CIRB, and its predecessor the CLRB, have provided useful precedents with respect to the meaning and the scope of an employee's right to refuse work on the basis of his or her reasonable cause to believe that the activity constitutes a danger. (See, e.g., **Casper and Canadian National Railway Company and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States & Canada, Local 257** (1992) 90 di 130; **A. Patrick Gilmore and Canadian National Railway Company** (1994) 96 di 61; **Allen Kucher and Canadian National Railway Company** (1996) 102 di 121; and see also **CROA 1290** and **2785**.)

There can be little doubt but that the grievor had a genuine belief that Mr. Miller was operating in an unsafe condition on the evening of May 26, 2002. It is evident from the material before the Arbitrator, however, that she tied her belief principally to what she viewed as the legal limit within which he could continuously operate a train, namely twelve hours. There is no other basis upon which the Arbitrator can appreciate her decision to take her train out of service at the Rouge Hill GO station, precisely at the time Mr. Miller commenced to exceed the twelve hour on duty limit. As noted above, it is not the employee's genuine belief which is at issue. It is whether, on a more objective test, there were reasonable grounds to conclude that the train operation in which she was involved was unsafe.

There is no dispute that the work performed by a conductor and an assistant conductor in GO train passenger service is highly safety sensitive. Apart from overseeing the safe entraining and detraining of passengers, the conductor and assistant conductor have an important role to play with respect to emergency procedures in the event of any unforeseen event, such as a derailment, an accident or an emergency involving passengers on their train. In the case of an emergency stoppage, it is the obligation of the assistant conductor to provide flagging protection for his or her train as well as to provide emergency assistance to passengers. These are but some examples. No one disputes the obligation of all running trades employees to be vigilant as to the fitness to work of their fellow crew members, particularly where an employee's physical condition, whether by intoxication (Rule G), or fatigue, poses a hazard to safe operations. The Canadian Rail Operating Rules require nothing less:

Canadian Rail Operating Rules

General Notice

> Safety and a willingness to obey the rules is of the first importance in the performance of duty. If in doubt, the safe course must be taken.

General Rules

> **A.** Every employee in any service connected with the movement of trains or engines shall:
>
> **(i)** be subject to and conversant with these rules, special instructions and general operating instructions;
>
> …
>
> **(iii)** provide every possible assistance to ensure every rule, special instruction and general operating instruction is complied with and shall report promptly to the proper authority any violations thereof;
>
> **(iv)** communicate by the quickest available means to the proper authority any condition which may affect the safe movement of a train or engine and be alert to the company's interest and join forces to protect it;
>
> …
>
> **(vi)** be conversant with and be governed by every safety rule and instruction of the company pertaining to their occupation;

In the case at hand the evidence falls short of establishing that Ms. Bondy had an objective basis upon which to conclude reasonably that Mr. Miller was unfit to work. As noted above, from the time she came on duty until the time she invoked section 128.1 of the **Code** at the Rouge Hill station, a period of some four hours, she had no direct contact with Mr. Miller, and was never in a position to observe him at close quarters. According to her testimony she was limited to viewing him at a distance, and observing that on some occasions he did not deploy the wheelchair safety ramp, that he did not consistently step onto the platform at stations and that, as best she could determine, he

did not appear to be patrolling the train before she gave him a reminder by radio that he should be more diligent in his tasks.

It is a cornerstone rule of railroading that a running trades employee is to be the judge of his or her own condition to work. As a result, in the case where an employee advises the company that he or she feels unfit to continue to work, and that to do so would jeopardize safety, it is generally incumbent on the employer then to provide prompt relief for that individual. The situation is far less simple, however where, as in the case at hand, one employee purports to judge the fitness to work of another, and does so with little or no close exposure to that individual.

As noted above, Ms. Bondy did not observe Mr. Miller nor speak with him to judge his physical condition. Mr. Miller at all times maintained that he was sufficiently rested and alert to work his overtime tour of duty, presumably to a maximum total of eighteen hours. While the Union's safety representative who attended at the work stoppage indicated that he would not want to work with Mr. Miller after his twelve hours on duty, the Company supervisors who were in attendance, as well as the Transport Canada inspector, Mr. Lalonde, were all of the opinion that Mr. Miller's physical condition did not constitute a danger within the meaning of section 128(1) of the **Canada Labour Code**.

As noted above, Ms. Bondy filed a letter appealing the determination made by Transport Canada Inspector Lalonde. As part of its submission, the Union asserts the provisions of section 147 of the **Code** to argue that, as the grievor's appeal is still pending, the Company was not entitled to dismiss or otherwise penalize Ms. Bondy by reason of her having invoked her rights under the **Code**. Counsel for the Union stresses that it is only upon the exhaustion of all appeals, consistent with section 147.1(1), that an employer may take disciplinary action against an employee who has wilfully abused his or her rights.

In the Arbitrator's view that submission cannot succeed on the facts of the case at hand. As noted above, on June 1, 2002 Ms. Bondy wrote a letter to Transport Canada appealing the ruling of Mr. Lalonde. Shortly thereafter, on June 7, 2002 she was advised in writing that she must provide the Canada Appeals Office on Occupational Health & Safety the supporting reasons and all documentation in relation to her appeal "… no later than June 28, 2002." It is not disputed that she did not provide any further material. She has done nothing further in relation to that proceeding for close to a year.

It seems evident to this Office that an employee cannot frustrate the ability of an employer under the **Canada Labour Code** to impose discipline for the abuse or misuse of section 128(1) of the **Code** by simply filing an appeal and leaving the matter pending indefinitely. In the circumstances, for the purposes of section 147.1(1) of the **Code**, the Arbitrator is prepared to conclude that Ms. Bondy has abandoned her appeal and that her appeal must therefore be deemed to have been exhausted within the meaning of that section of the **Code**. There was, therefore, no impediment to the Company assessing discipline against her. While it might have been arguable that the Company could not act during the period of time immediately following the filing of the grievor's letter of appeal to Transport Canada on June 1, 2002, I am satisfied that on July 25, 2002, the date of the grievor's discharge, one month after the deadline given to Ms. Bondy to perfect her appeal, that it was not unreasonable for the Company to consider that she had abandoned it, a conclusion amply supported by her continued inaction for close to one year since that time.

With respect to the merits of the grievance, did the Company have cause to discipline Ms. Bondy for what it perceived to be her misuse of the right to refuse unsafe work under the **Code**? After careful consideration, I am satisfied that it did. The fact that Mr. Miller had worked a tour of duty, and that working overtime would eventually involve him working more than twelve hours in a single day does not, quite apart from the issue of legality, of itself constitute grounds to conclude that Mr. Miller was so impaired by fatigue as to constitute a danger within the meaning of section 128(1) of the **Code**. Nor, based on Mr. Miller's own account and that of others who observed him, including the Transport Canada inspector, can the Arbitrator conclude, on the balance of probabilities, that Mr. Miller was not fit to work on the occasion in question, or indeed that Ms. Bondy had reasonable grounds to conclude that he was not fit to work.

Regrettably, the evidence suggests that the grievor became an employee on a mission, apparently based on her strong personal view of the application of the twelve hours on duty limit found in section 4.3 of the GOI. Significantly, although she claims to have observed Mr. Miller working in a manner that she viewed as unsafe for some considerable period of time during the early part of her tour of duty, it is not until he reached the twelve hour limit that she punctually invoked the application of section 128.1 of the **Code**. I am compelled to the inevitable conclusion that she then did so as a means of vindicating her own view that the Company's interpretation of the GOI

was itself contrary to the regulation and inconsistent with safe operations. While I accept that Ms. Bondy had a genuine belief that Mr. Miller should not be working on her train, I cannot find on the evidence adduced that she had reasonable objective grounds to believe that he was in fact unfit to work safely, which is to say that in the circumstances she did not have reasonable grounds to invoke the provisions of section 128(1) of the **Code**. Her actions, which can fairly be characterized as reckless, did amount to wilful misuse of the **Code**.

What then of the penalty of discharge? In the Arbitrator's view there are mitigating factors in the case at hand which suggest that it was excessive for the Company to summarily withdraw the grievor from service and discharge her for the events of May 26, 2002. A review of the evidence discloses that Ms. Bondy did not act frivolously or in bad faith. Nor did she act without giving ample advance notice to the Company of her concerns. As noted above, she communicated with Dispatcher Mike Cameron early during the tour of duty to inquire of the possibility of relieving Mr. Miller, clearly stating her concerns that he should not be operating the train beyond what she viewed as the regulatory limit of twelve continuous hours. While I am satisfied that the grievor's judgement was clouded by an excess of zeal, she did nevertheless act based on her understanding of the governing safety regulation concerning hours of work, under a colour of right. While her error in judgement is not excused thereby, the gravity of her actions, and the appropriate disciplinary response, must be assessed within that context. In the Arbitrator's view it was not on its face unreasonable for Ms. Bondy to have concerns about her assistant conductor working a possible uninterrupted eighteen hours in the operation of a passenger train, given the language of the GOI.

There are other mitigating factors to be considered. Ms. Bondy is an employee of sixteen years' service who, it appears, has only once been the subject of discipline on a prior occasion. She has never been disciplined for a violation of operating rules or any infraction relating to safety. On the whole, the Arbitrator must conclude that the Company's decision to discharge Ms. Bondy was excessive in the circumstances. In my view the instant case discloses errors in judgement on both sides, and merits a corresponding adjustment in the discipline assessed against Ms. Bondy.

The grievance is therefore allowed, in part. In addition to the removal of the suspension and order of compensation and benefits made above in relation to the incident of March 16, 2002, the Arbitrator directs that Ms. Bondy be reinstated forthwith into her employment, with compensation for one-half the wages and benefits lost from the time of her termination to the date of her reinstatement, and without loss of seniority. While the Arbitrator appreciates that the instant ruling does not of itself bind GO Transit, it is to be hoped that GO Transit will consider revising its request concerning Ms. Bondy's services, perhaps conditional upon her undertaking not to utilize section 128(1) of the **Canada Labour Code** to enforce her interpretation of the hours of service provisions of the CN GOI. In any event, should there be any issue as to the appropriate assignment to be given to the grievor upon her return to work the matter may be spoken to.

June 2, 2003

(signed) MICHEL G. PICHER
ARBITRATOR