CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3433

Heard in Montreal, Wednesday, 9 June 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discharge of Conductor Eric Devanney for "improper and fraudulent reporting of time claimed during the period of March 15, 2004 through to March 29, 2004."

JOINT STATEMENT OF ISSUE:

On April 16, 2004, Conductor Devanney was required to attend an investigation in "connection with the circumstances concerning the alleged delay to assignment L515 and improper reporting of time claimed on March 15, 16, 17, 18, 22, 23, 24, 25, 26 and 29." Subsequent to the investigation, Conductor Devanney was discharged for reasons as articulated above.

Although not limited hereto, it is the Union's position that the discipline assessed was unwarranted and, in any event, too severe. The Union requested that the grievor be reinstated, made whole without loss of seniority and benefits, and compensated for all lost earnings.

The Company denied the Union's request.

The matter is now properly before the Arbitrator for resolution.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. A. BEATTY	(SGD.) J. KRAWEK
GENERAL CHAIRPERSON	MANAGER – HUMAN RESOURCES

There appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
Wm. Hlibchuk	– Counsel, Montreal
D. Van Cauwenbergh	– Sr. Manager, Labour Relations, Toronto
B. Hogan	– Manager, Human Resources, Toronto
R. W. McGirr	– Assistant Superintendent

N. Gagnon	– Superintendent
Constable G. Boudreau	– CN Police
Constable B. Gallaghan	– CN Police
M. McNeil	– Witness
J. Stewart	– Witness

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. A. Beatty	– General Chairperson, Sault Ste. Marie
J. W. Armstrong	– Vice-President, Edmonton
R. Hackl	– Vice-General Chairperson, Edmonton
F. Boutilier	– Local Chairperson, (Yard) Halifax
E. Devanney	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator does not establish that the grievor knowingly or fraudulently engaged in a course of conduct involving the making of false time claims. Firstly, it is not disputed that there is no time claim made by Conductor Devanney in respect of his own time which is improper or would have gained to him any monies to which he was not entitled. The thrust of the Company's position is that Conductor Devanney tied up both himself and his fellow crew member, Locomotive Engineer Thomas Hollis, in such a way as to result in excessive payments of overtime to Mr. Hollis.

The record discloses that on March 17, 2004 Locomotive Engineer Hollis left the Truro Yard at 16:55. Conductor Devanney made a CATS profile entry for both himself and Mr. Hollis which showed them both as tied up for 17:10, which the Company

maintains constituted the theft of fifteen minutes of overtime by Locomotive Engineer Hollis as carried out by the grievor.

On March 25, 2004 Conductor Devanney, whose regular tour of duty was scheduled to end at 14:00, left the work place at 13:45 when it became evident that he could be seen by a chiropractor. He then arranged for Locomotive Engineer Hollis to perform his tie-up. It appears that on that date the work performed by the crew concluded at 12:14. Locomotive Engineer Hollis apparently left the property at 12:43, and returned, tying up both himself and Mr. Devanney in CATS for 14:00 at 14:24.

Finally, on March 26, 2004 Conductor Devanney made a CATS entry tying up both himself and Locomotive Engineer Hollis for 16:10. In fact Locomotive Engineer Hollis had left the yard at 15:36, apparently to participate in a visit to his mother's grave. The Company submits that that incident involves a theft of thirty-four minutes of overtime by Locomotive Engineer Hollis, as carried out by the grievor.

Counsel for the Company raises two concerns about what he characterizes as the improper actions of Conductor Devanney. Firstly, he maintains that the obligation of the employees was to show themselves as tied up at or near the point in time when their actual work was finished, and not at the conclusion of their normal tour of duty. For example, when the work was completed at 12:14 on March 25, 2004 counsel for the Company submits that the failure to tie up in CATS at or about that point in time

constituted a false entry. He stresses that the entry of tie up in CATS for 14:00 made by Mr. Hollis on that occasion leaves the Company with a record to indicate that at Truro, an unsupervised location, the workload was in fact one hour and forty-five minutes greater than it really was. This, he submits, prevents the Company from gaining accurate information for the purposes of manpower deployment.

Secondly, the Company's counsel asserts that the manner in which Mr. Devanney tied himself and Mr. Hollis up resulted in an improper overpayment of Mr. Hollis. He acknowledges that it is not inappropriate for one employee to do the CATS entry tying up another member of his or her crew. He submits, however, that in that circumstances it is incumbent on the employee making the CATS entry to give an accurate time as to the point at which the other crew member has terminated his or her actual work and left the premises.

Counsel for the Union expresses profound outrage at what he characterizes as the bad faith treatment of Mr. Devanney by Company management. He submits that it has been common practice for conductors to make CATS entries tying up their crew, generally assigning the same tie up time for all crew members, without necessarily keeping track of the precise minute to minute location or departure from the premises of other crew members. He submits that Conductor Devanney, a long service employee with a good disciplinary record, was innocent of any fraudulent intent, and that the Company, knowing full well that he was, nevertheless discharged him out of a callous

indifference to his personal circumstances, and his previous good service, simply to make an example of him for others.

The first issue for the Arbitrator to resolve is whether the Company has established, on the balance of probabilities, that the grievor knowingly and deliberately acted fraudulently in the reporting of time claims on the dates in question. I cannot find that that allegation is made out on the evidence. During the course of his disciplinary interview, which was extremely brief, when Mr. Devanney was asked to explain why he made CATS entries for Locomotive Engineer Hollis as he did he simply responded: “It has been a common practice for us to go off duty as a crew on this assignment. I did not actually see this day as any other. I now realize that this is not an acceptable procedure and I will not do this again.”

The material before the Arbitrator tends to confirm that there was a tolerance on the part of the Company of one crew member making CATS entries tying up other members of his crew, using the same time for the entire crew. In circumstances where a conductor might have paper work to fill out beyond the working time of the locomotive engineer, that might result in an obvious discrepancy. While that would make no practical difference if the tie up is within the normal tour of duty, it could have an improper impact in an overtime situation. However, it is far from clear to the Arbitrator that the strict rule which the Company now seeks to enforce, as indeed it is entitled to do, was fairly and properly communicated to the grievor at and before the time in question. Nor can the Arbitrator ascribe any blame to Mr. Devanney with respect to the

incident of March 25, 2004, to the extent that it was Mr. Hollis who, in his absence, made the CATS entry on that occasion.

Notwithstanding the foregoing, the Arbitrator is of the view that there would appear to have been an error in judgement exercised by Mr. Devanney which he knew, or reasonably should have known, could involve the recording of inaccurate information. In particular, the tying up of Mr. Hollis on March 26, 2004 when he had in fact left the premises thirty-four minutes earlier, would indicate an error of judgement bordering on recklessness. It does not, however, in my view constitute a deliberate scheme to defraud the Company or engage in the theft of time.

The issue then becomes the appropriate measure of discipline. Mr. Devanney is an employee of thirty years' service with an extremely positive career discipline record, a record containing no suggestion of dishonesty on his part. I must agree with counsel for the Union that on the objective evidence available to the Company it knew, or reasonably should have known, that the actions of the grievor did not merit discharge. I am satisfied, however, that there were grounds for assessing some discipline against Conductor Devanney for the poor judgement exercised by him on March 26, with respect to the time recorded for Locomotive Engineer Hollis. In my view the assessment of demerits would have been sufficient in that circumstances to bring home to the grievor the need to be more precise in the recording of tying up times for other members of his crew.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with full compensation for all wages and benefits lost. His record shall be amended to show the assessment of fifteen demerits for carelessness in the recording of the off duty time of Locomotive Engineer Hollis on March 26, 2004.

June 14, 2004

(signed) MICHEL G. PICHER
ARBITRATOR