

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3434

Heard in Montreal, Wednesday, 9 June 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**TEAMSTERS CANADA RAIL CONFERENCE
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)**

DISPUTE:

Discharge of Locomotive Engineer T.J. Hollis for alleged “improper and fraudulent reporting of time claimed, during the period of March 15, 2004 through March 29, 2004.”

JOINT STATEMENT OF ISSUE:

On April 12, 2004 Locomotive Engineer Hollis was notified that he was required to attend a formal employee statement on April 14, 2003 in connection with “the circumstances surrounding alleged delay to your assignment and alleged improper reporting of time claimed, during your tour of duty on March 15, 16, 17, 18, 22, 23, 24, 25, 26 and 29, 2004”. The Union twice formally requested that the Company make available the specifically requested information prior to the investigation but the requests were refused. The employee statement proceeded over the registered objections of the Union.

On May 5, 2004, Locomotive Engineer [Hollis] was notified that he was discharged.

The Union’s position is that Locomotive Engineer Hollis was not provided with a fair and impartial hearing. In the alternative, the Union’s position is that Locomotive Engineer Hollis’ discharge was unwarranted. The Union request that Mr. Hollis be reinstated without loss of seniority and with full compensation for all time lost.

The Company disagrees with the positions advanced by the Union and maintains that all pertinent information involving Mr. Hollis’ responsibility in this matter was presented at the outset of the investigation and, further, the assessment of “discharge” in this instance was appropriate in the circumstances.

FOR THE UNION:

(SGD.) C. SMITH
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. KRAWEK
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. Gallagher	– CN Police
M. McNeil	– Witness
J. Stewart	– Witness

And on behalf of the Union:

J. Shields	– Counsel, Ottawa
R. Leclerc	– General Chairman, Quebec
C. Smith	– 1st. Vice-General Chairman
T. J. Hollis	– Grievor

AWARD OF THE ARBITRATOR

The Union raises a preliminary objection with respect to the issue of whether the grievor was afforded a fair and impartial investigation. It is common ground that the Company conducted surveillance of Locomotive Engineer Hollis as a result of an e-mail tip received by management. That surveillance ultimately resulted in the conduct of a disciplinary interview resulting in the termination of Locomotive Engineer Hollis. The Union maintains that the grievor's right to a fair and impartial investigation under the terms of the collective agreement was violated by the Company's failure to provide to Mr. Hollis or his Union representative a copy of the e-mail which the Company maintains justified the institution of surveillance.

The Arbitrator cannot sustain the objection in the circumstances of the case at hand. Firstly, it is clear on the material before me that the Company relied only on the

evidence contained within the disciplinary investigation in coming to its decision to discipline Locomotive Engineer Hollis. While it is true that the e-mail may be relevant to the justification of the Company resorting to surveillance of its employees, the content of the e-mail itself is not relevant as regards the evidence relied upon by the Company to justify the termination of Locomotive Engineer Hollis. In other words, there is no document relevant to the decision of the Company withheld from the grievor or his Union on the facts of the case at hand. While the e-mail may explain the reason why the Company decided to undertake the investigation, it does not itself form part of the merits of the evidence dealing with the Company's decision to discipline Locomotive Engineer Hollis. It is not, to that extent, a document relied upon by the Company in support of its decision and cannot be characterized as a document improperly withheld from the grievor at the time of the investigation. In the circumstances, the Arbitrator cannot find any violation of the standard of a fair and impartial investigation mandated by article 71 of the collective agreement.

With respect to the merits of the grievance the Arbitrator cannot sustain the decision of the Company to summarily dismiss Locomotive Engineer Hollis on the evidence disclosed. While it does appear that on a number of occasions Locomotive Engineer Hollis was paid for time not worked, that was generally by reason of the practice, which I am satisfied was general and common at the location, for the conductor of the crew to make the CATS entry tying up both members of the crew, entering the same time for them. While the Company is clearly entitled to enforce a tighter standard, as it has apparently done more recently, at the time in question there

appears to have been a degree of laxity in the enforcement of the rule, and some tolerance on the part of the Company of crews being tied up as a unit. Insofar as the Company's allegation would therefore involve a deliberate attempt on the part of the grievor to falsify time claims in an effort to mislead the Company, the Arbitrator cannot, on the balance of probabilities, find that allegation to be made out as regards Locomotive Engineer Hollis.

There is, however, evidence of conduct on the part of Mr. Hollis which does, nevertheless, merit a serious degree of discipline. While Mr. Hollis may be a long service employee, he does not have an exemplary disciplinary record. In addition to a number of serious rules infractions over the years, he was previously disciplined for improperly booking sick, and providing incorrect information when doing so. Additionally, he was investigated and verbally warned with respect to not leaving Company premises without authorization during his tour of duty. The material before the Arbitrator discloses that on March 26, 2004 Locomotive Engineer Hollis left work to visit his mother's grave, arranging for his conductor to tie him up in the CATS system, resulting in an additional thirty-four minutes of overtime being claimed on his behalf. Additionally, Locomotive Engineer Hollis left the Truro Yard without authorization on two occasions. On March 23, 2004 he did so apparently to pick up his car at a dealership, leaving the premises at 16:07 and returning to tie himself up at 16:34. Additionally, on March 25, 2004, having completed productive work at 12:14, Locomotive Engineer Hollis left the Company's property at 12:43, returning to tie up in CATS at 14:24, again without authorization.

The Arbitrator cannot agree with counsel for the Company that the conduct engaged in by Locomotive Engineer Hollis constitutes a concerted attempt to engage in the theft of time. It is common ground, for example, that on March 25, he would in any event have been entitled to a minimum payment up to 14:00, the time for which he indicated himself as tied up. The fact remains, however, that the grievor was careless with respect to providing the Company accurate information as to the time at which his productive work had ceased and was clearly indifferent to the directives which he had received concerning his unacceptable tendency to leave the Company's premises during his tour of duty.

In all of the circumstances the Arbitrator is satisfied that while the termination of Locomotive Engineer Hollis was not appropriate, a serious measure of discipline was justified. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost, and without loss of seniority. The period of time between the grievor's termination and reinstatement shall be registered as a suspension for carelessness in timekeeping and leaving the workplace without authorization.

June 14, 2004

(signed) MICHEL G. PICHER
ARBITRATOR