

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**CASE NO. 3439**

Heard in Edmonton, Tuesday, 13 July 2004

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION**

**EX PARTE**

**DISPUTE:**

Dismissal of John Kruger without an investigation.

**UNION'S STATEMENT OF ISSUE:**

John Kruger was sent a notice to appear for an investigation on March 21st, 2003. Unfortunately, Mr. Kruger did not receive this notice until March 23rd, 2003. For obvious reasons he did not attend the March 21st. investigation.

A series of letters ensued, none of which were received by Mr. Kruger in advance of the statement date.

Mr. Kruger then received a letter stating that he was dismissed.

The Union contends that Mr. Kruger was disciplined without the benefit of an investigation, as required by the collective agreement. Accordingly, the Union requests that John Kruger be reinstated and that he be made whole for all wages and benefits lost.

The Company disagrees.

**FOR THE UNION:**

**(SGD.) R. A. HACKL**  
**FOR: GENERAL CHAIRPERSON**

There appeared on behalf of the Company:

|           |  |
|-----------|--|
| J. Hunder | – Counsel, Edmonton                      |
| R. Reny   | – Sr. Manager, Human Resources, Edmonton |
| D. Brodie | – Manager, Labour Relations, Edmonton    |
| T. Brown  | – Superintendent, Edmonton               |

And on behalf of the Union:

|                 |  |
|-----------------|--|
| D. Ellickson    | – Counsel, Toronto                     |
| R. A. Hackl     | – Vice-General Chairperson, Edmonton   |
| J. W. Armstrong | – Vice-President, UTU-Canada, Edmonton |
| Wm. Witwicky    | – Vice-Local Chairperson, Kamloops     |
| J. Kruger       | – Grievor                              |

### **AWARD OF THE ARBITRATOR**

The record confirms that the grievor's employment file was closed after he repeatedly failed to respond to communications from the Company, and in particular to notices to attend at disciplinary investigations.

At the time of the events giving rise to his discharge, the grievor, Conductor John Kruger, had exercised his seniority to bid onto the furlough board at Biggar, Saskatchewan. In that capacity, while he continued to be entitled to the payment of wages, he was under an obligation to be available to respond to calls to work as needed. It appears that in the situation then in effect at Biggar he would occupy an active furlough board for half the month, and an inactive furlough board for the remainder. In other words, he could expect to be called for service every other week.

There appears to be some dispute between the parties as to the precise number of times the grievor may have been called for service, and failed to respond to his call.

The Company believes that the grievor was given three calls to work between September 6, 2002 and March 31, 2003, while the Union believes that there were four occasions when the grievor was called. The Arbitrator does not view that difference as material to the outcome of this grievance. Significantly, it is common ground that the grievor did miss calls for work on two occasions, being February 8 and March 14, 2003. Nor does it appear disputed that for working on one single occasion in a period of over six months, as a person on the furlough board the grievor received in excess of \$32,000 in wages.

Not surprisingly, the Company had concerns about the grievor's failure to respond to calls while he was on the furlough board. It therefore delivered to him a notice to appear at an investigation scheduled for March 21, 2003. An attempt to contact the grievor by telephone on that occasion met with no success, and a registered letter was therefore sent to him. Without responding, the grievor did not attend at the scheduled investigation. The Company then sent a second notice by registered mail, advising the grievor to attend at a further employee statement on April 4, 2003. An additional notice was then provided, indicating that there would also be an investigation into his failure to attend at the statement scheduled for March 21, 2003. The statements scheduled for April 4, 2003 were also not attended by the grievor, nor did he provide any response or explanation to the Company, notwithstanding that it is common ground that he did in fact receive the notice of those investigations on or about April 4, 2003.

The Company next sent a third notice to the grievor, by registered mail, advising of an investigation scheduled for April 28, 2003. The notice summarised the previous notices and failures to attend and further indicated that should the grievor fail to attend the April 28 statement his employee record would be closed. The grievor did not attend the statement scheduled for April 28, and again provided no response or explanation to the Company. The material before the Arbitrator confirms that the grievor did receive delivery of the final notice, sent to him on April 17, 2003, on May 6, 2003. In the result, on April 28, 2003 the Company sent a letter to the grievor advising that his employment file with the Company had been closed.

The Company heard nothing from the grievor until June 16, 2003, when the Union initiated an appeal of the grievor's termination and closure of file. It does not appear disputed that while the grievor did not respond to the various notices which were sent to him concerning his failure to respond to the calls to work, as well as his failures to attend scheduled investigations, he was in fact working in the service of the Hudson's Bay Railway, out of the terminal of Gillam, Manitoba, some 1,200 kilometres from his home terminal with the Company in Biggar, Saskatchewan. What the evidence reflects is that the grievor knowingly rendered himself unavailable for service while drawing the benefit of wages on the furlough board by reason of his decision to provide his services at the same time to the Hudson's Bay Railway in Manitoba.

By any standard, furlough board protection is an extraordinary form of job security. In exchange for concessions in the management of its operations, including

the ability to operate on a conductor only basis, the Company has provided to the Union and its members the opportunity to protect wages through the establishment of furlough boards. While employees on a furlough board remain subject to being called to work, the reality is that they perform little active service to the Company while continuing to receive the value of wages and benefits. In some circumstances, as was the case of Mr. Kruger, employees can, by the exercise of their seniority, bid onto the furlough board. In the Arbitrator's view, a most basic element of the bargain between the Company and the Union in the furlough board arrangement is that employees who enjoy that extraordinary protection must take all reasonable steps to be available for work when called.

Regrettably, the case at hand discloses a remarkable degree of indifference on the part of the grievor. Not only was he unavailable for the limited number of calls which he received, he remained unavailable for disciplinary investigations for missing those calls, all by reason of the fact that he had gone to work for another railway, in another province while enjoying the wages and benefits of furlough board standing.

While it may not be in violation of the furlough board system for an employee to hold work outside the Company, it would appear clear to the Arbitrator that such work cannot interfere with an employee's fundamental obligation to the Company, namely to be available for work when called or at a minimum, to provide an explanation for the failure to do so. Not only did the grievor fail in the basic obligation of availability, more importantly he failed in the obligation to respond to the Company's efforts to investigate

the reasons for his non-availability, and did so repeatedly notwithstanding his awareness of the Company's concern as early as April 4, 2004.

In all of the circumstances the Arbitrator is left with little alternative but to conclude that, for reasons he best appreciates, the grievor effectively abandoned his employment. In the circumstances I am satisfied that the Company was justified in its decision to close his employment file. The grievance must therefore be dismissed.

July 20, 2004

**(signed) MICHEL G. PICHER**  
ARBITRATOR