

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3441

Heard in Edmonton, Wednesday, 14 July 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

Heavy Equipment Operator J. Frederick of Calgary who was discharged for conduct unbecoming an employee of CN while on duty September 18 and 19, 2003.

COMPANY'S STATEMENT OF ISSUE:

On September 18, 2003, Mr. J. Frederick was working as a heavy equipment operator at the Calgary Intermodal Terminal. While attempting to remove container TNXU 78517, Mr. Frederick lifted the tractor portion of the truck off the ground. As a result of this incident, Mr. Don Timbrell, a truck driver for Trans-X Company, filed a written complaint to CN concerning Mr. Frederick's conduct.

On September 19, 2003, Mr. J. Frederick was again working as a heavy equipment operator at the Calgary Intermodal Terminal. On that same day, Mr. Jeff Hayden, a truck driver for Laker Company, filed a written complaint to CN that Mr. Frederick had questioned him in an inappropriate manner, used profane language when speaking to him, and ignored the driver's request for assistance to reset a container onto the truck.

The Company required that Mr. Frederick attend an employee investigation and the grievor was subsequently discharge for these culminating incidents of conduct unbecoming an employee of CN.

The Union contends that: the allegations against Mr. Frederick were not substantiated during the investigation; the Company solicited evidence against the grievor to the chagrin of the witness; it is further the Union's position that any discipline, if warranted, was excessive in

the circumstances of the case; discipline must also be mitigated by the fact that the grievor is seeking help through the EFAP. Accordingly, the Union is asking that the grievor be reinstated forthwith, and that he be compensated for all lost wages and benefits.

The Company disagrees and has declined the Union's appeal.

UNION'S STATEMENT OF ISSUE:

Following an investigative statement held on September 24, 2003, Mr. Jim Frederick was dismissed for alleged conduct unbecoming a CN employee. The specific allegations against the grievor were that he swore at a truck driver for Transx and that he lifted the cab of the Transx truck during the performance of his duties.

It is the Union's position that the allegations against Mr. Frederick were not substantiated during the investigation and that the Company solicited evidence against the grievor to the chagrin of the witness.

It is further the Union's position that any discipline, if warranted, was excessive in the circumstances of the case. Discipline must also be mitigated by the fact that the grievor is seeking help through the EFAP.

Accordingly, the Union is asking that the grievor be reinstated forthwith, and that he be compensated for all lost wages and benefits.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

FOR THE COMPANY:

(SGD.) P. PAYNE
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

- P. Payne – Manager, Labour Relations, Edmonton
- D. Brodie – Manager, Labour Relations, Edmonton
- T. Brown – Superintendent, Edmonton

And on behalf of the Union:

- J. Moore-Gough – National Representative, Chatham
- B. Kennedy – Regional Representative, Edmonton
- L. Colby – Local Chairperson, Calgary
- J. Frederick – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the Company did have reason to assess discipline against Heavy Machine Operator Jim Frederick. I am satisfied, on the basis of the evidence adduced, that Mr. Frederick displayed an unacceptable level of indifference towards the Company's customers, in the person of independent truck drivers utilizing the Calgary Intermodal facility. He did so, in one case, by laughing at a driver who was concerned that his tractor had been lifted when Mr. Frederick was in the process of removing a container from the driver's trailer by the operation of his crane. It appears that in that circumstance the forward pins of the container were still engaged in the chassis of the trailer, causing the rear wheels of the tractor to be elevated. The grievor's attitude towards the incident caused the driver to write a letter of complaint concerning that incident which occurred on September 18, 2003. The next day, September 19, 2003, resulted in another written complaint from a different driver, essentially taking exception to the dismissive attitude of Mr. Frederick, and the fact that he apparently makes himself available on the CB radio to certain truck drivers, and not to others.

The grievor does not have a positive disciplinary record. At the time of the incidents in question he had thirty-five demerits on his record. Over the years he incurred discipline for safety related infractions and failures of service and the failure of proper service to customers on some six separate occasions.

The only real issue in the case at hand is the appropriate measure of discipline. While the grievor's record is not exemplary, and the evidence does indicate errors of judgement on his part which justified the assessment of discipline, there are mitigating factors to be considered. While the grievor's service has been interrupted, he has been employed by the Company for some seventeen years. The evidence further indicates that with respect to the issue of the lifting of the tractor on September 18, 2003, resulting in a complaint from the truck driver involved, there was a partial fault on the part of the driver. It does not appear disputed that the locking pins located at the front end of the container, which serve to fasten the container to the chassis of the trailer, were not in fact unlocked and open, as they should have been. The obligation to open the pins is the driver's. While it appears that the Company has instructed CN drivers to open the pins, and has indicated to heavy equipment operators that they should report drivers who fail to do so, the evidence falls short of a clear directive from the Company to crane operators advising that they should not handle a container until all pins are properly released. In the result, it appears that there has been some tolerance on the part of the Company of a short cut process whereby crane operators attempt to partially lift and then slide the container towards the rear of the chassis to allow the pins to come out of the locking slots. It would appear that that was the process that the grievor was engaged in when he jostled and lifted the chassis of the complaining truck driver's unit.

While in the Arbitrator's view these circumstances do not justify the manner in which the grievor proceeded, and certainly would not amount to condonation of his having laughed at the truck driver whose tractor was lifted up, there would, at a

minimum, appear to be a certain amount of responsibility on the part of the Company for effectively tolerating this method of operating. In addition, it appears that the grievor, who has had anger management issues in the past, did refer himself to the EFAP program following his termination.

In all of the circumstances the Arbitrator is satisfied that this is an appropriate case for the fashioning of a remedy which gives the grievor a last chance at rehabilitation. It would be stressed that I am satisfied that the Company has been patient and faithful to principles of progressive discipline in its handling of the grievor's prior infractions. He must therefore appreciate that any further discipline may have the most serious of consequences.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. His disciplinary record shall stand at thirty-five demerits.

July 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR