

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3523

Heard in Calgary, Tuesday, 8 November 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of dismissal of Mr. Rick Windsor on December 19, 2002, in connection with an incident in the Lethbridge Yard on December 6, 2002.

JOINT STATEMENT OF ISSUE:

On December 19, 2002, Mr. Windsor was issued a Form 104 which dismissed him from Company service for his "failure to ensure that your movement was operated in compliance with the rules and instructions resulting in a side collision and damage to cars GATX 301069, LW 60969, GATX 48044 and GATX 48095, for your failure to immediately report this incident and for providing false information to a Company officer in regards to a side collision."

Mr. Windsor entered the Company's service in January 1995, and was promoted to conductor in February 1997. The Union's position is that the dismissal of Mr. Windsor is far too severe and excessive a penalty in these circumstances. The Union submits that Mr. Windsor's conduct in connection with the December 6, 2002 incident is isolated and uncharacteristic of his proven ability to work safely and diligently.

It is the Union's position that there are sufficient mitigating circumstances to warrant reinstatement without loss of seniority or benefits. Mr. Windsor was suffering from excessive personal stress as well as depression during the period up to and including the December 6, 2002 incident. The Union submits that these non-culpable circumstances substantially interfered with Mr. Windsor's ability to comply with the rules.

It is the Union's position that the dismissal of Mr. Windsor is not in keeping with the Company's obligation to accommodate his personal medical condition(s).

The Union seeks an order that the grievor be reinstated without loss of seniority or benefits and upon such other terms as the Arbitrator deems appropriate. The Union also seeks compensation for all lost wages from December 19, 2002, or in the alternative, from a point deemed appropriate by the Arbitrator.

The Company disagrees with the Union's position. The Company's position is that the dismissal of Mr. Windsor on December 19, 2002, is appropriate and justified in the circumstances. The Company believes that Mr. Windsor's actions in connection with the side collision on December 6, 2002, warrant serious discipline. In particular, the Company believes that the seriousness of Mr. Windsor's actions is exacerbated by a subsequent failure to be honest and forthright about the incident.

The Company does not believe that the facts as a whole warrant the reinstatement of the grievor under any circumstances, and therefore denies the Union's request.

FOR THE UNION:

(SGD.) D. FINNISON
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) STEVE BROMLEY
GENERAL MANAGER

There appeared on behalf of the Company:

C. Ayton	– Labour Relations Officer, Calgary
J. Copping	– Director, Labour Relations, Calgary
C. Lencucha	– Road Manager
Dr. Robinow	– Witness

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. Finnson	– General Chairperson, Calgary
D. Able	– General Chairperson, Calgary
D. Olson	– Vice-General Chairperson, Calgary
A. Singer	– Vice-General Chairperson, Cranbrook
G. Crawford	– Local Chairperson, Lethbridge
R. A. Hackl	– Vice-General Chairperson, CN Lines West, Edmonton
R. Windsor	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor was responsible for a side collision while working as a yard foreman in Lethbridge Yard on December 6 and 7, 2002. The collision damaged some four cars, and included a perforation damage to an empty tank car which had previously contained anhydrous ammonia, an extremely hazardous substance. The record discloses that the locomotive engineer working with the grievor was not aware of the side collision. The grievor and his workmate, Yard Helper Mike Kennedy, were both aware of the damage and neither of them made any report to the Company, which was obviously contrary to a number of operating rules as well as a local operating bulletin. At the conclusion of their tour of duty on Saturday, both employees went home, although they give differing accounts of their general intentions at that time.

The following day, on Sunday December 8, 2002, the damaged cars became the subject of an inquiry by local management. When Manager Craig Lencucha contacted Mr. Windsor by telephone to ask if there had been any incident during his tour of duty the grievor responded that it had been "probably one of the best shifts in the last couple of weeks". Mr. Lencucha also left a message on the home telephone of Mr. Kennedy, who was not then available. The following morning, on Monday December 9, 2002, upon learning of the message left by Mr. Lencucha Yard Helper Kennedy contacted Mr. Windsor before speaking with the Company's manager. It appears that Mr. Kennedy then advised Mr. Windsor that he was going to disclose what had happened, although

according to Mr. Kennedy the grievor indicated that he preferred that the collision not be reported, in hopes that the cars might be repaired without the specifics of the incident coming to light. It is common ground that Yard Helper Kennedy then called Supervisor Lencucha and advised that he and Mr. Windsor were involved in a side collision which caused damage to the four cars.

The information developed in the subsequent disciplinary investigations confirms that Mr. Kennedy and Mr. Windsor were moving cars into tracks 6 and 7 when they became uncertain as to whether track 6 and track 7 contained sufficient space for more cars. Yard Helper Kennedy proceeded to investigate and when he lined track 6, and was proceeding to check the fouling point of the cars in track 7, the grievor released a set of cars into track 6 when he saw that Yard Helper Kennedy had lined track 6. He did so without verifying any further information with Yard Helper Kennedy, as a result of which the side collision with cars in track 7 occurred. During his disciplinary investigation Mr. Kennedy asserted that Mr. Windsor suggested that the two of them say nothing, while Mr. Kennedy urged Mr. Windsor to submit a "Midas" report and advise the yardmaster of what had occurred.

It is not disputed that both employees had an obligation to report the incident, and to do so during the course of their tour of duty. For his failure to make the timely report of the side collision Mr. Kennedy was assessed forty demerits. The grievor, who did not "come clean" when given the opportunity to do so by Manager Lencucha, and who did not admit to the incident until the disciplinary investigation was commenced,

was discharged. No discipline was assessed against the locomotive engineer, it being clear that he was unaware of what had transpired.

The position of the Company is that Mr. Kennedy was deserving of serious discipline, but less serious than the grievor because he did tell the truth when confronted. Because the grievor consciously misled the Company's manager when he inquired as to whether there had been any incident during their tour of duty on Friday December 6 and Saturday December 7, 2002 the Company determined that the bond of trust between the grievor and the employer was severed and that the termination of his employment was appropriate.

As noted above, the Union does not dispute the facts as related above. Its counsel questions, however, the true motives of Mr. Kennedy, suggesting that he may have deliberately shifted greater responsibility for the initial deception onto Mr. Windsor. I do not consider that I need to resolve that issue, as there is a clear distinction between the actions of Mr. Windsor and those of Mr. Kennedy when they were each confronted by supervision and expressly asked as to whether there had been any incident. Mr. Kennedy came clean and Mr. Windsor did not. On that basis, the Arbitrator cannot sustain the suggestion of the Union that there was a discriminatory treatment of Mr. Windsor in the circumstances.

The real issue is whether mitigating circumstances would warrant a measure of discipline short of discharge for Mr. Windsor. In that regard the Union draws to the Arbitrator's attention documentary evidence confirming that at the time of the incident the grievor was under medication for a condition of clinical depression, a condition which had in fact occasioned his absence from work for a period of time shortly before the incident in question. It appears that he had been back at work, medically cleared for safety sensitive activities, for only two tours of duty when the incident occurred. In short, the Union stresses the explanation of the grievor which is that his personal circumstances, related largely to marital difficulties, and his state of depression placed him in a position where he felt that the side collision was a matter which he could simply not deal with, a perception which led to his course of concealment and deception.

The Arbitrator has some difficulty with that submission. On a number of occasions this Office has recognized that clinical depression may explain and mitigate the actions of an employee. That is particularly so where an employee engages in an act of inadvertence, a failure of concentration or some other spontaneous action over which his or her control may be impaired by his or her state of depression. What the case at hand discloses, however, is something of a different order. For reasons he best appreciates, the grievor consciously chose to conceal a collision during yard operations for which he was responsible. His decision to conceal the event was more than an omission which lasted through his tour of duty. It extended to deliberately deceiving his supervisor during the course of a telephone call the following day. While it may be that, as Mr. Windsor states, he just wished the whole matter would go away, the fact remains

that his ability to judge between right and wrong, truth and falsehood, was not impaired by his medical condition. Indeed, there is no medical opinion before the Arbitrator to substantiate any such causal link.

What the evidence discloses is that an employee of relatively short service knowingly deceived the Company by failing to report a collision, including damage to the shell of a tank car which previously contained a hazardous substance. While the grievor's personal burdens may have made it more difficult for him to deal with the problem, they cannot be said to have impaired his ability to be candid and forthright with his employer in respect of such a serious incident. These events involve a matter which I am satisfied does go to the bond of trust between employer and employee. Regrettably, that bond was severed by the grievor's protracted course of deception, extended over a period of some two days. Indeed, Mr. Windsor acknowledged nothing until he had no alternative, given the truthful account provided by Mr. Kennedy.

In all of the circumstances the Arbitrator is satisfied that the Company was justified in its decision to terminate the services of Mr. Windsor, and that its decision should not be disturbed. The grievance must therefore be dismissed.

November 14, 2005

(signed) MICHEL G. PICHER
ARBITRATOR