

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

CASE NO. 3525

Heard in Calgary, Thursday, 10 November 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

45 demerits assessed on the personal record of Mr. Larry Colby for alleged conduct unbecoming an employee of CN during his shift as Heavy Equipment Operator on December 1, 2004.

UNION'S STATEMENT OF ISSUE:

On December 7, 2004, Mr. Larry Colby was summoned for an investigation for alleged conduct unbecoming an employee during his shift as Heavy Equipment Operator (HEO) on December 1, 2004. Following this investigative statement, on January 5, 2005, the Company debited Mr. Colby's employment record with 45 demerit marks effective December 1, 2004, for: "conduct unbecoming an employee of CN during his shift as HEO on December 1, 2004."

The Company claims that Mr. Colby refused an order of his supervisor with respect to when he should be taking his lunch break.

It is the Union's position that Mr. Colby took his lunch break at the normal time he always does. This time was also pre-determined and assigned at the operational tail-gate meeting that is held before the commencement of shifts. The supervisor failed to advise Mr. Colby that she changed this plan, and that Mr. Colby was to commence his lunch break later into the shift.

Furthermore, it is the Union's position that Mr. Colby did not consciously refuse an order of the supervisor to go back to work in that he did not take the supervisor's first comments to be a direct order, and that he explained he was taking his lunch as was previously planned, and based on this plan, was expecting a call to update him on his mother's surgery which took place

on this date. Mr. Colby did go back to work, he reheated his lunch first to eat in the machine he was operating, which is common practice among HEOs at Calgary.

With regard to the foregoing it is the Union's position that: **1.** Mr. Colby was treated in an arbitrary, discriminatory and an excessive manner in regard to the imposition of 45 demerits on his record; and **2.** The imposition of 45 demerits is excessive and unwarranted given the extenuating circumstances and mitigating factors; and **3.** The situation became confused by the supervisors themselves as a plan regarding lunch period was established at the tail-gate meeting in the morning but was altered without advising Mr. Colby in advance that his normal and pre-assigned lunch break was changed.

Therefore, with further regard to the foregoing, it is the position of the Union that the 45 demerits debited against Mr. Colby's employment record should be removed.

The Company denies the Union's contentions and claim.

FOR THE UNION:

(SGD.) R. FITZGERALD
PRESIDENT, COUNCIL 4000

There appeared on behalf of the Company:

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| P. Payne | – Manager, Labour Relations, Edmonton |
| D. B. Brodie | – Manager, Labour Relations, Edmonton |
| L. Rea | – Assistant Superintendent Transportation, Calgary |
| S. Currell | – Trainmaster, Calgary |
| R. Hargreaves | – Trainmaster, Calgary |
| D. Barron | – Field Maintenance Supervisor, Edmonton |

And on behalf of the Union:

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| B. McDonagh | – National Staff Representative, Vancouver |
| R. Fitzgerald | – President, Council 4000, Toronto |
| B. Kennedy | – Regional Representative, Edmonton |
| C. Duncan | – President, Local 4001, Vancouver |
| M. Malaska | – Local Chair, Local 4001, Vancouver |
| L. Colby | – Grievor |

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied that the evidence does disclose an act of insubordination on the part of the grievor. It is not disputed that he disobeyed a directive of his supervisor, and insisted on taking his lunch break when he was directed not to do so. While it may be, as the evidence indicates, that his lunch break was originally scheduled for the time he took it, and a change in that schedule was made without giving him any prior advice, the fact remains that it was his obligation to follow his

supervisor's directives and to return to work when he was told to do so. In failing to respond to the order that was given to him, Mr. Colby plainly made himself liable to some measure of discipline.

There is, however, at least one mitigating factor to be considered. The evidence confirms that on the day in question the grievor's mother was undergoing serious surgery. When his lunch hour was first established, at the commencement of the shift, Mr. Colby arranged with his wife to telephone him during his scheduled lunch break to give him information as to the outcome of his mother's surgery. That, it appears, is the reason he insisted on remaining available and on lunch during the initially scheduled lunch period. Unfortunately, it appears that he made no attempt to explain that circumstance to his supervisor or, indeed, to give any substantial elaboration of the pre-arranged telephone call during the course of the Company's investigation. While the grievor's circumstance obviously does not excuse his failure to obey the directive given to him, it is a factor which can be considered in mitigation. The Arbitrator is also satisfied that the length of the grievor's service, being some twenty-three years, is also a factor to be considered. Nor can the Arbitrator give extensive weight to the Company's submission that the grievor has been recidivistic with respect to insubordination. While it appears that in 1988 and 1993 Mr. Colby did fail to follow directives, there is no record of any such conduct over the period of eleven years prior to the incident which is the subject of this grievance.

On the whole, the Arbitrator is satisfied that the assessment of twenty demerits would have been appropriate in the circumstances to bring home to the grievor the importance of following directives, and indeed giving the employer the necessary information to understand his own personal situation, to the extent that it had a bearing on his actions.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor's discipline for the events of December 1, 2004 be reduced to twenty demerits.

November 14, 2005

(signed) MICHEL G. PICHER
ARBITRATOR