

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

**CASE NO. 3526**

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)**

**EX PARTE**

**DISPUTE:**

15 demerits assessed on the personal record of Mr. Larry Colby for damages caused to NCUU 680190 and Fantuzzi 10172 on January 20, 2005. This discipline consequently caused Mr. Colby to be discharged for the accumulation of demerit marks over sixty (60).

**UNION'S STATEMENT OF ISSUE:**

On February 21, 2005, Mr. Larry Colby was summoned for an investigation for "damages sustained to Fantuzzi 10172 and NCUU 680190 on January 20, 2005" during his shift as Heavy Equipment Operator (HEO). Following this investigative statement, on March 3, 2005, the Company assessed 15 demerit marks on Mr. Colby's employment record for: "Damages caused to NCUU 680190 and Fantuzzi 10172 on January 20, 2005."

Subsequently, on March 3, 2005, Mr. Colby was dismissed for: "Accumulative discipline record of 100 demerits."

It is the Union's position that: **1.** There are extenuating circumstances in this matter that mitigate the situation and therefore warrant the expunging of the 15 demerits. **2.** Mr. Colby has an admirable work history of 23 years' service with the Company. **3.** Mr. Colby took the necessary precautions while performing his duties on this day and was operating the Fantuzzi as a reduced speed due to the slipper conditions. These slippery conditions were discussed at

the operational tail-gate meeting that is held before the commencement of shifts. **4.** It is further the Union's position that there were contributing factors that caused this accident, which included the slippery road conditions, as well as the curve and slope in the roadway where Mr. Colby was working and the poor tread on the Fantuzzi's tires, all contributing to the machine sliding into the Intermodal container.

With regard to the foregoing it is the Union's position that: **1.** The Company failed to provide Mr. Colby with a fair and impartial investigation by their delay in conducting this investigation 33 calendar days from the date of the actual incident; and **2.** Mr. Colby was treated in an arbitrary, discriminatory and an excessive manner in regard to the imposition of 15 demerits on his record; and **3.** The Company intentionally heaped demerits on Mr. Colby in an effort to dismiss him; and **4.** The Company's failure to ensure that the working conditions were safe for employees by not sanding the pad in a timely fashion, and in addition the Company's failure to ensure the vehicles, machinery and equipment used by the employees in the course of their employment were in safe working order, contributed directly to the occurrence of the accident in question; and **5.** In the Union's view, on the day in question, the Company failed to comply with the following sections of Part II of the **Canada Labour Code**, its guidelines and regulations and was therefore at the time, in violation of same: Section 124, Section 125(1), Section 125(1)(k), Section 125 (1)(f), Section 125(1)(z.02). **6.** In addition to failing to comply with the sections of the **Canada Labour Code** Part II identified herein, the Union also takes the position that on the day in question the Company was also in violation of Section 2 of the Health & Safety Plan between Canadian National and the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Council 4000.

Therefore, with further regard to the foregoing, it is the position of the Union that the 15 demerits debited against Mr. Colby's record should be removed and he should be reinstated forthwith, with full seniority and compensation for all lost wages, benefits and losses incurred as a result of his dismissal, including, but not limited to, lost overtime and interest on any moneys owing.

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:

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:

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  
L. Colby

– Local Chair, Local 4001, Vancouver  
– Grievor

**AWARD OF THE ARBITRATOR**

Upon a review of the evidence the Arbitrator is satisfied that the grievor was negligent in his operation of the Fantuzzi container lifting machine which he was charged with operating on January 20, 2005. The evidence indicates that there was an icy condition in one part of the Intermodal yard, and that Mr. Colby had been expressly warned about it. Notwithstanding that warning he chose to travel through the area, as a result of which his lift machine collided with a container, causing some \$3,600 in damage to the container and in excess of \$4,000 in damage to the Fantuzzi.

Nor is the Arbitrator persuaded that the Company failed to give the grievor a fair and impartial investigation. While it appears that the investigation was delayed slightly more than a month by reason of the grievor's medical leave of absence, the Arbitrator accepts the representations of the Company that his supervisor indicated to him verbally on the day he left work that the accident would be investigated upon his return, as indeed occurred, without unreasonable delay. Nor do I consider that the alleged failure of the Company to spread sand or gravel on the area in question, in supposed violation of the **Canada Labour Code**, constitutes, in all of the circumstances, a sufficient element to absolve the grievor of his own responsibility, given the fact that he was specifically warned about the location. The Arbitrator's conclusion not to disturb the assessment of fifteen demerits is also influenced, in substantial part, by the fact that the grievor has a relatively extensive record of prior discipline for accidents involving damage to equipment and property.

For the foregoing reasons the grievance is dismissed.

November 15, 2005

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