

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

**CASE NO. 3527**

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:**

30 demerits assessed on the personal record of Mr. Larry Colby for damages caused to TNXU 735253 on February 17, 2005. This discipline consequently caused Mr. Colby to be discharged for the accumulation of demerits over sixty (60).

**UNION'S STATEMENT OF ISSUE:**

On February 21, 2005, Mr. Larry Colby was summoned for an investigation for "damages sustained to TNXU 735253 on February 17, 2005" during his shift as Heavy Equipment Operator (HEO). Following this investigative statement, on March 3, 2005, the Company assessed 30 demerit marks on Mr. Colby's employment record for: "damages caused to TNXU 735253 on February 17, 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 30 demerit marks. **2.** Mr. Colby has an admirable work history of 23 years' service. **3.** Mr. Colby took the necessary precautions while performing his duties on this day, and was operating the Fantuzzi at a reduced speed due to the slippery 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 Unions position that there were contributing factors that caused this accident which included the slippery road conditions as well as the slope of the roadway at "E-lot" where Mr. Colby was working, which contributed to the machine sliding into an 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 not calling upon witnesses who actually witnessed the accident and who would attest to the care Mr. Colby took given the slippery road conditions; and **2.** Mr. Colby was treated in an arbitrary, discriminatory and an excessive manner in regard to the imposition of 30 demerits on his record; and **3.** That 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 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)(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 one 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 30 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	– Local Chair, Local 4001, Vancouver

L. Colby

– Grievor

**AWARD OF THE ARBITRATOR**

The Arbitrator is satisfied that the grievor was responsible for the accident which occurred during the course of his duty on February 17, 2005. It does not appear disputed that during the course of his tour of duty on that day the grievor lost control of his Fantuzzi container lifting machine and slid on a slippery downhill grade into a container, causing damage in excess of \$3,000. Nor does the evidence demonstrate recklessness or knowledge on the part of the Company with respect to dangerous working conditions, in supposed violation of the **Canada Labour Code**.

As part of its submission the Union argued that the grievor was deprived of a fair and impartial hearing because the Company did not call as a witness a truck driver whose vehicle was being serviced by Mr. Colby at the time. The grievor maintains that the truck driver could have given evidence to confirm that he was operating his equipment in a slow and safe manner. The Arbitrator has some difficulty with that submission, to the extent that the grievor himself clearly had the opportunity to identify the driver at the time of the incident and to obtain such statement as might have been appropriate for the purposes of offering rebuttal during the course of any ensuing disciplinary investigation. I do not, in these circumstances, conclude that the Company was under an obligation to do so or that its failure to make inquiries in that regard deprived the grievor of his right to a fair hearing. (See, e.g. **CROA 2920** and **2934**.)

The sole issue in this matter is the appropriate measure of discipline. It is clear that the assessment of thirty demerits placed the grievor in a dismissible position, even having regard to the reduction of prior discipline in another grievance which is closely related in time. When the prior adjustment in discipline in **CROA&DR 3525** and the dismissal of the grievance in **CROA&DR 3526** are considered together with the instant case, I am satisfied that on the whole the grievor should be reinstated into his employment, but clearly without compensation for any wages and benefits lost.

After careful consideration I am satisfied that a substitution of penalty would be appropriate in all of the circumstances. Coupled with the findings and conclusions in the two prior grievances mentioned above, I am satisfied that he should be returned to his employment with a total of fifty demerits on his record with his time off work to be recorded as a suspension. Clearly the grievor knows, or reasonably should know, that he is being given a second chance to demonstrate that he can work in a safe and discipline-free manner for a sustained period of time. That chance is being afforded to him largely by reason of the length of his prior service. Any future recidivism in respect of accidents at work must, as the grievor should appreciate, have the gravest of consequences.

November 15, 2005

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