

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

CASE NO. 3543

Heard in Montreal, Thursday, 16 February 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The demotion/disqualification of Conductor Tim Elcheson of Edmonton for failure to properly report an injury, failure to properly report and failure to work safely.

UNION'S STATEMENT OF ISSUE:

While working a tour of duty on March 1st, 2004, Conductor Tim Elcheson suffered an injury while lining a switch. Upon completion of the shift, Conductor Elcheson left a note to his supervisor describing his injury, how it occurred and the location of the switch. Following an employee statement, Mr. Elcheson was restricted from working as a conductor.

The Union contends that this disqualification/demotion is not warranted, given the circumstances.

Further, the Union contends that this demotion, a punitive act, by the Company's own admission, is contrary to the **Canada Labour Code** and should be expunged from the grievor's record and he be made whole for all losses. Additionally, the Union contends that the Company acted improperly in denying the grievor the spareboard guarantee should he choose to occupy the spareboard.

FOR THE UNION:

(SGD.) R. A. HACKL
VICE-GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) K. MORRIS
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- K. Morris – Manager, Labour Relations, Edmonton
- J. Torchia – Sr. Manager, Labour Relations, Edmonton
- L. Quilichini – Assistant Superintendent, Transportation, Edmonton

And on behalf of the Unions:

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|----------------|--------------------------------------|
| D. Ellickson | – Counsel, Toronto |
| R. A. Hackl | – Vice-General Chairperson, Edmonton |
| B. R. Boechler | – General Chairman, Edmonton |
| T. Elcheson | – Grievor |

AWARD OF THE ARBITRATOR

On April 12, 2004, the Company issued a Form 780 demoting the grievor from the position of conductor. The reasons cited in the form, and therefore the issues in this arbitration, are the grievor's alleged failure to properly report an injury, his failure to properly report a hazard and his failure to work safely during his tour of duty on March 1, 2004.

The evidence before the Arbitrator confirms that during the course of his tour of duty on March 1, 2004, while operating as conductor, the grievor encountered difficulty lining a high masted switch (VC 31) located on the main line at mile 98.06 on the Vegreville Subdivision, apparently at the entrance to an industrial spur on which he worked that day. After several unsuccessful attempts at moving the switch, he was finally successful when the locomotive engineer stood on the switch's cross bar, apparently relieving pressure and allowing it to move. The grievor's unchallenged evidence is that in attempting to move the switch unsuccessfully he felt a pain across the middle of his back, as a result of which he was absent from work for a period of some two weeks, in receipt of Workers' Compensation benefits.

At the conclusion of his tour of duty the grievor reported back to the Scotford Yard office to go off duty. There was no supervisor then on duty. Also, there were no forms, referred to as Form 3903, which an employee is supposed to fill out to report an injury. In the circumstances Mr. Elcheson then wrote a two-page note addressed to his supervisor, Mr. John McElhone, reporting the injury which he had suffered and the problem with the switch. He left the note on his supervisor's desk. It is not disputed that it was seen and acted upon by a supervisor who came on duty later that morning.

Shortly thereafter, on March 3, 2004, the grievor was interviewed by Superintendent Tom Brown with respect to the particulars of the incident. While there is some controversy as to what precisely was said, it does not appear disputed that at the conclusion of that conversation Mr. Brown indicated to the grievor that he would be withheld from work until such times as a full investigation, including a formal employee statement, was concluded. While the Union asserts that during that conversation Mr. Brown stated to the grievor that he doubted the *bona fides* of his claim of injury and that he would be demoted from the position of conductor, the sanction which ultimately was assessed, the Arbitrator finds it unnecessary to comment on this aspect of the dispute in light of the objective and undisputed evidence with respect to the merits of the case.

There can be little doubt but that the Company then had concerns about the safety of the grievor's work habits. Unfortunately Mr. Elcheson had been the subject of discipline on three prior occasions in a relatively short period of time before the events of March 1, 2004. He received a written reprimand in October of 2003 for a violation of GOI section 8, item 12.10.4, an operating rule. Subsequently he was given a fourteen

day deferred suspension for the run-through of a switch in violation of CROR 104 in December of 2003. Shortly thereafter, in January of 2004, he was assessed a seven day suspension, which coupled with the previous deferred suspension, in effect became a twenty-one day suspension to be served, for a violation of CROR 104(g). The incidents in which the grievor was involved during that period of time were serious. The first involved a derailment as a result of crossed drawbars. The second concerned the run-through of a hand throw switch by reason of the grievor's failure to protect the point of his movement. That was shortly followed by a collision between the vehicle the grievor was operating and a yard locomotive. Finally, when the grievor lined a switch underneath a moving tank car, a derailment resulted. It was some five weeks later that the incident which is the subject of this grievance then occurred.

While the Arbitrator can appreciate the Company's concerns for safety, a factor which is paramount in any case, it is important to examine closely the alleged infractions in the case at hand, given the severity of a permanent demotion from the position of conductor. Firstly, the Arbitrator cannot sustain the position of the Company that the grievor sustained an injury to his back by reason of having worked unsafely. There is, very simply, no evidence of any unsafe action by Mr. Elcheson. With respect, as a general rule an unsafe motion or action cannot be inferred, without more, from the mere fact that the employee sustained an injury. It does not appear disputed by the Company that the switch in question was resistant to normal movement at the time, and required the locomotive engineer to stand on the cross bar before it could be sufficiently freed to move. In the result, that part of the allegation of the Company is simply not proven.

Concern also arises with respect to the alleged failure of the grievor to properly report an injury, as alleged in the Form 780. While it is true that the grievor's obligation was to fill out a Form 3903 with a supervisor, the uncontradicted evidence is that there was no supervisor at the Scotford Yard office when he ended his tour of duty in the early morning hours and, in any event, apparently because of the Company's own failure, there were no Form 3903 documents in the Scotford Yard office at the time. That fact was specifically highlighted in the grievor's handwritten note to his supervisor. Nor can the Arbitrator attach substantial weight to the fact that the grievor left his handwritten note on his supervisor's desk. It does not appear disputed that that is exactly what he would have done with a Form 3909, if one had been available.

What, then, did the grievor do that was wrong? The Arbitrator is satisfied that there was an error committed by the grievor, in particular with respect to the reporting of the potential hazard of the main line switch which had been the cause of his injury. The condition of the switch could cause injury to another employee. The Arbitrator cannot reject out of hand the submission of the Company that it was then incumbent upon the grievor, at a minimum, to advise the rail traffic controller of the problematic condition of the switch. It is not clear whether other crews could be called upon to use that switch in the short term following the incident. But given the uncertainty as to when the handwritten note left by the grievor might get seen by a supervisor, particularly in the circumstances of a then ongoing strike, the failure to make an immediate report to the rail traffic controller of the condition of the switch did, at best, leave a situation of uncertainty, if not potential hazard, insufficiently reported. On that basis, and on that

basis alone, the Arbitrator must find that the grievor did render himself liable to some discipline.

The issue then become whether demotion was the appropriate response, in all of the circumstances. The Arbitrator cannot ignore certain aggravating factors, and in particular the apparent pattern of unsafe work practices engaged in by the grievor giving rise to three prior incidents of discipline shortly before the events of March 1, 2004. Indeed, as noted by the Company's representative, a document filed in evidence would indicate that the grievor indicated to his psychologist that his mind had not been sufficiently focused on his work during the period in question, apparently by reason of stress in his personal life. On the other hand, certain mitigating factors must also be weighed. Firstly, it would appear that when the grievor left the site of the faulty switch, its performance had substantially improved, if only by reason of his locomotive having run across it. There was, in other words, something less than an immediate and dire situation of possible danger left behind. Additionally, some weight must be given to the fact that Mr. Elcheson has some twenty-four years of service with the Company. Nor is it entirely clear that the demotion to the position of assistant conductor was such as to respond fully to the possibility of the grievor becoming again involved on a lapse of judgement on the job. It is not disputed that the switching responsibilities of an assistant conductor may well be equal to or greater than those of a conductor, albeit the conductor bears a greater degree of responsibility for planning work and completing reports and other documents.

After careful consideration, the Arbitrator is satisfied that a demotion for some period of time was not inappropriate. An indefinite demotion, however, was in my view excessive in all of the circumstances. On the whole, I am satisfied that a demotion from the position of conductor for a period of not more than three months would have been appropriate to bring home to the grievor the importance of bringing full focus and attention to his job.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated forthwith to the position of Conductor, with his record to reflect a demotion from the position of conductor for a period of three months following the incident of March 1, 2004. The grievor shall be compensated for all wages and benefits lost for the balance of the period in question, subject to any issues of mitigation, which may be addressed with the Arbitrator if necessary.

February 20, 2006

(SIGNED) MICHEL G. PICHER
ARBITRATOR