

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3552**

Heard in Montreal Tuesday, 9 May 2006

concerning

ONTARIO NORTHLAND TRANSPORTATION COMMISSION

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discipline assessed Conductors L. Smith, S. Gowlett and T. Blackburn.

JOINT STATEMENT OF ISSUE:

On September 12, 2005, six (6) regular crew members on three (3) regular Ontario Northland freight trains booked rest away from their home terminal. The three (3) conductors from these trains, Mr. L. Smith, Mr. S. Gowlett and Mr. T. Blackburn were each assessed 30 demerits for their participation in what the Company viewed as an employee action which deliberately delayed all regular freight train service.

The Union filed grievances on behalf of the three (3) conductors citing the three crews booked rest in accordance with the normal application of the collective agreement. The Union maintains the investigations held for Mr. Smith and Mr. Blackburn were not fair and impartial.

The Company denied the grievances.

FOR THE UNION:

(SGD.) P. KONING
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) S. CARMICHAEL
PRESIDENT, ONTC

There appeared on behalf of the Company:

G. W. Zabarelo – Manager, Labour Relations, North Bay
J. L. Thib – Chief Transportation Officer, North Bay

And on behalf of the Union:

P. Koning – General Chairperson, North Bay
J. Corley – Local Chairperson – Rail
R. Larabie – Local Chairperson – Motor Coach
S. Gowlett – Grievor

AWARD OF THE ARBITRATOR

The record discloses that commencing on or about September 8, 2005, the Company suspended conductor-only operations and assigned brakepersons to a number of trains. This it did as a means of avoiding the layoff of junior employees in the face of a surplus employment situation. The Company's actions meant the elimination of conductor-only premium payments, a matter which raised dissatisfaction among some running trades employees.

On Monday September 12, 2005 six regular crew members, including the three grievors in the instant case, booked rest at their away from home terminal. While all three cited the hot weather as the reason for not operating their return assignments as scheduled, the Company concluded that in fact what was occurring was a concerted slowdown in protest against the suspension of conductor-only operations. It appears that the brakepersons assigned to the trains in question did not in fact book rest. At issue in the case at hand are the three conductors who were disciplined, it being understood that the enginemen, who were also disciplined, have their own grievances pending.

The evidence discloses that it is not in the normal habit of the employees to book rest as was done at the away from home terminal on the day in question. It is further clear from the evidence that all three of the grievors had previously worked a substantial number of days over the same summer when the temperature was in excess of 30°

Celsius. Additionally, it does not appear disputed that there was a conversation between the grievor S. Gowlett and Mr. John L. Thib, Chief Transportation Officer of the Company on Friday, September 9, 2005. During the course of that conversation, according to Mr. Thib's recollection, Mr. Gowlett strongly protested the suspension of conductor-only premiums, asserting that the Company was violating a collective agreement right. Mr. Thib recalls Mr. Gowlett then saying "I have to be careful what I say, but there are ways to deal with this." It appears that on that occasion the grievor stated that he would not work with a brakeman that day, declaring "... if he's going to work, I am not, either he goes home or I go home." In fact it appears that Mr. Gowlett did work with a brakeperson on the day in question. Mr. Gowlett's recollection of the conversation is slightly different. He states that what he said was that he had to be careful what he said, because he might be misunderstood.

The Union maintains that the Company violated the obligation to conduct a fair and impartial investigation with respect to the grievors Smith and Blackburn, on the basis that the written statement of Chief Transportation Officer Thib with respect to his conversation with Mr. Gowlett was entered into the record only in the investigation of Mr. Gowlett, and not into the investigation of Mr. Smith and Mr. Blackburn. The Arbitrator cannot sustain that objection. The Company was entitled to draw inferences, as it did, from the general pattern of all six running trades employees booking rest in an atmosphere where there was clear animosity concerning the use of brakepersons on assignments as a means of minimizing layoffs. While the statement allegedly made by Mr. Gowlett would clearly have a bearing with respect to his own actions, it is less than

clear that it would be appropriately admissible as bearing on the decisions and actions of the grievors Smith and Blackburn. In the result, I am satisfied that the Company did not violate any procedural obligations by not incorporating Chief Transportation Officer Thib's written statement as part of the record in the disciplinary investigations of the grievors Smith and Blackburn.

I am also satisfied that the Company was correct in the general inference which it drew. It is clear that all of the grievors went to work on September 12, 2005 after a significant rest period. The pattern of a complete booking of rest by all running trades employees at the away from home terminal on the day in question was clearly unprecedented and inexplicable on any rational basis other than an intention to slow productivity in protest of what was obviously a very contentious initiative by the Company to suspend conductor-only operations and, obviously, the consequent loss of conductor-only switching premiums to both conductors and enginemen. While the precise circumstances of the enginemen are not before the Arbitrator, and no comment is made with respect to the merits of their grievances, I am satisfied, on the balance of probabilities, that the three grievors in the case at hand did withhold their services in a concerted fashion by an abuse of the right to book rest. In these circumstances the following passage from **AH 551**, a grievance by the United Transportation Union against the Canadian National Railway Company heard by Arbitrator Weatherill on March 18, 2004 (award dated April 8, 2004) is particularly apposite:

In the normal course, an employee cannot be called upon to justify his or her exercise of the right to book rest.

That is not to say, however, that the right to book rest is theoretically incapable of being abused, or that the employer may not take any steps to correct abuse if it occurs. It is clear, for example, that where employees act in concert in booking rest, as with any other concerted action intended to force the employer to concede something, it may be found that they are participating in an illegal strike, and that they are subject to penalties because of that: see, for example, the **Canadian Pacific Limited** case, (1981) 42 di. 40, a decision of the Canada Labour Relations Board, as well as a series of arbitration cases, including **CROA No. 2547** for example, where the assessment of demerits was upheld in cases of employees held to have booked rest in furtherance of an unlawful work stoppage.

Participating in an illegal strike is among the most serious of industrial relations offences. It is calculated to undermine the very grievance and arbitration process contemplated under the **Canada Labour Code** as the sole means of resolving collective bargaining disputes during the term of a collective agreement. It must, in the Arbitrator's view, be dealt with by a corresponding serious measure of discipline. In prior cases the assessment of thirty demerits has been confirmed by this Office as being appropriate, as for example in **CROA 1911**. I am satisfied that it is equally appropriate in the case at hand.

For all of the foregoing reasons the grievances must be dismissed.

May 15, 2006

(signed) MICHEL G. PICHER
ARBITRATOR