

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

CASE NO. 3593

Heard in Montreal, Tuesday, 12 December 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discharge of Conductor Remo Zappia – June 06, 2006.

JOINT STATEMENT OF ISSUE:

On June 6, 2006, Conductor Zappia was required to attend a Company investigation in connection with “circumstances surrounding your alleged insubordination and conduct unbecoming toward an officer of the Company while working as Conductor on Malport Road Switcher L57631-11, which commenced duty at 14:00 on May 11, 2006.” Mr. Zappia, subsequent to the investigation, was discharged from service.

It is the Union’s position that the discipline assessed, in consideration of all the factors relating to this matter, was unwarranted but in any event, too severe. The Union is requesting the reinstatement of Mr. Zappia without loss of seniority and benefits, and compensation for all lost earnings as a result of the discharge. In the alternative, that the discipline assessed be reduced accordingly in consideration of all mitigating factors.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) D. VanCAUWENBERGH
SR. MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

D. VanCauwenbergh – Sr. Manager, Labour Relations, Toronto
B. Hogan – Manager, Labour Relations, Toronto
D. Lee – MCO
J. Orr – General Manager, Toronto Division

And on behalf of the Union:

R. A. Beatty – General Chairperson, Sault Ste. Marie
G. Anderson – Vice-General Chairperson, Toronto

J. Robbins	– Vice-General Chairperson, Sarnia
B. R. Boechler	– General Chairperson, Edmonton
G. Gower	– Local Chairperson, Toronto
S. Pommet	– Local Chairperson, Montreal
R. Zappia	– Grievor

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator confirms that the grievor declined to obey a direction from his supervisor after booking off at the end of his tour of duty in the early morning hours of May 12, 2006. The record indicates that the grievor had had a previous conversation with Assistant Superintendent Terry Lee having to do with the length of the lunch break which he and his crew were taking during the course of their road switcher assignment. It appears that during their conversation, at the start of the grievor's tour of duty on May 11, 2006, Mr. Lee indicated that times taken for lunch should not jeopardize customer service and should be maintained within the terms of the collective agreement. According to the Company's submission, Mr. Zappia replied "Oh, you want us to work by the collective agreement do you?"

Later that evening the grievor's crew advised the dispatcher that they would be booking rest after ten hours on duty, which would place them off duty at 23:45. It does not appear disputed that when the crew returned to Malport Mr. Lee indicated to Mr. Zappia that he wanted to review the events of the evening with him, as he had learned from Mr. Zappia that two industrial customers had not been serviced and a number of cars had been set off from the grievor's movement on line. Mr. Lee therefore requested that the grievor attend at his office, which Mr. Zappia did.

There is some conflict as to the precise words which may have been used in the ensuing conversation. It does not appear disputed, however, that to all appearances Mr. Lee intended to take the grievor through a detailed and documented review of his ten hour tour of duty to gain some understanding for the reasons for the failure of customer service which had occurred. The grievor was clearly not receptive to the prospect of spending an extensive additional period of time explaining the events of the evening to Mr. Lee. It is not disputed that it had rained heavily all through the course of the grievor's tour of duty and that he was wet and cold as well as tired and was facing a relatively extensive drive home at that time.

According to Mr. Lee's account Mr. Zappia stated that, having booked rest, he was under no obligation to stay and give any further explanations of his tour of duty to his supervisor. There can be little doubt that Mr. Lee forcefully asserted that Mr. Zappia was under an obligation to give answers to the questions that he had to put to him. To that end Mr. Lee clearly directed the grievor that he must stay and respond to his questions. According to Mr. Lee, after refusing to sit in a chair as directed by his supervisor Mr. Zappia finally said "Screw you" and left.

The grievor denies using that language. He does not, however, deny that he took the position that having booked rest he was under no obligation to then expend extensive time explaining the tour of duty to Mr. Lee. It would appear, as well, that Mr. Zappia felt that he would in all likelihood be attacked for the lunch period which he and

his crew had taken, subsequently disclosed to have been some fifty-seven minutes as indicated in the briefs presented at the arbitration. There may be some dispute between the parties as to whether that was or was not a reasonable lunch period in all of the circumstances. That is not, however, the issue before the Arbitrator.

At issue before me is whether the grievor was insubordinate in his response to his supervisor. I am satisfied that he was. It was plainly open to Mr. Zappia to explain to Mr. Lee that he would be happy to meet with him at any length upon his return to work later that same day. Indeed, it appears that an extensive conversation did occur between the two of them upon the resumption of the next tour of duty. On the facts, however, it is difficult to escape the conclusion that the approach which Mr. Zappia took to his supervisor was unduly disrespectful and abrupt. In that regard the Arbitrator cannot accept the suggestion of the Union that an employee, having booked rest, cannot be spoken to by a supervisor who may feel it important to gain knowledge with respect to the events of the tour of duty just ended. Issues of ongoing productivity, safety and general operational efficiency can vitally depend upon the sharing of such information, without delay. On the other hand, the Arbitrator cannot accept that it is open to a supervisor to compel an employee who has booked rest to remain on the premises for the purposes of an extensive fact finding exercise which could, to all appearances, be conducted at a time which does not conflict with an employee's booked rest, particularly after a tour of duty in which he has performed some two hours of overtime work.

What the evidence discloses, to the Arbitrator's satisfaction, is poor judgement exhibited by both chief actors in this unfortunate scenario. There was, in my view, an element of provocation in Mr. Lee's insistence that the grievor remain to review in detail the movements of his crew through a ten hour tour of duty, knowing that Mr. Zappia had booked rest, was entitled to go home and that he would, in any event, soon be returning to work for the commencement of his tour of duty later the same day. That said, however, the lack of judgement exhibited by Mr. Lee would not give the grievor a licence to be disrespectful and dismissive of his supervisor. While I tend to agree with the Union's argument that this was not a situation where the grievor should surrender his time and grieve later, as the grievance and arbitration process could not make him whole with respect to his lost rest period, he could have been far more forthcoming and polite with his supervisor and need not have been abrupt and dismissive as he was.

In the circumstances I am satisfied that some measure of discipline was appropriate, but that the discharge of a nineteen year employee who had no discipline on his record since 1998, is excessive in the circumstances. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost and without loss of seniority.

December 18, 2006

(signed) MICHEL G. PICHER
ARBITRATOR