

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

CASE NO. 3594

Heard in Montreal, Tuesday, 12 December 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discharge of Conductor Wayne Szewczok.

JOINT STATEMENT OF ISSUE:

On September 27, 2004, Mr. Szewczok was required to attend a formal investigation in connection with the circumstances pertaining to his submission and receipt of OCS claims made during a period between September 2002 and June 15, 2004.

As a result of this hearing, the grievor was discharged for the use of OCS expense system resulting in fraudulent receipt of Company funds on sixteen (16) different occasions for the period of time in question.

With respect to the foregoing, the Union contends that at no time did the grievor personally submit any claims, benefit from any monies received or have any knowledge that the claims were fraudulent.

In view of the above the Union contends the discipline assessed Mr. Szewczok was unwarranted and excessive and requests that he be reinstated into service without loss of seniority and made whole for all wages and benefits lost.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) D. VanCAUWENBERGH
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. Krawec – Manager, Labour Relations, Toronto
D. VanCauwenbergh – Sr. Manager, Labour Relations, Toronto

B. Hogan – Manager, Labour Relations, Toronto
 D. Fournier – Regional Manager, CMC
 R. A. Bowden – Manager, Labour Relations, Toronto

And on behalf of the Union:

G. Anderson – Vice-General Chairperson, Toronto
 R. A. Beatty – General Chairperson, Sault Ste. Marie
 J. Robbins – Vice-General Chairperson, Sarnia
 B. R. Boechler – General Chairperson, Edmonton
 G. Gower – Local Chairperson, Toronto
 S. Pommet – Local Chairperson, Montreal
 W. Szewczok – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond any dispute, that the grievor was instrumental in the scheme of a former superintendent to defraud the Company of monies totalling some \$25,000.00. It is not disputed that from September of 2002 through June of 2004, on sixteen different occasions, Company Superintendent J. Zarowny, who is described as a supervisor, mentor and friend of the grievor, arranged to have OCS claims made up in the grievor's name, and approved by Mr. Zarowny, deposited into the grievor's bank account. The payments in question ranged in size from \$648.83 to \$2,980.00. On each of the sixteen occasions, as agreed with Mr. Zarowny, the grievor withdrew the funds from his bank account and remitted the cash to Mr. Zarowny. As a result of audits and a subsequent police investigation the scheme was uncovered and both the grievor and Mr. Zarowny were criminally charged with fraud over \$5,000, contrary to section 380(1) of the Criminal Code of Canada.

It appears that by reason of insufficient evidence the charges against the grievor were not successful. Mr. Zarowny pleaded guilty to a lesser charge of possession of stolen funds under \$5,000. Following its own investigation, the Company discharged the grievor, as it did Mr. Zarowny.

It appears that three other employees were also found to have received funds in a similar way through the scheme of Mr. Zarowny. In each case, however, it was on but one occasion, and the Company assessed a lesser degree of discipline against them. The issue before the Arbitrator is whether the grievor's practice, involving sixteen occasions of facilitating fraud by Mr. Zarowny against the Company, rendered him liable to discipline, and whether discharge was the appropriate measure of discipline in all of the circumstances. The Union argues, in part, that the grievor remained innocent as to the illegality of Mr. Zarowny's actions and intentions, and that as an employee of twenty-nine years' service, he should not be discharged in all of the circumstances.

The Arbitrator has substantial difficulty with the case presented by the Union. Mr. Szewczok knew certain things. He knew that the actions of Mr. Zarowny served to conceal from the Company that supposed expense claims by Mr. Zarowny were in fact being misrepresented as expense claims of Mr. Szewczok. He knew fully that monies of the Company were being placed into his bank account for the sole purpose of transferring them, unbeknownst to the Company, back to Mr. Zarowny. Faced with such a scheme, at a very minimum, it was incumbent upon Mr. Szewczok to verify with

someone else in management that the transactions in which he was involved on behalf of Mr. Zarowny were legitimate and lawful.

The grievor confirmed at the arbitration hearing the he spoke not a word of this arrangement to anyone else within the Company for the entire period of the two years during which it went on. Only his wife, who had direct access their bank account, became aware of what was happening. The Arbitrator finds it difficult to understand why, if the grievor truly believed that this was a legitimate arrangement, he would not have discussed it with anyone else or at a minimum verified its regularity with some other member of the Company's management. I find it difficult to dismiss out of hand the Company's suggestion that Mr Szewczok's willing participation in this scheme, on sixteen different occasions totalling amounts in excess of \$25,000 is consistent with more than mere naivety or an error in judgement on his part. As noted above, the grievor plainly knew that he was falsely receiving Company funds into his bank account which were in fact destined to Mr. Zarowny. Even if one accepts that what was involved was a lack of judgement, it is understandable that the Company would take the view that the actions of the grievor, in facilitating a criminal scheme against the Company, have effectively broken the bond of trust essential to the employer-employee relationship.

Having regard to the totality of the evidence, the Arbitrator is not persuaded that this is a case for a substitution of penalty. Having knowingly involved himself in a

scheme which involved the redirection of Company funds in a scheme which was false on its face, the grievor cannot now avoid the consequences of his actions.

For the foregoing reasons the grievance must be dismissed.

December 18, 2006

(signed) MICHEL G. PICHER
ARBITRATOR