CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3614

Heard in Montreal Thursday, 12 April 2007

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal the discharge of Locomotive Engineer Garth Bates of Canora, SK, for alleged fraudulent time claim submissions related to his tours of duty on Train A420 41 23 on August 23 and 24, 2006.

UNION'S STATEMENT OF ISSUE:

On November 7, 2006, Mr. Bates was advised that he had been discharged by the Company as a result of time claims he had submitted for yard rates of pay under the provisions of article 11.3, Agreement 1.2, and for time tied up between terminals under the provisions of Article 29.1, Agreement 1.2. The Company's position was that there were no provisions for payment and that rendered Mr. Bates' claims fraudulent.

The Union contends that Mr. Bates' time claims were legitimate and in accordance with the provisions of Agreement 1.2 and longstanding practice on the assignment he was working. The Union's position in this matter is that Mr. Bates should be reinstated without loss of seniority and compensated for any loss of wages or benefits related to his discharge. In addition, the Union requests that Mr. Bates be compensated for his claim for yard rates and time tied up between terminals on August 23 and 24, 2006.

The Company has not responded to the Union's grievance, which was submitted on November 17, 2006. However, the Union contends that the Company has violated Section 94(1)(a) of the **Canada Labour Code** by circumventing the Union and meeting with the grievor on January 26, 2007 to offer a conditional reinstatement agreement. The Company advised Mr. Bates that he could be reinstated if he agreed to admit to wrongdoing during his tour of duty on Train 420 of August 23, 2006, waive Union representation, accept the time period of his discharge as a suspension, agree not to progress his claims for yard rates and time tied up between terminals to arbitration, and resign from his position as UTU Local Chairman and Co-Chairman of the Canora, SK Health and Safety Committee. Mr. Bates has advised the Company that the proposed reinstatement agreement is unacceptable.

FOR THE UNION:

(SGD.) B. WILLOWS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Labour Relations, Winnipeg
D. Fisher	– Director, Labour Relations, Montreal
J. Kane	– Pay Systems Audit Officer, Edmonton

And on behalf of the Union:

M. Church	– Counsel, Toronto
B. Willows	– General Chairman

G. Bates – Grievor

AWARD OF THE ARBITRATOR

Upon a review of the material filed the Arbitrator has some difficulty with some aspects of the Company's case. In discharging the grievor the employer concluded that he knowingly and deliberately engaged in making fraudulent wage claims. The proof of that allegation rests upon the employer, on the balance of probabilities. To the extent that that the allegation is serious the standard of proof must be commensurate. Should the evidence disclose no more than an error of judgement or a misinterpretation of the provisions of the collective agreement by the employee, the burden of proof of establishing fraud would not be discharged.

As reflected in the form 780 advising the grievor of his notice of discharge, the Company alleges the submission of fraudulent time claims in two respects: firstly, hours charged by the grievor at yard rates of pay during the grievor's tour of duty at Hudson Bay, Saskatchewan, pursuant to article 11.3 of the collective agreement; secondly, the improper submission of a time return for time while tied up between terminals under article 29.1 of the collective agreement at Hudson Bay, Saskatchewan, on August 23 and 24, 2006.

Article 11.3 of the collective agreement provides as follows:

> 11.3 Locomotive engineers required to perform yard work at any one yard in excess of five (5) hours in any one day will be paid at yard rates per hour for the actual time occupied. Time paid under this paragraph will be in addition to payments for road service and may not be used to make up the basic day.

The material before the Arbitrator discloses that the grievor's crew was detained at Hudson Bay in the operation of train A420441-23, performing switching work within the yards of industrial clients. On August 23, they performed some seven hours and forty minutes of yard work at Hudson Bay, going off duty and spending the night at a local hotel for a period of some eight hours. They then went back on duty at 07:00 on August 24, but encountered delays in getting their instructions from the rail traffic controller, further delays in the make-up of the their train by reason of the actions of the Hudson Bay Railway, as a result of which they did not take charge of their train until 08:56, and did not leave Hudson Bay until 09:30 on August 24.

The grievor's time claim for the two days in question included ten hours and ten minutes for yard switching at Hudson Bay. A subsequent investigation disclosed that part of the time in question included periods during which the grievor's locomotive was idle, awaiting work then being performed by the conductor and assistant conductor of his crew. It also included time Mr. Bates took off his locomotive during the evening of August 23, to have a bowl of soup, having been on the power for some twelve hours. Additionally, the time claimed at yard rates by Mr. Bates included the period of time the crew travelled from the yard at Hudson Bay to their hotel, and the time it took to check into their hotel, on the night of August 23. It also included time counted from 07:00 on August 24 until actual work began on the locomotive at 08:56.

During the course of argument at the hearing it became apparent that there is a substantial difference of opinion between the Union and the Company with respect to the wage entitlement of a locomotive engineer who encounters delays during the course of yard switching while in road service. In that regard reference was made, in part, to a memorandum issued by the Company dated March 19, 1998 which deals with the payment of yard rates to employees in road service. That memorandum reads, in part, as follows:

> Preparatory and inspection time may not be used in the calculation of yard rates.
>
> Conductors and brakemen must be performing yard work (switching) the entire time claim in made for. Any delay, waiting for signals, air tests, etc. should not be used in determining yard rates and must be indicated in the remarks.
>
> Locomotive engineers can be switching or may use delay etc. in calculating yard rates.

The Union argues that, in accordance with long established practice, and in its view consistent with the above memorandum, locomotive engineers who encounter delay during yard switching are entitled to claim that time at yard rates of pay. They distinguish the entitlements of the locomotive engineer from those of conductors and assistant conductors who, as appears from the memorandum, cannot charge yard rates for periods of delay.

Apparently there are certain undisputed qualifications to the above stated rules. As evidenced in certain "job aids" established by the Company, road crews engaged in yard switching in excess of five hours can take meal breaks during the course of their duties without any reduction in their pay at yard rates. On that basis, on the facts at hand, at arbitration the Company takes no exception to the grievor having left his locomotive to have a bowl of soup on the evening of August 23, although it appears to have done so earlier in the process. The Company does, however, maintain that fraud is disclosed in the fact that they grievor and his crew claimed travel time to and from the yard at Hudson Bay, to their hotel, as well as the delay in the start of their tour of duty on the morning of August 24, 2006. Its representatives maintain that there is nothing in the memorandum reproduced above nor in the provisions of the collective agreement which would suggest that yard rates can be charged by any employee for such time. In response the Union stresses that the practice of many years, during which such claims have in fact been allowed, the Company has not enforced the rule so characterized.

With respect to the application of article 29.1, it is not disputed that a locomotive engineer is entitled to payment for the first eight hours tied up between terminals at the direction of the Company. The grievor, being tied up at Hudson Bay by the Company's decision to put his crew to bed at the conclusion of their work on August 23, 2006, made a claim under that provision. It appears that he did not in fact make his claim until the investigation into the events of that day by the Company, explaining that he apparently forgot to do so at the time and was reminded of the events by the investigation process.

The Company takes the position that the grievor was not entitled to any payment under article 29.1 because Mr. Bates' crew was in fact tied up by reason of a miscalculation of available hours made by another member of his crew in a discussion with the rail traffic controller. Based on that discussion the rail traffic controller directed the crew to tie up for the night. It does not appear disputed in fact that they had sufficient hours remaining to finish their work at Hudson Bay and return with their train to Canora. Apparently the Company takes the position that the tie up direction was improperly obtained and that any claim in relation to the period should therefore not be paid under the provisions of article 29.

I turn to consider the merits of this dispute. Firstly, the Arbitrator has substantial difficulty sharing the Company's view of the state of mind of the grievor, who is characterized as having acted fraudulently. There is obviously some substantial scope for interpretation of the Company's own memorandum of March 19, 1998 which categorically states that locomotive engineers "may use delay, etc." in calculating their yard rates. The Arbitrator is satisfied that the Company is correct in its interpretation of article 11.3, to the extent that it asserts that the grievor could not claim for the time spent travelling to his hotel and checking in. The same conclusion holds partially with respect to the time spent by the grievor and his crew on the morning of August 24, 2006 awaiting the instructions of the rail traffic controller and the final preparation of their train by the members of the Hudson Bay Railway Company. The unchallenged evidence regarding past practice appears to be that save for fifteen minutes of preparatory time such delay has been included in time charged at yard rates. That fifteen minute period of time, it appears to the Arbitrator, would clearly fall within the memorandum of March 19, 1998, which clearly states that preparatory and inspection time is not to be used in the calculation of yard rates. I must therefore agree with the Company that part of what the grievor did between 07:00 and 08:56 on August 24 cannot be claimed at yard rates.

I do not, however, agree with the Company that what the crew engaged in was deliberate fraud or attempted theft of time from the Company. What the evidence discloses is a difference of understanding or interpretation of the kind that is common in the administration of these provisions and which would normally result in an audit letter being issued to the employees in question. While I am satisfied that the grievor was careless in the way he claimed his time, I am not satisfied that the Company has established any fraudulent intent on the part of the grievor. Nor can I conclude that he made an improper claim with respect to the period of time he was tied up at Hudson Bay, at the Company's direction, when he had no knowledge of the time miscalculation made by another member of his crew.

While the grievor did make himself liable to some discipline, there are substantial mitigating factors which come to bear in the case at hand. Firstly, it appears that the two other members of the grievor's crew were reinstated into their employment by the Company. As stressed by counsel for the Union, their actions were, if anything, more serious than the grievor's to the extent that they did not deduct meal times and other delays in making their claims.

Additionally, and disturbingly, the grievor was offered reinstatement into employment by Superintendent James Newton only on condition that the grievor, who is the local chairman of the United Transportation Union, give up his union office and any significant activity in the union for the duration of his employment with the Company. The Company's representatives do not deny that fact, and readily concede that Mr. Newton's actions were highly unlawful. However, even assuming that Mr. Newton proceeded out of gross ignorance, that fact does little to dispel

the Union's suggestion that the grievor was singled out for reasons unrelated to the merits of his alleged actions in respect of the time claims.

Mr. Bates is an employee of more than thirty years' service with a good disciplinary record and a good work record. It is difficult for this Office to reconcile that he was not offered reinstatement, on proper and lawful terms, while his two crew mates have been returned to service.

Nor can the Arbitrator give significant weight to the Company's assertion that the bond of trust has been broken between itself and Mr. Bates. The evidence discloses that for a number of weeks after the Company became aware of the events leading to the grievor's discharge it maintained both Mr. Bates and his crew mates in full service, through the end of the grain transportation season, at which point they were discharged. Additionally, the reinstatement of the conductor and the assistant conductor who worked with Mr. Bates calls into question the credibility of the Company's assertion that it cannot place any trust in the grievor, whose actions were essentially no different than theirs. Finally, it appears that reinstatement was offered to the grievor by Mr. Newton, albeit on illegal terms.

For the reasons related above, the Arbitrator is satisfied that the Company has failed to prove deliberate fraud on the part of Mr. Bates. The evidence does show carelessness and errors of judgement deserving of some discipline. At most, as noted above, the grievor would have been deserving of an audit letter to explain to him that he cannot claim yard rates of pay for time expended travelling to and from his hotel, or for preparatory time, even if it does involve some delay. Beyond that, ten demerits would be appropriate for his inattention to the time return submitted on his behalf.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with full compensation for all wages and benefits lost, with interest, with ten demerits to be placed on his record.

April 16, 2007

(signed) MICHEL G. PICHER
ARBITRATOR