

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

CASE NO. 3636

Heard in Montreal, Tuesday, 11 December 2007

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discharge of Conductor Michael Booth.

JOINT STATEMENT OF ISSUE:

On April 25, 2007, Mr. Booth was required to attend a formal investigation in connection with the circumstances surrounding: "Alleged threats made by you to another employee while on the picket line at Oshawa during the UTU strike."

Following the investigation, the Company issued a Discipline Form 780 dated April 27, 2007, assessing Mr. Booth with a discharge from Company service effective February 14, 2007 for "Conduct unbecoming an employee on February 14, 2007 at Oshawa, Ontario."

The Union contends that the discipline assessed Mr. Booth was excessive.

The Company disagrees.

FOR THE UNION:

(SGD.) G. ETHIER
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) R. A. BOWDEN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

R. A. Bowden	– Manager, Labour Relations, Toronto
F. O'Neill	– Manager, Labour Relations, Toronto
D. Thomas	– Mechanical Supervisor
K. Sabo	– CN Police Constable

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
G. Ethier	– General Chairperson
M. Booth	– Grievor
C. Little	– Local Chairperson, Belleville
M. Booth	– Grievor

AWARD OF THE ARBITRATOR

The facts of this grievance are not in substantial dispute. On the morning of February 14, 2007 the grievor was involved in picketing activity at Oshawa, Ontario pursuant to a lawful strike then being engaged in by the Union. On the morning of that date Mechanical Foreman Dantae Thomas, a supervisory employee normally assigned to work in Chicago, reported to work in Oshawa in relief of the mechanical supervisor at the Oshawa Yard, an assignment he had been performing for the previous four days, since the commencement of the strike.

Upon Mr. Thomas' vehicle arriving at the yard at or about 7:30 a.m. Mr. Booth approached his car. It appears that Mr. Booth then had a plastic snow shovel, with a wooden handle, in his hand, apparently after cleaning some snow around the area of the picket line. It appears that during the verbal exchange between the two through the window of Mr. Thomas' vehicle, Mr. Booth was told by Mr. Thomas that he was not there to perform struck work but rather to relieve the mechanical supervisor, and that he had come from Chicago for that purpose. When the two discussed the ramifications of crossing a picket line in the United States, Mr. Thomas stated that a person might get shot.

This appears to have provoked Mr. Booth. On the evidence I am satisfied that he then threw down his shovel, stepped back, inviting Mr. Thomas to exit his car and fight with him. Mr. Thomas indicated that he would not leave his vehicle, whereupon Mr. Booth uttered words to the effect that Mr. Thomas was a coward, that all Americans are cowards and that if he saw him on the picket line the next day he would "beat his ass over the head with a hockey stick." At or about that moment it appears that other picketers intervened and that Mr. Thomas was allowed to proceed into the workplace.

Feeling shaken by the incident, Mr. Thomas reported it to CN Constable Ken Sabo who investigated and shortly called in the Durham Regional Police who arrested Mr. Booth, charging him with uttering threats contrary to the **Criminal Code of Canada**. It is common ground that Mr. Booth entered a plea of no contest, as a result of which the charges were withdrawn and he entered into a recognizance or peace bond, undertaking to keep the peace and be of good behaviour, and not to communicate or associate with Mr. Thomas, except for supervised work activities.

Following a disciplinary investigation of the incident, the Company dismissed Mr. Booth for conduct unbecoming. In support of its decision the Company notes that Mr. Booth has been the subject of prior discipline on a number of occasions, and that in 1999 he was assessed thirty demerits for conduct unbecoming an employee when he used insulting language towards a supervisor.

The Union takes a substantially different view. Firstly, it notes that the grievor has nineteen years of service with no prior record of threats or physical altercations. It also argues the jurisprudence which relates to the mitigating value to be given to events which occur within the charged atmosphere of the picket line during a strike. Additionally, its counsel notes that during the course of the disciplinary investigation Mr. Booth did extend an apology, stating that "... if Mr. Thomas' understanding of the matter is that I was threatening, I would once again like to extend my apologies for any misunderstanding."

In the Arbitrator's view the Company had every reason to be substantially concerned with the report of the incident given to it by Mr. Thomas, and indeed with the conduct exhibited by Mr. Booth on the morning of February 14, 2007. Threats of physical violence have no place in the workplace, even within the strained atmosphere of a strike and picket line. There are, however, mitigating factors to consider.

First among those is the approach which boards of arbitration have taken to the unique circumstances of picket lines, and how those circumstances may, to some degree, be viewed as a mitigating factor. There are a number of prior arbitration awards which have resulted in discipline short of discharge for picket line activity involving verbal insults, threats and even some physical contact. In **Re Gates Rubber of Canada Ltd. and United Rubber Workers, Local 733** (1978), 18 L.A.C. (2d) 412 (O'Shea) the arbitrator made the following comments at p. 416:

It is recognized that during a prolonged strike pressures are generated on both sides. When employees are required to sustain themselves without their regular employment, financial hardship and deprivation result. Resentments grow as the strike continues until tempers of employees are such that the slightest provocation is sufficient to generate retaliation out of all proportion to the cause. Often times when these explosive situations develop an imagined complaint or a misinterpreted incident is sufficient to provoke a violent reaction. When such reactions occur, one

must look at the whole picture in order to assess the extent of blame. If employees react to a certain situation in such explosive conditions and that reaction is what one would normally expect to take place in those circumstances, the existence of the strike should be considered as a mitigating factor.

Dismissal was found by Arbitrator Verity to be excessive in a case involving threats on a picket line in **Re Hamilton Board of Education and C.U.P.E., Local 1344** (1993) 33 L.A.C. (4d) 441 (Verity). This Office also reinstated a discharged employee who was found to have improperly entered a vehicle crossing the picket line, putting his hand on the arm of an office employee assigned to do bargaining unit work during the same strike, in **CROA&DR 3629**. (See also **Re Telus Communication Inc. v. Telus Communication Workers' Union** [2006] C.L.A.D. No. 417 (Sims) and **Re Radio Shack Division, Tandy Electronics Ltd. and United Steel Workers** (1980) 26 L.A.C. (2d) 227 (Beck).)

What are the mitigating factors in the case at hand? Firstly, obviously there was no physical contact or any actual assault as against Mr. Thomas. Without diminishing the seriousness of the verbal threat uttered by Mr. Booth, it is noteworthy that during the course of the Company's disciplinary investigation Mr. Booth did offer an apology for his actions, and that he was then precluded by the Court's directives from approaching Mr. Thomas to convey his apology on a personal basis. Additionally, while the Arbitrator is not persuaded that there was anything gravely provoking by the comments made Mr. Thomas, it must be remembered that what transpired did arise in the sensitive context of a picket line. The fundamental question is whether an employment of close to twenty years should be terminated for that incident.

While it is true that the grievor's prior disciplinary record is not exemplary, the Arbitrator is not persuaded that the incident is such as to foreclose the possibility of an ongoing employment relationship. In considering that question I consider it significant, as well, that of his own volition Mr. Booth undertook and successfully completed an anger management course following his termination. In all of the circumstances I am satisfied that it is appropriate to substitute a lesser penalty, albeit a severe one, which will allow the grievor to return to service with a full appreciation of how serious and unacceptable his actions were.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment at the conclusion of a suspension of ten months, calculated from 27 April 2007, without loss of seniority and without any compensation for wages and benefits lost.

December 14, 2007

(signed) MICHEL G. PICHER
ARBITRATOR