

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

CASE NO. 3638

Heard in Montreal Tuesday, 8 January 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Locomotive Engineer John Wever for conduct unbecoming an employee on January 1, 2007.

JOINT STATEMENT OF ISSUE:

On January 1, 2007, John Wever was the locomotive engineer on GO 905. When that train arrived in Union Station, Locomotive Engineer Wever proceeded from the control unit to the next coach in an attempt to use the washroom facilities.

John Kelly, a manager with the Company, indicated that he wished to speak with Locomotive Engineer Wever about concerns with train delays. Locomotive Engineer Wever advised that he wished to use the washroom first, after which he would speak to Mr. Kelly.

Locomotive Engineer Wever alleges that Mr. Kelly blocked his access to the washroom facilities and when Mr. Wever attempted to squeeze by Mr. Kelly moved in an attempt to close the gap. There was contact between the two, which led to raised voices on both sides.

Mr. Kelly accuses Mr. Wever of “pushing up against me with his right hand and right side of his body”.

Based on the incident and the investigation, Mr. Wever was terminated.

FOR THE UNION:

(SGD.) P. VICKERS
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) B. J. HOGAN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

B. Hogan	– Manager, Labour Relations, Toronto
R. Bowden	– Manager, Labour Relations, Toronto
J. Kelly	– Sr. Manager, Commuter Operations, Toronto

And on behalf of the Union:

J. C. Morrison	– Counsel, Ottawa
P. Vickers	– General Chairman, Sarnia
C. Spigelski	– Witness
J. Wever	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that something of a verbal altercation occurred between the grievor and Manager John Kelly, aboard the grievor’s GO train when it was stopped at Union Station on January 1, 2007.

That day was particularly sensitive as the Company was implementing a change of operations which involved the removal of one locomotive engineer from all trains in GO train service. It does not appear disputed that Mr. Kelly had concerns about possible train delays occasioned by employee actions prompted by the job reduction, and that the grievor's train was running some fifteen minutes late between Oshawa and Toronto on that day.

The evidence confirms that Mr. Kelly boarded the cab car at the western most end of the train where Locomotive Engineer Wever and Assistant Conductor Clifford Spigelski were located. As Mr. Kelly stood on the mezzanine level of the car Mr. Wever approached him, having told his assistant conductor that he was going to the washroom. The positioning of Mr. Kelly at the top of the stairway of the mezzanine level effectively blocked Mr. Wever's passage. When Mr. Kelly stated that he wished to have an explanation from Mr. Wever with respect to the delay of his train, the grievor told him that he was on his way to the washroom, and that he would discuss the matter with him afterwards.

Although the evidence of the three witnesses to the incident varies somewhat, the Arbitrator is satisfied that initially Mr. Kelly insisted that Mr. Wever respond to his questions before going to the bathroom. This obviously offended the grievor who, I am satisfied, was willing to answer the manager's questions, but felt that he had a right to go the bathroom unimpeded and could speak with Mr. Kelly afterwards. It appears that after two or three refusals on the part of Mr. Kelly to allow the grievor to pass, he simply attempted to do so, apparently brushing up against Mr. Kelly. This caused both men to move back a step, and to exchange words with still more elevated voices. Finally Mr. Kelly let the grievor pass, and it does not appear disputed that upon his return from the washroom, Mr. Wever did give Mr. Kelly the information he desired, and that nothing irregular appears to have occurred with respect to the delay of his train. Nevertheless, the Company conducted a disciplinary investigation, as a result of which the grievor was dismissed for insubordination.

The Arbitrator has great difficulty with the discipline assessed by the Company in the case at hand. At the time of the incident Mr. Wever was an employee of twenty-two years' service. He then had an exemplary disciplinary record, having received discipline on only one occasion in all of his years with the Company, the assessment of fifteen demerits in 1993 for a rule violation. There is nothing in the grievor's record to suggest any prior insubordination or the failure to follow orders from his superiors.

While the Arbitrator appreciates that Mr. Kelly may have had proper motivation to inquire as to the reasons for a train delay on the date in question, I am compelled to accept the characterization of Mr. Kelly's approach towards Locomotive Engineer Wever as being provocative. The ability of a locomotive engineer in GO service to have a washroom break on a station stop should not be a debateable issue. Mr. Kelly knew, or reasonably should have known, that he had no legitimate basis to refuse to allow Mr. Wever to pass by him, and should have arranged to speak to him after his bathroom break with respect to the delay encountered by his train. As noted above, I am satisfied that Mr. Kelly verbally insisted, more than once, that he be given full responses to his questions before Mr. Wever would be allowed to proceed to the washroom. In that dubious circumstance, the Arbitrator does not find it surprising that Mr. Wever might have felt provoked and attempted to simply walk past his supervisor in what appears to have been a relatively non-aggressive fashion.

Were there grounds for assessing discipline against Mr. Wever in the case at hand? After careful consideration, I think not. At most what occurred was a mild touching and a tense verbal exchange which, I am satisfied, would not have occurred but for the inappropriate interference of Mr. Kelly who appeared to assert, more than once, that Mr. Wever was not free to go to the washroom until his manager had satisfaction with respect to the questions he wished to put to him. While it is obviously not for the Arbitrator to assess the degree of physical urgency which Mr. Wever was then experiencing as regards his need to go to the bathroom, I am satisfied that the evidence does not place the incident fairly within the "work now – grieve later" principle. In coming to these conclusions it should be clear that the Arbitrator finds the evidence of the grievor, and in particular the supporting evidence of his assistant conductor, to be more credible than the account provided by Mr. Kelly. In the result I am satisfied that no discipline should have issued.

The grievance is therefore allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost and without loss of seniority.

January 14, 2008

(signed) MICHEL G. PICHER
ARBITRATOR