

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

CASE NO. 3742

Heard in Montreal, Wednesday, 15 April 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

The assessment of 20 demerits to Heavy Equipment Operator P. Myhaluk for his alleged failure to follow safe operating practices on November 7, 2008 and his subsequent discharge for accumulation of demerits.

UNION'S STATEMENT OF ISSUE:

On November 7th, 2008, Mr Myhaluk was confronted by Supervisor Azim Abdul, who accused Mr. Myhaluk of booming out with a container over another, an improper method. Mr. Myhaluk thanked Mr. Abdul for educating him on this matter and agreed that it would never happen again. Mr. Myhaluk was suspended from service.

On December 19, 2008, a formal investigation was conducted into this matter.

Following the investigation, the Company assessed 20 demerits bringing the grievor's total to 75, which culminated in Mr. Myhaluk's discharge for accumulation of demerits in excess of 60.

On January 5, 2009, The Union appealed the discipline assessed contending that the discipline assessed was unwarranted, excessive and discriminatory. The Union seeks in resolution that the 20 demerits be removed from the grievor's record and that he be reinstated and compensated for all wages and benefits lost.

On January 15, 2009, the Union amended their grievance alleging that the Company targeted Mr. Myhaluk as a result of his activities as a Union Representative and a Union Health and Safety Representative. The January 15, 2009, letter further contends that the discipline was issued in bad faith, was discriminatory in nature and a form of harassment by the Company. It is the Union's position that the Company has treated Mr. Myhaluk differentially [sic] in all matters. The Union requests that Mr. Myhaluk be transferred from the Brampton Intermodal Terminal to another position within the 5.1 Agreement. This because of the discrimination exhibited against him by Mr. Abdul and Mr. T O'Reilly.

The Company maintains that the grievor's responsibility has been determined and that the assessment of 20 demerits and his subsequent discharge for accumulation of demerits in excess of 60 was warranted. The Company additionally maintains that the allegations raised in

the Union January 15, 2009, amendment are without merit and have no bearing on the instant dispute.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

- R. Bateman – Sr. Manager, Labour Relations, Toronto
- D. S. Fisher – Director, Labour Relations, Montreal
- D. Cater – Terminal Manager, Brampton Intermodal Terminal, Brampton

And on behalf of the Union:

- D. Olszewski – National Representative, Winnipeg
- P. Myhaluk – Grievor

AWARD OF THE ARBITRATOR

The grievor was observed to move a first container and place it on the ground in his assigned L7 area. He then picked up another container and travelled to the extreme north end of block 7. The grievor then stopped at M7, boomed out and reached over the front container on the ground and placed the container from L7 behind that same front container. The grievor was told by a supervisor that he was not allowed to perform such a manoeuvre and would be written up as failing an efficiency test. The grievor asked the supervisor at the time if he could reach over another container to place another one in the middle row on the ground and was told that this was not permissible either. According to the statement of the supervisor, the grievor thanked the supervisor, in his words "... for educating him and said that it will not happen again". A second supervisor on the scene also provided feedback and the grievor thanked him "... for educating him in this matter and said it will never happen again".

The placement of the container directly behind another container by the grievor could have resulted in serious property damage or injury. The Company took appropriate action and there is cause to discipline the grievor. There are, nevertheless, important considerations in this case on the appropriateness of the 20 demerit penalty which resulted in the grievor's termination for accumulation of demerits.

As the Union pointed out, the grievor has dedicated over 33 years of his life to the service of the Company and will be eligible for pension in less than 2 years. A further and equally compelling mitigating factor is that the grievor evidently acted in a courteous manner on being confronted with the wrongful placement of the container. I note in particular that the grievor readily acknowledged his error and that the counselling discussion over the proper placement of the container was conducted in a professional manner. This is not a case where the employment relationship is unsalvageable, particularly given that the grievor is closing in on the end of his career. After consideration of all the circumstances, it is appropriate to uphold the grievance and substitute the 20 demerit penalty assessed by the Company with a period of suspension. The grievor is to be reinstated to his former position without compensation or loss of seniority.

May 4, 2009

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR