

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

**CASE NO. 3771**

Heard in Edmonton, Tuesday, 9 June 2009

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The closure of Anthony Sheena's employment file under the provisions of Article 108.6 of Agreement 4.3.

**UNION'S STATEMENT OF ISSUE:**

The grievor, Anthony Sheena, was a newly hired conductor, working under the probationary period of the collective agreement. On November 26, 2006, the grievor suffered an injury while on duty. On December 4, the Company proposed Mr. Sheena [sic] participate in the Company's light duty program Mr. Sheena's physician would not approve the grievor's participation in light duties for medical reasons.

On December 14, the grievor was issued a notice to appear for an investigation – scheduled for December 21 – with respect to this matter. On December 20, the grievor advised the Company that the doctor had now approved the grievor's participation in light duties. On December 21 the grievor received a registered letter informing him that his employment file was being closed under the probationary provisions of the collective agreement. No employee investigation took place.

The Union submits that the grievor has been unfairly dismissed and that he ought to be reinstated into his probationary position and made whole for all losses.

The Company maintains that the Mr. Sheena was determined to be unsuitable for reasons unrelated to this incident and that the Company is within its rights to close the grievor's file.

Further, as a preliminary matter, the Company submits that this grievance was not forwarded by the Union in a timely manner and that it is not properly before the arbitrator.

The Union submits that time limit extensions had been requested and granted properly protecting the time limits and that even if time limits have been exceeded, this is a proper case for the arbitrator to exercise his discretion under the Canada Labour Code to extend the time limits and determine the case on its merits.

**FOR THE UNION:**

**(SGD.) B. R. BOECHLER**  
**GENERAL CHAIRMAN**

There appeared on behalf of the Company:

- D. Crossan – Manager, Labour Relations, Prince George
- D. VanCauwenbergh – Director, Labour Relations, Edmonton
- P. Payne – Manager, Labour Relations, Edmonton
- K. Morris – Manager, Labour Relations, Edmonton

And on behalf of the Union:

- K. Stuebing – Counsel, Toronto
- B. R. Boechler – General Chairman, Edmonton
- R. A. Hackl – Vice-General Chairman, Edmonton
- A. Sheena – Grievor

### **AWARD OF THE ARBITRATOR**

The present grievance, along with several other discipline and policy grievances, were progressed in a timely manner up to February 17, 2007. On February 19, 2007, the Board of Directors of the UTU International passed a resolution removing the General Chairperson and Vice-General Chairperson from their positions and replaced them with two vice-presidents who were responsible for overseeing union operations.

On February 28, 2007, the Company and the Union agreed that an extension of time limits on all outstanding grievances would be granted for a period of 60 days from the date of ratification of the Memorandum of Agreement, signed February 24, 2007, provided such grievances had not already expired prior to February 10, 2007. The sixty day extension actually expired on June 9, 2007 and a further extension was granted prior to that time to July 19, 2007. The grievor was dismissed on December 21, 2006 and his grievance was therefore considered timely at that point given that it fell within the 60 day cut-off date. On April 10, 2007, the membership of the UTU rejected the Memorandum of Agreement. The Government then passed return-to-work legislation on April 18, 2007.

The Union relocated its offices in Edmonton at the end of July 2007. The new General Chairperson, Mr. Robert Thompson, was elected on October 26, 2007. According to the Union, he discovered that some 66 grievances had not been progressed in a timely manner, including the grievor's. Mr. Thompson met with the Company's Mr. VanCauwenbergh on December 21, 2007. An agreement was reached to extend time limits on all discipline and discharge cases but not the policy grievances.

The instant grievance was faxed to the Company's Mr. Morris on December 21, 2007. That same day a package of all the remaining discipline grievances were sent by the Union to Mr. VanCauwenbergh but the instant grievance was not included in the package. On February 18, 2008, the Union submitted the instant grievance to the Company at Step 3.

The Company submits that the Union's attempt to progress the grievance to Step 3, some 7 months after the expiry of all extensions, is prejudicial from a liability perspective and its ability to defend this matter. In that regard, the Company states that the grievor's probationary record was no longer available to the Company at the time the grievance was progressed to Step 3. The Union maintains that the grievance is timely because it was protected by the 60 day agreement struck in February 2007. Alternatively, the Union submits that the Company is estopped from advancing a position regarding a breach of time limits because of Mr. VanCauwenbergh's commitment to extend time limits on all cases involving discharge or discipline. In the

final alternative, the Union urges that the arbitrator exercise his discretion and extend the time limits pursuant to section 60 (1.1) of the **Canada Labour Code**.

The key evidentiary point in my view revolves around the discussion between Mr. VanCauwenbergh and Mr. Thompson on December 21, 2007. The Company, although dealing with grievances that had technically expired, agreed to process those discipline and discharge grievances that met the original 60 day extension requirements of February 28, 2007. Although there is evidence before me that the instant grievance was faxed to the Company that same day, it was not among those sent in the package of grievances delivered to Mr. VanCauwenbergh as per the agreement of December 21, 2007. The onus was clearly on the Union to follow through on the agreed manner of delivery and it unfortunately failed to do so, whether through administrative error or otherwise.

The Company has since closed its file and the particulars surrounding the grievor's performance during his probationary period are no longer available. The Company would be clearly prejudiced if it was required to defend the grievance without access to critical evidence surrounding the grievor's performance during his probationary period. The failure of the Union to follow the agreed step of delivering the grievance in the package with other discipline and discharge grievances has resulted in a breach of the prescribed time limits set out in the grievance procedure provisions and renders the grievance inarbitrable.

There is also no basis for a finding of estoppel. The agreement of the Company was to accept the discipline and discharge cases captured by the earlier extension agreement of December 2007. The Union, to repeat, failed to live up to its end of the agreed conditions for processing of the discipline and discharge grievances by failing to include the instant grievance in the package delivered to Mr. VanCauwenbergh. It cannot now claim detrimental reliance when it clearly breached the agreed requirements for processing of the grievances after the December 21, 2007 meeting.

This is also not a case where the arbitrator should exercise the discretion available under the legislation to extend time limits. The evidence is that the Company is unable to now locate the probationary performance records given that the file has been closed for some time. It is reasonable in my view that these records would not be available given the short tenure of the grievor with the Company, an employee who had not yet completed his probationary period. In balancing the interests of both parties, the scales tip in favour of the Company in this case to not extend the time limits.

For all the above reasons the preliminary objection is upheld and the grievance is dismissed.

June 23, 2009

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