

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

**CASE NO. 3793**

Heard in Montreal, Thursday, 16 July 2009

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

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

**EX PARTE**

**DISPUTE:**

Concerning the discharge of Lead Hand Mechanic Mr. Robert Brewitt for alleged “misrepresentation and involvement regarding the circumstances surrounding the unauthorized leave, time of unauthorized departure and falsification of time records on December 31st, 2008 by [another] Mechanic ...”.

**UNION’S STATEMENT OF ISSUE:**

It is common ground that on December 31st, 2008, [an] employee left work early. The Company charged [that employee] with “inappropriate use of Company property and time”. It is the Company’s position that the grievor, Mr. Brewitt, participated in the alleged infraction of [that employee].

The Union denies the allegations. It is the Union’s position that the grievor acted properly at all material times. He was forthright and honest in his investigative statements and the Company has failed to meet the burden of proof as regards any wrongdoing. The Union also contends that the investigative hearing was not fair and impartial. The Company also failed to take into account such mitigating factors as the grievor’s long service and the death of the grievor’s sister on the night in question. The Union requests the grievor be reinstated with full wages, benefits and seniority.

The Company denies the Union’s allegations and maintains the discipline assessed.

**FOR THE UNION:**

**(SGD.) R. FITZGERALD**

PRESIDENT

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, BIT, Brampton        |

And on behalf of the Union:

- R. Fitzgerald – President, Toronto
- J. Almdal – Regional Representative, Toronto
- D. Michaluk – Regional Representative,
- R. Brewitt – Grievor

### **AWARD OF THE ARBITRATOR**

The grievor, Lead Hand Mechanic Robert Brewitt was dismissed for what the Company characterizes as misrepresentation and his deception in respect of his involvement in the unauthorized departure from work and falsification of time records in respect of another employee working on his crew on December 31, 2008. The grievor denies any wrongdoing and the Union submits that the Company has not adduced evidence that will discharge its burden of proof in the case at hand.

Before turning to the facts, it is instructive to recall the comments of this Office in **CROA 3322**. That case involved the discharge of an employee for having allegedly falsely misrepresented an injury. While much of that case turned on the issue of whether the employee was afforded a fair and impartial investigation, in approaching the general issue of the burden of proof the arbitrator commented as follows:

Bearing in mind that the Company has the onus of proof in this matter, and that an allegation as serious as fraud requires a high standard of clear and cogent evidence, what the case at hand presents is evidence which is equivocal at best.

...

The record in the case at hand discloses that another employee, S.L., left work early on the evening of December 31, 2008. As it happens, Yard Mechanical Supervisor Jim Cheeseman conducted a spot visit to the Concord garage. When he asked of S.L.'s whereabouts he was told that he had left shortly before, an explanation which Mr.

Cheeseman found puzzling as there were apparently no other tire marks on the freshly fallen snow of the parking lot save for those of his own vehicle.

The evidence discloses that S.L.'s time card did not reflect an accurate recording of his departure on December 31, 2008. The card was obscured by reason of the fact several entries were stamped over top of each other in the out column for that date. The labour distribution entry on the labour sheet for that day also indicated that S.L. had left work at or about 22:30 rather than 23:00 as scheduled. The grievor's evidence is that S.L. asked him to leave early and that he gave him permission to do so, seeing him leave at or about 22:25. Forensic evidence indicates that in fact the multiple stampings on the time card appear to have been made variously at 22:42, 22:46 and/or 22:48. During the course of the ensuing Company investigation S.L. admitted that he himself had adjusted the labour transfer sheet and was responsible for the double punch on his card. It does not appear disputed that the grievor in fact called employee S.L. after Mr. Cheeseman's visit to the garage, presumably to advise him of the supervisor's concerns about his whereabouts.

The Company does not believe the version of events recounted by S.L. It has concluded that in fact S.L.'s card was double punched by the grievor after their telephone call following the visit to the garage by Mr. Cheeseman. Notwithstanding the grievor's denial of that allegation, the contrary account of S.L. and the supporting testimony of a third employee who was present at the garage, the Company has formed the opinion that Mr. Brewitt was intrinsically involved in the punch card fraud of S.L.,

who it surmises in fact departed work considerably earlier, claiming payment for an extensive period of time not worked.

Upon a careful review of the evidence the Arbitrator cannot sustain the Company's conclusion. There is, very simply, no direct or compelling evidence presented by the Company to connect the grievor to the improper punching of the time card of S.L. On the other hand there is direct testimony from S.L. himself, supported by two other employees, to the contrary. Although during the initial stages of the investigation S.L. denied any wrongdoing, he eventually "came clean" and explained that when he received a phone call to the effect that someone was looking for him at work he returned to the workplace and double punched his card at or about 22:45. The Company can offer no direct evidence to undermine or contradict that account of events given by S.L. It prefers to believe that S.L. was long gone and did not return to the plant, and that his card was in fact double punched by Mr. Brewitt.

While the Arbitrator can understand the reasons for the Company's surmise and suspicion, a board of arbitration cannot reduce the standard of proof to one of mere possibility or suspicion, given the rules of evidence which govern our procedures. It is for the Company to prove, on the balance of probabilities, that the grievor did manipulate the time card of employee S.L. There is, very simply, no direct evidence to confirm that allegation. Indeed, such direct evidence as is before the Arbitrator is entirely to the contrary.

In the result the grievance must be 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.

July 20, 2009

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**