

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

CASE NO. 3828

Heard in Calgary, Thursday, 12 November 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

Discharge of Anthony Fudali for alleged sleeping on duty July 30, 2009.

UNION'S STATEMENT OF ISSUE:

On August 25, 2009, Mr. Anthony Fudali was issued a CN form 780 advising that he was discharged for nesting/sleeping on duty July 30, 2009.

The Union contends that Mr. Fudali was sleeping on his lunch break in order to attend to a long standing disability and that in any event the discipline was excessive, arbitrary and discriminatory. It is the Union's position that the Company failed to take into consideration mitigating factors such as the employee's disability, long service and excellent work history.

The Union is seeking compensation for all losses including but not limited to wages, benefits and CCS for pensionable service.

The Company failed to respond to the Union's position within the time limits outlined in the Supplemental 5.1 collective agreement.

FOR THE UNION:

(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

- R. Campbell – Manager, Labour Relations, Winnipeg
- B. Laidlaw – Manager, Labour Relations, Winnipeg
- C. Calquhoun – Senior Coordinator

And on behalf of the Union:

- R. Fitzgerald – National Representative, Toronto
- B. Kennedy – President, Council 4000, Edmonton
- D. Michaluk – Regional Representative, Praire Region
- R. Shore – Regional Representative, Mountain Region
- A. Fudali – Grievor

AWARD OF THE ARBITRATOR

The record discloses that the grievor was found sleeping in his car on July 30, 2009. His explanation is that he exchanged lunch hours with another employee to move his break to an earlier time period as he suffers from sleep apnoea and had not slept well the previous three nights. He decided to nap in his car over the lunch period, using his cell phone as an alarm to wake him in time to return to work.

Following an investigation the Company apparently did not believe his explanation and discharged him. While the Arbitrator is compelled to agree that the Company did have grounds to issue some discipline against Mr. Fudali, I am not persuaded that termination was appropriate, given all of the mitigating factors.

It does not appear disputed that the grievor does suffer from sleep apnoea and that he was asleep in his car when observed by Mr. Calquhoun. There is some discrepancy in the evidence, however. The supervisor as well as Trainmaster Harapiak claim that immediately following the incident when Mr. Fudali was being interviewed he admitted to having slept on prior occasions. However, during the course of his

disciplinary investigation Mr. Fudali denied any such admission and denied having done so. A close examination of the record satisfies the Arbitrator that that issue is not, in any event, before me. The form 780 notice of termination states that the discharge is solely for “nesting/sleeping while on duty on July 30, 2009.” The sole issue, therefore, is whether that single infraction was deserving of discharge in the circumstances.

The Arbitrator is satisfied that there substantial mitigating circumstances to be considered which would suggest that discharge is not appropriate in the case of Mr. Fudali. Firstly, as noted in **CROA&DR 3827**, he is an employee with thirty-four years’ service with virtually no discipline on his record prior to a short time before the events giving rise to this grievance. The Company does not challenge the fact that he suffers from sleep apnoea nor does it appear disputed that the supervisor did tolerate employees swapping lunch breaks, which would explain why the grievor was away from his work station during what would otherwise be his working time.

Obviously Mr. Fudali should have advised his superiors of his condition and given them some indication that he intended to retire to his car for a short nap during his lunch break or, alternatively, failing permission to do so, he could have punched out and left work as being unfit for any further service. It was simply not appropriate for him to take it upon himself to retire to his vehicle to sleep without any indication to his supervisors.

I am satisfied that the instant case involves errors of judgement on both sides. I am therefore satisfied that it is appropriate to reinstate the grievor into his employment forthwith, without loss of seniority. Given the mutual lack of judgement, I direct that the grievor be compensated for 50% of his loss of wages and benefits for the period between his termination and the date of his reinstatement. The time between those two events shall be recorded as a suspension.

November 24, 2009

(signed) MICHEL G. PICHER
ARBITRATOR