

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

CASE NO. 3876

Heard in Calgary, Tuesday, 9 March 2010

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of a discharge to Locomotive Engineer P. Wells on February 13, 2009, for “conduct unbecoming and failure to follow instructions and return a leased CN motor vehicle on December 25, 2008.”

UNION’S STATEMENT OF ISSUE:

On December 24, 2008, Locomotive Engineer Wells was authorized by the Company to utilize a rental vehicle to drive himself and his conductor from Kamloops to Vancouver, B.C. Due to weather conditions and the grievor’s developing medical condition, the car was not immediately returned. After a routine traffic stop, the vehicles was impounded, causing a further delay in its return. The Company conducted an investigation and determined that the grievor had failed to follow instructions and was guilty of conduct unbecoming an employee, resulting in Mr. Well’s discharge.

The Union’s contends the grievor failed to return the vehicle on December 25, 2008 due to weather and medical circumstances that occurred on and after that date and that these mitigating circumstances were not a consideration in the decision to discharge. [sic] The Union contends that the Company has failed to prove allegations of unbecoming conduct that would warrant discharge. The Union contends a violation of articles 86.1 and 86.2 given that the investigation was not fair and impartial due to the investigations being conducted utilizing questionable evidence and that the investigation strayed from the initial reason for the investigation as stated in the notice to appear.

It is the Union’s position that Mr. Wells’ discipline is unwarranted and should be expunged or, in the alternative, the discipline should be significantly reduced. Mr. Wells should be compensated for all loss of wages or benefits.

FOR THE UNION:

(SGD.) T. MARKEWICH
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

- | | |
|--------------|-----------------------------------|
| M. A. Church | – Counsel, Toronto |
| B. Willows | – General Chairman, Edmonton |
| T. Markewich | – Vice-General Chairman, Edmonton |
| G. Mensaghi | – Local Chairman, Calgary |
| P. Wells | – Grievor |

AWARD OF THE ARBITRATOR

The evidence confirms that because of highly unusual snow conditions in Vancouver and the lower mainland on December 24, 2008, the grievor was given permission to use a rental car to deadhead from Kamloops to Vancouver, with his crew mate. Locomotive Engineer Wells was instructed that he should return the rental car to the Vancouver airport the following day, December 25, 2008. In fact the car was not returned on December 25 and, two days later on December 27, 2008 it was impounded by the Vancouver city police from a location in downtown Vancouver described as the three hundred block of Columbia Street. The report provided to the Company by the Vancouver city police is that the grievor was inside the car without a shirt on and was in the company of a female passenger.

According to the report obtained from the Vancouver police by CN Constable Mark Golouch the Vancouver police stopped the grievor in his vehicle for the investigation of possible prostitution activity. According to the report the grievor stated that he was going to the airport and that the female in the vehicle stated that she lived with the grievor and that they were in the downtown area to purchase marijuana. It is not disputed that the vehicle was impounded by the Vancouver police because it became clear that the grievor had resided in British Columbia for longer than three months, having previously transferred from Jasper, Alberta, and had not obtained a British Columbia driver's licence. Following an investigation, the Company discharged

Locomotive Engineer Wells for conduct unbecoming and the failure to follow instructions.

At the hearing the Company stressed the grounds for its decision. In that regard it lists the grievor's failure to return the vehicle as instructed, his having retained the car for three days during which he apparently made personal use of it for a trip to a hospital on Christmas Day, that he had an unauthorized person in the car, that his driver's licence was not in order and that he was involved in what appears to have been an attempt to procure marijuana.

On the face of it these allegations have a very serious appearance. The grievor's explanation, however, which the Arbitrator accepts in substantial part, sheds a different light. Firstly, the grievor explains that the snow conditions in Vancouver were such on December 24 that he could not physically reach the airport and that for a period of at least two days his own car remained inaccessible in Thornton Yard. Mr. Wells further explains that he attempted on at least two occasions to call the Company's supervisors to advise of the situation, but was unable to get an answer, after which he gave up. In addition, he indicates that the person in his vehicle was a personal friend who was assisting him in navigating the car to the airport as he was not familiar with the route to the airport from his home in Surrey. He also explained that he was not wearing a shirt inside the car because he was then suffering from extremely painful boils and lesions on his back and that part of the reason for his friend being there was to assist him in putting on his coat. It may also be noted that while the CN police report was provided to the grievor as part of the record at his disciplinary investigation, no questions were put to him by the investigating officer with respect to the statement of his companion with respect to marijuana.

On the whole, the Arbitrator is satisfied that while there were serious errors committed by Locomotive Engineer Wells, and that he did place himself in what appeared to be a compromising situation in a Company vehicle, there are mitigating factors which would suggest that this is an appropriate case for his reinstatement.

Firstly, the employee has twenty-seven years' service and had a clear disciplinary record at the time of his discharge. Such discipline as he previously received was, with one exception, entirely related to attendance issues. It is not disputed that he was a good operating employee and has no record of any prior misconduct. Additionally, his failure to return the vehicle as scheduled is, in my view, sufficiently explained by the apparently unprecedented volumes of snow which struck the Vancouver area on the days in question. I accept his evidence that he was unable to reach his own car and that the volume of snow made it impossible for him to return the vehicle to the airport before December 27th. Additionally, I must accept the submission of counsel for the Union to the effect that there is no meaningful evidence with respect to any attempt to obtain marijuana by the grievor, bearing in mind that the report of the CN police is hearsay at best, and was not in fact pursued in any way during the Company's disciplinary investigation. I also accept that he was suffering from serious lesions to his back, which required him to visit the hospital on Christmas Day for several hours.

The grievor was nevertheless subject to serious discipline for not having taken the necessary steps to communicate with a Company supervisor the fact that he had retained the car beyond the date for which its use had been authorized, that he was using it for personal purposes and that he did have an unauthorized person with him in the Company's rented vehicle. The state of his driver's licence, not verified by the Company, is a technicality that should not cause his termination.

In the result, I am satisfied that this is an appropriate case for reinstatement, albeit without compensation. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for his wages and benefits lost.

March 15, 2010

(signed) MICHEL G. PICHER
ARBITRATOR