

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

CASE NO. 3880

Heard in Calgary, Wednesday, 10 March 2010

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the issuance of 30 demerits to Locomotive Engineer Tom Hicken for conduct unbecoming and the resulting dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On June 23, 2008, the grievor reacted inappropriately to the receipt of a Form 104 for another incident.

The Company determined that the grievor's conduct was conduct unbecoming of an employee at CP. On July 17, 2008, Mr. Hicken's employment record was assessed 30 demerits for conduct unbecoming an employee and he was terminated by the Company for an accumulation of demerits under the Brown System of Discipline.

The Union contends that the assessment of 30 demerits and dismissal of Mr. Hicken is unwarranted and excessive in all of the circumstances. The Union contends that the grievor's conduct was a momentary outburst for which he subsequently apologized.

The Union further contends that the grievor was suffering significant personal stress at the time of the incident in question, which contributed to his conduct. The Union contends that the grievor has since successfully resolved this stress condition through professional treatment.

The Union requests that Mr. Hicken be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions and denies the Union's request.

FOR THE UNION:

(SGD.) D. ABLE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) A. A. GARCIA
FOR: ASSISTANT VICE-PRESIDENT – OPERATIONS

There appeared on behalf of the Company:

D. Burke – Project Specialist, Calgary
R. Wilson – Assistant Vice-President, Industrial Relations, Calgary

J. Bairaktaris – Director, Labour Relations, Calgary
A. A. Garcia – Manager, Labour Relations, Calgary
V. White – Assistant Labour Relations Officer, Calgary

And on behalf of the Union:

M. A. Church – Counsel, Toronto
D. Able – General Chairman, Calgary
G. Edwards – Sr. Vice-General Chairman, Revelstoke
G. Seiller – Local Chairman, Lethbridge
R. Purtil – Local Chairman, Moose Jaw
T. Hicken – Grievor

AWARD OF THE ARBITRATOR

The Company has discharged the grievor for conduct unbecoming. It is not disputed that when he was given a Form 104, advising him that he had been assessed fifteen demerits for falsely claiming leave by reason of an injury, he erupted into a verbal tirade against Road Manager Frank Szing, who issued him the Form 104 in a private encounter on May 18, 2008. Among his comments he stated: “This is a fucking joke!” and “You are a fucking joke and everyone here thinks you are a fucking joke ...”. After leaving the office Mr. Hicken telephoned Mr. Szing some twenty minutes later and continued with his abusive verbal assault upon the supervisor.

Following an investigation, the Company assessed thirty demerits against Conductor Hicken for conduct unbecoming.

The Arbitrator accepts the Company’s submission that the grievor’s conduct was entirely unacceptable, and deserving of a severe measure of discipline. However, there are mitigating factors to consider. Firstly, shortly after the incident itself Mr. Hicken telephoned Road Manager Szing at his home and made an unqualified apology to him,

as recorded during the course of the Company's subsequent investigation. He reiterated that apology and his profound regret at the arbitration hearing. It is also significant that Mr. Hicken, albeit his disciplinary record is not without blemish, is fifty-two years of age and has some thirty-one years of service with the Company. In the circumstances I am satisfied that there are sufficient grounds to make a substitution of penalty, albeit on conditions fashioned to protect the Company's legitimate interests.

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 any wages and benefits lost. Mr. Hicken's reinstatement shall be conditional upon his accepting firstly, to maintain a rate of availability and attendance at work to be not less than that of the average of his peers at his terminal, for a period of not less than two years. Should he fail to maintain that standard during any three month period in that time, he shall be subject to termination. Additionally, for the same period of time his reinstatement is conditioned upon maintaining civility and respect in his relations and communications with supervisors and fellow employees. Any failure of that condition shall likewise render the grievor liable to discharge.

March 15, 2010

(signed) MICHEL G. PICHER
ARBITRATOR