

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

CASE NO. 3911

Heard in Edmonton, June 9, 2010

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Conductor Calvin Osterlund for violation of General Notice No. OPR-002 leaving Company property during his tour of duty on June 9, 2009 without proper permission.

JOINT STATEMENT OF ISSUE:

On June 9, 2009, Mr. Osterlund was employed as the conductor on assignment YFJ016 at Fort St. John, BC, commencing at 06:30. During his tour of duty Mr. Osterlund left CN property to drive his father on a personal errand to assist with the repair of his vehicle. On June 11th and 19th, 2009 Conductor Osterlund was required to attend an employee investigation in connection with General Notice No. OPR-002 dated January 9, 2009 – leaving company property without permission.

Following this investigation, Mr. Osterlund was dismissed for “Violation of General Notice OPR-002 dated January 9, 2009, leaving Company property during your tour of duty on June 9, 2009 without proper permission.

The Union contends that the penalty of discharge is excessive and suggests a verbal warning or written reprimand be substituted and that the grievor be made whole for all lost wages and benefits.

The Company disagrees.

FOR THE UNION:
(SGD.) J. HOLLIDAY
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) D. CROSSAN
FOR: DIRECTOR HUMAN RESOURCES

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
K. Morris	– Sr. Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg
K. Hutchinson	– Auditor, Edmonton
D. Rechsteiner	– Trainmaster, Smithers

There appeared on behalf of the Union:

J. Holliday	– General Chairman, North Vancouver
W. Martin	– Local Chairman, North Vancouver
M. Braaten	– Vice-Local Chairman, North Vancouver
G. Geddes	– Local Chairman, Prince George

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that Conductor Calvin Osterlund did leave the work premises without proper authorization on June 9, 2009. He was then working a yard assignment at Fort St. John with Yard Foreman Brany Vaskic and his father, the late F.A. Osterlund. The absence of the grievor and his father from the premises was ascertained by Trainmaster Dan Rechsteiner who visited the yard and noticed that the grievor's personal vehicle was missing. According to Trainmaster Rechsteiner's report, when he radioed the crew to provide an updated switching list he received no response. That caused him to proceed to the yard where he found only Nr Vaskic. It appears that the trainmaster went to the yard shortly after 9:00 a.m. and that the grievor returned at 09:35. The grievor then indicated to him that he and his father had run a personal errand.

The Company relies on the content of a general notice in respect of attendance management re-issued on January 9, 2009. Said to be included in the General Notice Books for all locations including Fort St. John, the notices read, in part:

Employees are not permitted to leave the property during working hours without proper permission from their supervisor.

Conductor Osterlund had been on duty since 06:30 on the day in question. During his disciplinary investigation he responded that he believed that he could leave the premises with the permission of Yard Foreman Vaskic, it being understood that he would combine his coffee and lunch breaks to accommodate his errand. The Union's representative submits that it is not uncommon for employees in the workplace to absent themselves for a short time with the approval of their yard foreman, apparently on the general understanding that the yard foreman would clear the absence with a member of management. In the instant case Yard Foreman Vaskic responded "Yes" when asked if he had approved the grievor's leaving the yard for a short errand on the morning June 9, 2009. He added, however, that he did so believing that Mr. Osterlund would himself get further permission for his absence from a higher supervisor.

During his disciplinary investigation Mr. Osterlund indicated that he had no knowledge of the attendance management document relied on by the Company. The unchallenged evidence of the Union is that the document was not in fact placed in a binder or on a bulletin board where it would be required reading for all employees, for example being signed off by them. Rather, it appears that it was placed in a rolodex clipboard which contains general information of various kinds, some of which is irrelevant to particular employees at any particular time. The Arbitrator was directed to no rule which required employees to regularly review or sign off on the contents of the rolodex clipboard.

On a review of the materials before me, I am satisfied that the grievor did commit an error which rendered him liable to discipline. I am satisfied that he knew, or reasonably should have known, that the better course would have been to verify with higher management, either himself or through Mr. Vaskic, that he could leave the work premises as he did. However, in my view there are extensive mitigating factors which must be taken into account in the case at hand.

I am satisfied, on the balance of probabilities, that there was within the workplace a culture of laxity with respect to employees absenting themselves briefly without proper authority. The general notice on attendance management, first issued in February of 2007, re-issued in November of 2007 and again on January 9, 2009 would seem to confirm that a problem did exist in that regard. Significantly, the unchallenged evidence put forward on behalf of the grievor is that the notice in question was not promulgated in such a way that employees would necessarily see it or that their reading of the notice was to be verified by any signing off. In what I view as another mitigating aspect, I accept the grievor's evidence that his overall intention was to take his thirty minute lunch break at an early point so as to accommodate his errand. Finally, there appears to be no dispute that his absence from the workplace would not, in the end, have caused any loss of production. It appears unchallenged that the work which remained for Mr. Osterlund and his father to perform would have been accomplished during the balance of their tour of duty, without great difficulty.

I am not satisfied that the facts disclosed justify the summary termination of an employee of twenty-three years of service. While it is true that the grievor's disciplinary record is not exemplary, it does not contain any similar offence recorded over his past service. Additionally, a suspension for the alleged submission of an irregular time claim in February of 2009 was pending and under grievance when the grievor was terminated on June 25, 2009.

When all of the foregoing factors are taken into account, including the Arbitrator's view that the grievor did not intend to engage in the theft of time, as alleged by the Company, I am compelled to the conclusion that a substitution of penalty is appropriate for what I consider to have been a serious error of judgement on the part of the grievor, notwithstanding the mitigating factors reviewed. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost and without loss of seniority. The period between the termination of Mr. Osterlund and his reinstatement shall be recorded as a suspension for his failure to obtain proper authority to leave the work premises during his tour of duty on June 9, 2009.

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR