

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

**CASE NO. 3940**

Heard in Montreal, Wednesday, 13 October 2010

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the assessment of 15 demerit marks to Locomotive Engineer G. (Ben) Foreman for conduct unbecoming an employee on July 23, 2008, after receiving a Form 780.

**JOINT STATEMENT OF ISSUE:**

On July 23, 2008, Mr. Foreman was given a Form 780 by a Supervisor, assessing him with 10 demerit marks for a previous incident. After receiving the Form 780, Mr. Foreman reacted in a manner that the Company considered unacceptable, with verbal threats and abusive language towards the Supervisor.

The Company conducted an investigation of the incident and assessed discipline in the form of 15 demerit marks.

The Union contends that the Company failed to establish the conduct unbecoming and requested that the Company expunge the discipline assessed.

The Company disagrees with the Union's contentions.

**FOR THE UNION:**  
**(SGD.) T. MARKEWICH**  
FOR: GENERAL CHAIRMAN

**FOR THE COMPANY:**  
**(SGD.) D. BRODIE**  
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
K. Morris	– Sr. Manager, Labour Relations, Edmonton
T. Brown	– General Manager Operations, Winnipeg
D. Broesky	– Trainmaster, Winnipeg

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
T. Markewich	– Vice-General Chairman, Edmonton
G. B. Foreman	– Grievor

### **AWARD OF THE ARBITRATOR**

The material before the Arbitrator confirms that the grievor had been investigated in relation to having booked sick to obtain leave from work on May 23, 2008. On July 23 Trainmaster Donovan Broesky delivered the Form 780 advising the grievor that he had been assessed ten demerits for that incident. While there is some conflict in the evidence as to what was said between the two individuals at that time, the Company maintains that the grievor made a statement to his supervisor which was unacceptable and unbecoming of an employee, as a result of which it assessed fifteen demerits against him.

Mr. Broesky's note of the incident is related in his Memo To File dated July 23, 2008. He relates that he met Mr. Foreman at the Symington yard booking in room while the latter was going on duty. He relates that when he presented Mr. Foreman with the Form 780 he asked him to read it to him as he did not have his glasses. According to Mr. Broesky when he read the contents to the grievor the grievor refused to sign it stating that it was "bull shit". The supervisor further relates that when Mr. Foreman refused a second time to sign he turned and walked from the booking in room stating "I'll never double out again and I'll fuck them every chance I get." He states that he in fact turned and came back towards him, repeating "I'll fuck them every chance I get." His memo then states "He then departed the booking in room."

The grievor gives a substantially different account of the event. Firstly, he notes that there are several factual errors in the account given by Mr. Broesky. Firstly, at the time in question he was coming off duty after a long assignment, not going on duty. Secondly, he relates that the supervisor did not meet him in the booking in room, but rather followed him into the locker room where they were alone when he presented him with the Form 780. Mr. Foreman denies that he had to request Mr. Broesky to read the notice to him as he did have his glasses and states that he has no recollection of having used the language attributed to him.

The Company does not challenge the factual inaccuracies which appear on the face of Mr. Broesky's Memo To File. It is trite to say that in a matter of discipline the burden of proof is on the employer. It must establish, on the balance of probabilities, that the conduct alleged in fact occurred.

With the greatest respect, the Arbitrator finds it difficult to assign substantial credibility to the statement of events made by Supervisor Broesky. There is obviously a significant difference between the booking in room at Symington Yard and the employees' locker room, notwithstanding that they may be adjacent to each other. The repeated reference is to the incident having taken place in the booking in room in the supervisor's memorandum raise substantial questions about the memorandum itself. That issue is not aided by the fact that the supervisor misstates that the grievor was going on duty when he approached him. On the whole, the Arbitrator is not prepared to find that the Company has discharged the burden of proof which is upon it in this matter.

While it is entirely possible that the grievor may have used some form of strong statement to his supervisor, the case as presented does not satisfy the Company's burden of proof.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the fifteen demerits assessed against the grievor be removed from his record forthwith.

October 18, 2010

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