

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

CASE NO. 4027

Heard in Montreal, Tuesday, 12 July 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Locomotive Engineer Gerald Pilon for "Your blatant and calculated submission of a fraudulent time ticket dated July 9, 2010."

JOINT STATEMENT OF ISSUE:

Mr. Pilon, a locomotive engineer from Capreol, submitted a stand-alone time claim for July 9, 2010, for not being called to work within his time block and was discharged by the Company.

The Union submits that there was no cause for discharge or discipline in this case and further contends that the time claim submitted as per the Time Pool Principle was a legitimate time claim.

The Company disagrees with the Union and maintains that the discipline assessed was both warranted and appropriate.

FOR THE UNION:

(SGD.) P. VICKERS
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) B. HOGAN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

M. Marshall	– Sr. Manager, Labour Relations, Toronto
B. Hogan	– Manager, Labour Relations, Toronto
D. VanCauwenbergh	– Director, Labour Relations, Toronto

There appeared on behalf of the Union:

J. C. Morrison	– Counsel, London
P. Vickers	– General Chairman, Sarnia
G. Pilon	– Grievor

AWARD OF THE ARBITRATOR

The Company alleges that the grievor fraudulently claimed the payment of constructive miles when he was not called. Essentially the Company's position is that he was not available and therefore could not make the claim for the constructive miles. Its position is based largely on a telephone conversation between the grievor and a Crew Dispatcher on July 9, 2010. In that conversation Mr. Pilon related to the dispatcher that he had scheduled a personal leave day for the following day and inquired as to whether he would be receiving a call on the 9th.

It appears that during that conversation the grievor related that he had previously received calls close to the commencement of his personal leave day, calls which he accepted and which therefore meant that he lost the personal leave day in question. He was obviously trying to avoid that scenario, if possible. As a result, when the dispatcher asked him what time he was booking off at he responded "Do me a favour – just in case I get a freebie – don't do nothing until call time."

It does appear that during that conversation said to the dispatcher that if she did call him: "You will just talk to an answering machine." and that he was going to his trailer to share some weekend time with his wife. He also said during the course of that conversation "If I'm lucky maybe it will go over their heads and they won't sharp practice me for once." The latter reference appears to be in relation to prior situations when the grievor was in fact called and ended up losing his personal leave day.

In essence the position of the Company is that the grievor had no intention of accepting a call on July 9 and, in the circumstances, could not legitimately claim the constructive miles for the fact that he was not called on that day. The Union has a substantially different view of the conversation and the grievor's intention. Essentially, counsel for the Union submits that consistent with past experience, Mr. Pilon was simply trying to determine whether there was a likelihood he would be called. In his view if he was not called he would be able to claim the constructive miles, and that would be so even if he had gone to his trailer. Strictly speaking, the position of the Union is that the grievor's availability to respond to a call was never in fact tested, as no call was ever made to him. On that basis the Union submits that the grievor should be paid the constructive miles which he claimed, and that no discipline should have issued to him.

The Arbitrator has some difficulty accepting the Union's submission without qualification. In my view it was not unreasonable for the Company to draw the conclusion from the grievor's conversation with the crew dispatcher that he had no intention of accepting a call on the day in question. While it is also possible that he was doing nothing more than express a hope that he would not be called, and might well have accepted a call if it came as had occurred on prior occasions, that is not what his words conveyed.

On the other hand, I am also of the view that the Company has not demonstrated that the grievor did have a fraudulent intention to deceive the Company or to game the

calling rules. I am satisfied that he was, in fact, simply trying to size up whether he could expect a call or whether he might “get lucky” and not be called and be compelled to lose his personal leave day by accepting the call. That said, I cannot reject the position of the Company that the words conveyed to the crew dispatcher by the grievor appeared to convey the message that he did not intend to accept a call, but that he did not want to book off on the chance that he might be able to claim constructive miles.

In my view what the evidence discloses is a gross error of judgement on the part of Mr. Pilon. While I am satisfied that he did not intend to defraud the Company, and was simply hoping to “get a freebie” as he would be entitled to do under the normal operation of the collective agreement, the words he conveyed clearly suggested something else. To that extent he was, in my view, the author of his own misfortune.

The grievor is an employee of some thirty-one years of service with a relatively positive disciplinary record. He is said to be one year from eligibility for a full pension at the time of his termination. In the circumstances I am satisfied that the substitution of a suspension and the return of the grievor to his employment is not inappropriate, and that the substituted penalty will have the desired rehabilitative effect of conveying to Mr. Pilon the importance of being clear and straightforward in his communications with the Company and its crew dispatchers.

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 wages and benefits lost. The period between the grievor's termination and reinstatement shall be substituted as a suspension for the improper claim for constructive miles.

July 22, 2011

(signed) MICHEL G. PICHER
ARBITRATOR