

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4213

Heard in Edmonton, June 11, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 15 demerits to C. Ludwar of Melville, SK for alleged failure to follow the instructions of a supervisor and failure to use the IP process when submitting time claims for the tours of duty on February 12 and 13, 2012.

ExPARTE STATEMENT OF ISSUE:

On February 12 and 13, the Grievor was working as Conductor on train 78641-12. The Grievor, working Conductor only, was required to pick up several cuts of cars at Rocanville Mine and double them to a main line siding where they could be assembled into a complete train.

The Locomotive Engineer engaged in a conversation with CN Assistant Superintendent Gerry Guest with respect to this matter and the Company's apparent requirement to perform more work than the collective agreement permitted. Mr. Guest instructed the crew to submit their time claims in a certain fashion that was contrary to the collective agreement. Upon completion of the tour of duty, the Locomotive Engineer contacted the Union representative and the timekeeping auditor for clarification on how to submit the claims. The claims were properly submitted, and paid, in accordance with the collective agreement.

The grievor was then required to attend an employee investigation for alleged failure to follow the instruction of a supervisor and for failure to utilise the IP process for submitting the time claims, following which the grievor was assessed 15 demerits.

It is the Union's position that the Assistant Superintendent does not have the right to advise employees to submit incorrect time claims and then discipline them for not following his instructions to do so.

The Company disagrees.

FOR THE UNION:
(SGD.) R. Hackl
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Brodie
K. Morris

– Manager Labour Relations, Edmonton
– Senior Manager Labour Relations, Edmonton

P. Payne	– Manager Labour Relations, Edmonton
D. VanCauwenbergh	– Director Labour Relations, Toronto
G. Guest	– Assistant Superintendent OPS, Melville

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
R. Hackl	– General Chairman, Saskatoon
R. Thompson	– Vice General Chairman, Edmonton
B. Boechler	– Retired General Chairman, Edmonton
B. Willows	– General Chairman, Edmonton
B. Ermet	– Vice General Chairman, Edmonton
C. James	– Vice General Chairman, Melville

AWARD OF THE ARBITRATOR

The grievor was assessed 15 demerits for “...your failure to follow your Assistant Superintendent’s Instructions, and your failure to use the Interpretative Process (IP) when submitting claims for en route switching premiums for re-assembling your train at Rocanville on train 78641-12 on February 12 & 13, 2012.”

The evidence discloses that the grievor was assigned as Conductor on train 78641-12 on February 12 and 13, 2012. Along with his locomotive engineer, he was to proceed engines light from Melville to the customer’s property at Sylvite Mine located on the Rocanville spur. The mine is said to be some ten miles off the main line, the Rivers subdivision. Because of certain technical limitations in the braking power of the locomotive consist, the crew, the grievor and locomotive engineer Lewis Rathgeber, were required to move the cars of their train from the mine site back down to the main line in two separate segments. In fact they moved one segment of cars down prior to booking rest at the end of their work day on February 12, returning the next day to pick up the other half of their train, then moving the assembled train to Rivers Manitoba.

It appears that during the course of the second day a radio communication occurred between the crew and Assistant Superintendent Gerald Guest, apparently through the cell phone of Locomotive Engineer Rathgeber. During that conversation it was indicated to Mr. Guest that the crew intended to make "pick up en route" claims under the conductor only provisions of the collective agreement, such claims being generally known as "PE" claims. Mr. Guest then instructed the crew that they were not entitled to make PE claims in relation to the work, as it was not a stop en route for the purpose of picking up or setting out cars. In his opinion the work was doubling, and should be claimed as such.

It appears that sometime following that conversation, notwithstanding that a contrary date appears in the transcript, Mr. Guest spoke with Audit Officer Todd Chappell advising him to watch for the claims of the grievor's crew, stressing that they had been instructed that they could not make a PE claim.

The record confirms that upon making his claim after the conclusion of his assignment Mr. Ludwar did in fact make claims for a total of four PE moves. It seems that the claims made by both employees prompted a call to the locomotive engineer by Audit Officer Chappell which caused a flurry of subsequent telephone calls. It appears that the grievor consulted with a Union representative, after which he apparently reduced his claim to two conductor only claims for the work performed. It appears that in an email which he received from Union representative Monte Rutzki, Mr. Ludwar was advised:

“the time setting out cars at Rocanville support tracks and then picking them up upon return are two separate conductor only claims, as you are no longer on the spur.”

Mr. Rutzki also indicated to the grievor that he might wish to submit a stand alone claim under the claim code “IP” as to whether he might also be entitled to a payment for doubling.

One or two days after making his initial time claim the grievor encountered Mr. Guest in the Melville booking-in room. When Mr. Guest questioned the grievor’s submitting a time claim which would include PE’s, Mr. Ludwar revised his time claim by submitting the claims under the Interpretative claim process (IP), a claim process by which an employee signals to the Company that his claim may be uncertain and require a ruling as to its correctness. Notwithstanding that adjustment, Mr. Guest apparently remained of the opinion that the grievor had failed to follow his directive that he could not make a PE claim in relation to switching out the Sylvite Mine. Based on that perception, the grievor was made subject to a disciplinary investigation after which he was assessed 15 demerits for his failure to follow his Assistant Superintendent’s instructions and his failure to use the IP process.

The Union challenges the Company’s actions on a number of fronts. Initially, it submits that the grievor was denied a fair and impartial investigation, principally by reason of the fact that Assistant Superintendent Guest was present through the entire investigation and that the presiding officer did not produce all emails and recordings which the Union believed might shed some light on the facts of the case.

The Arbitrator has reviewed the record of the investigation, a process which was apparently extended over four days to deal with both employees. Suffice it to say that this investigation, both from the standpoint of the conduct of the Company and of the Union representative acting on behalf of the grievor is far from a model as to how a civil investigation should be conducted. I find it difficult to reject out of hand the suggestion of the Company's representative that if the investigation became protracted, it was in large measure the result of spurious and overly legalistic objections made repeatedly by the Union's representative.

I cannot sustain the Union's position that the grievor was denied a fair and impartial investigation merely by virtue of the fact that Mr. Guest, who was a witness in the proceedings, was present in the room at all times. I consider it significant that there was no contentious evidence being given by Mr. Guest, nor any dispute as to the instruction which he provided to locomotive engineer Rathgeber to the effect that PE claims should not be made. It is also clear from the record that he answered a number of questions from both sides during the course of the investigation, in his capacity as a witness. The fact that Mr. Guest was a superior Company Officer in relation to the investigating officer, as he also was in relation to the grievor, does not of itself taint the investigation as being other than fair and impartial. Nor am I to prepared to conclude that the tone of certain questions put by the investigating officer was such as to cross the line and deprive the investigation of its fairness and impartiality. For these reasons the Union's preliminary objection with respect to the regularity of the disciplinary investigation must be dismissed.

I have greater difficulty with the Company's case, however, as regards the merits of the grievance. The material before me confirms that prior to the assessment of discipline the grievor did in fact submit his PE claim subject to the IP process. While it is true, as the Company stresses, that he did not do so in his initial draft, upon taking advice from his Union representative he reduced his PE claim and, finally, after an encounter with Mr. Guest, he filed it subject to the IP process, which would have flagged the claim for close review prior to approval. This aspect of the Company's case cannot, in my view, be sustained. How can the grievor be disciplined for failing to invoke the IP process when in fact he did, at least at the final stage of the submission of his claim?

I also have some difficulty with the assessment of discipline to the extent that Assistant Superintendent Guest considers that an employee who has a different view of his wage entitlement than he does is liable to discipline for disobeying a direction if he in fact files a claim other than as the Assistant Superintendent directs. The files of this Office are replete with cases which reflect disagreement between honest persons as to the appropriate form of wage claim which is to be made in any given fact situation. With respect, an employee is entitled to make the wage claim that he or she feels in good faith is justified under the terms of the collective agreement, whether or not the employee's supervisor agrees or directs otherwise. While it is true that an employee who knows that management does not agree with his or her interpretation of their wage entitlement should invoke the IP process, that was in fact done, albeit after some

considerable discussion, in the case at hand. I do not see upon what basis an employee can be disciplined in such a circumstance.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the 15 demerits assessed against Mr. Ludwar be stricken from his record.

June 14, 2013

MICHEL G. PICHER
ARBITRATOR