

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1380

Heard at Montreal, Wednesday, June 12, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Rail Division)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of the discipline assessed the record of Foreman Welder G. Ernst, 25 June 1984.

JOINT STATEMENT OF ISSUE:

On 5 April 1984 Mr. Ernst authorized the employees under his jurisdiction (Welding Gang No. 10) to leave the work site at approximately 12:00 hours.

Mr. Ernst claims to have submitted forecasted time cards for April 4 and 5, 1984 for 8 hours straight time and two hours overtime for each employee on his gang including himself.

Following an investigation, Mr. Ernst was assessed 25 demerits for submission of time documents which were in contravention to Company instructions.

The Brotherhood requested that the discipline be removed on the grounds that Mr. Ernst brought the discrepancy to the attention of Clerk Bonnet at the Regional Welding Office on 5 April 1984 and stated that the time cards would be corrected in the next period.

The Company denies the contention and the request to remove the discipline.

FOR THE BROTHERHOOD:

(SGD.) PAUL A. LEGROS
System Federation General
Chairman

FOR THE COMPANY:

(SGD.) J. R. GILMAN
FOR: Assistant
Vice-president
Labour Relations

There appeared on behalf of the Company:

T. D. Ferens	- Manager Labour Relations, CNR, Montreal
J. Russell	- Labour Relations Officer, CNR, Montreal
D. J. Bloomfield	- Welding Supervisor, CNR, London
R. R. Hannah	- Welding Supervisor, CNR, Toronto
J. P. Guillemette	- Welding Supervisor, CNR, Toronto
M. M. Bonett	Welding Clerk, CNR, Toronto

And on behalf of the Brotherhood:

W. Montgomery	- General Chairman, BMW, Belleville
P. A. Legros	- System Federation General Chairman, BMW, Ottawa
R. Y. Gaudreau	- Vice-President, BMW, Ottawa
G. Ernst	- Grievor, Kingston

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AWARD OF THE ARBITRATOR

The grievor, Gang Foreman G. Ernst, was assessed 25 demerit marks for the submission of time documents on behalf of himself and his gang in contravention of company instruction. More particularly, the grievor submitted time documents for the April 5, 1984 shift for time not worked thereby claiming wages at both the straight time rate and the punitive rate which the affected employees were not entitled to receive. It is important to note the grievor was not charged with fraud or for the committal of an otherwise dishonest act. Nonetheless his alleged omission to adhere to proper instruction may have resulted in the payment by the company of wages that were not earned.

The grievor does not deny that he omitted to follow the instructions for submitting time sheets as alleged by the company. At his first formal investigation his explanation was that he had been authorized by his superiors to submit forecasted time sheets. Accordingly, when he and his gang were compelled to cut short their shift on April 5, 1984 because of the inclement weather conditions, the forecasted time sheets that had hitherto been submitted by mail would require correction. In this regard the grievor also insisted that he was given the permission of his Supervisor, Mr. T. Campbell, with respect to the early termination of that shift. Moreover, Mr. Ernst maintained that at the first opportunity he alerted Mr. Bonett, the Clerk who processed the relevant time documents, to the necessary changes that would have to be made.

The company maintained that there was only one procedure that the grievor was obliged to follow in submitting time documents. That procedure was known to him, particularly following a seminar in February 1984 attended by the grievor where such instructions were repeated only in exceptional circumstances, such as long weekends occasioned by a holiday are Gang Foremen authorized, by permission of their superiors, to submit forecasted time documents. In this incident the grievor received no such authority and as a result was properly disciplined.

The grievor adduced evidence of an alleged employer practice adopted by two other foremen in 1979 and 1983 to demonstrate that forecasted time sheets were commonplace at CN. He indicated in a like manner that with the authority of his Supervisors D. Bloomfield and J. P. Guillemette, he simply pursued the same practice.

This is a case that must be resolved on the credibility attached to the conflicting stories that have been related by both parties. The employer attempted to confirm the grievor's statements by investigating each of his Supervisors as well as Mr. Bonett in order to determine whether validity could be attached to them. In each instance the grievor's statements were not corroborated but in fact were contradicted. Without detailing these statements the contradictory evidence indicated that the grievor was not given permission to cut short the shift of April 5, 1984, he was not given authority to use forecasted time sheets, and the time sheets in question were not submitted in advance by mail but were handed in to Mr. Bonett on April 5, 1984, and finally no advice was given by the grievor that the time sheets would require correction.

A second formal investigation was arranged by the employer to enable the grievor to respond to these contradictory statements. He declined the opportunity. Moreover, the grievor insisted that his trade union representative, Mr. Montgomery, stay away from the investigation. He attended the interview alone and failed to cooperate with the presiding officer because of his objection to his role. The grievor preferred that another company officer preside over the investigation. Accordingly, the grievor did not attempt to challenge or otherwise explain the contradiction that had apparently discredited his original statements.

At the arbitration hearing the grievor complained that he was denied the opportunity to cross-examine those persons who had furnished these statements. He claimed he had asked for the opportunity to cross-examine at the time of his second interview. The transcript of the investigation does not reflect that request. Moreover, because the grievor asked that his union representative stay away from the proceedings he has denied himself an associate who could corroborate that such a request was made. Indeed, the transcript indicates that the only objection made by the grievor at his second interview pertained to the role of the presiding officer.

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It is important to emphasize that the investigative interview is an entrenched procedure for acquiring information with respect to alleged misconduct that might result in the employer's decision to discipline an employee. The employer is required by operation of the collective agreement to conduct such investigations, prior to the imposition of discipline. Its design is to allow the employee to provide an explanation for his conduct and to extend him the opportunity to forward mitigating circumstances that might alleviate the severity of the employer's disciplinary response. In this regard the investigations must be "fair". That is to say an employee must be given the opportunity to adduce evidence by calling his or her own witnesses as well as being permitted the right to cross-examine the witnesses called by the employer. And, any omission on the employer's part in extending such opportunities might very well require the investigation process to be reopened to correct any such

deficiency. While the formal investigation process may not be the most perfect way of acquiring facts relevant to alleged employee misconduct, it is the process that both employer and trade union have agreed to follow. In the last analysis, that process is recognized under the current collective agreement and the employees represented thereunder are just as much bound by it as the employer and trade union. In short, any employee who does not wish to adhere to the formal investigation procedure does so at his or her peril.

In resolving this dispute I have concluded that the grievor is simply not to be believed. He was extended every opportunity afforded by the investigative process as well as the arbitration hearing to convince me of the legitimacy of his defence. He has not succeeded in undermining the overwhelming evidence that contradicted his explanation insofar as he was given the authority by his supervisors to submit forecasted time sheets. And indeed, because I do not believe that defence, the explanations he has given with respect to his having obtained the permission of his supervisor to cut short his gang's shift on April 5, 1984 as well as his efforts to correct the misinformation contained in their time sheets have also been discredited.

Because the grievor knowingly committed a serious offence I find no basis for varying the 25 demerit marks that have been assessed. The grievor's grievance is therefore dismissed.

DAVID H. KATES,
ARBITRATOR.