CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2304
Heard at Montreal, Tuesday, 8 December 1992
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
UNITED TRANSPORTATION UNION
DISPUTE:
Dismissal of Trainman R.A. Ellerbeck, Niagara Falls, Ontario, effective 24 April 1992.
JOINT STATEMENT OF ISSUE:
On 16 March 1992, Mr. R.A. Ellerbeck provided an employee statement for alleged fraudulent submission of maintenance of earnings claims. The employee statement concluded on 18 March 1992. Subsequent to the employee statement, Mr. R.A. Ellerbeck was discharged from the service of the Company effective April 24, 1992 for ``Fraudulent Submission of Maintenance of Earnings Claims in Pay Periods 3-4, 5-6 and 11-12 of 1991."
The Union appealed the discharge of Mr. Ellerbeck on the grounds that: 1.There were mitigating circumstances. 2. The Company entrapped Mr. Ellerbeck. 3. The dismissal of Mr. Ellerbeck was unwarranted.
The Company declined the Union's appeal.
FOR THE UNION:
FOR THE COMPANY:
(SGD.) M. P. GREGOTSKI
(SGD.) A. E. HEFT
GENERAL CHAIRPERSON
for: VICE-PRESIDENT, GREAT LAKES REGION
There appeared on behalf of the Company:
J. M. Kelly
Senior Project Officer, Labour Relations, Toronto
A. E. Heft
Manager, Labour Relations, Toronto
D. Brodie
Labour Relations Officer, Montreal
S. Valcourt
Assistant Manager/Administration Crew Management Centre, Toronto
And on behalf of the Union:
M. P. Gregotski
General Chairperson, Fort Erie
G. J. Binsfeld
Secretary Treasurer, G.C.A., Fort Erie
B. J. Lennox
Local Chairperson, Niagara Falls
R. A. Ellerbeck
Grievor

AWARD OF THE ARBITRATOR

On a review of the evidence the Arbitrator is satisfied that the grievor, Trainman R.A. Ellerbeck, knowingly and repeatedly submitted fraudulent maintenance of earnings mileage claims in three separate pay periods. Specifically, he booked off for miles when in fact the trips which he had worked in the given mileage month were well short of the miles which would entitle him to do so. In the result he claimed, and wrongfully received, payments totalling $4,621.63.

Mr. Ellerbeck maintains that he did not intend to wrongfully appropriate the monies in question. He states that he made the claims in the belief that he was entitled to do so, by a strict interpretation of articles 28.4(a) and 28.5 of the collective agreement. The provisions are as follows:

QQINDENT28.4 QQINDENTIn the application of this Article, employees will be governed as follows:

QQINDENT(a) QQINDENTthey will maintain a record of the total accumulated mileage for which paid commencing with their mileage date and report to the designated officer when the maximum mileage has been made so that relief can be provided;

QQINDENT28.5 QQINDENTIn the application of this Article, mileage paid for as:

QQINDENT(a) QQINDENTgeneral holidays (Article 77);

QQINDENT(b) QQINDENTtravel allowance (Article 23);

QQINDENT(c) QQINDENTbereavement leave (Article 76);

QQINDENT(d) QQINDENTpayment for examinations (Article 71);

QQINDENT(e) QQINDENTannual vacation (Article 78); and

QQINDENT(f) QQINDENTheld-away-from-home terminal (Article 18);

QQINDENTwill not be charged against an employee's mileage records. However, employees will not be permitted to stipulate the period off duty on account of mileage limitations as their annual vacation period. When the annual vacation dates allotted in advance (as provided in paragraph 78.11 of Article 78 [Annual Vacation]) coincides with the time an employee is off duty because of mileage limitations, the date will not be changed and employees will be allowed to commence annual vacation on the allotted date.

According to Mr. Ellerbeck, once he became entitled to incumbency payments, when those incumbency payments were expressed in terms of miles on his statement of earnings, referred to as a "blue slip", provided to him by the Company, he included the incumbency miles in the calculation of "accumulated mileage for which paid" under article 28.4(a) of the collective agreement. This, he says, he did on the basis that there was no specific exclusion of those miles for the purposes of the calculation found within article 28.5 of the collective agreement.

Hx *d @He vif t to full payment without he collective agreement. The evidence discloses that on December 3, 1991, he was given written notice to attend a disciplinary interview on December 9, 1991 in connection with defacing a customer's packaging. The Union's objection is therefore without merit.

For the foregoing reasons the grievance must be dismissed.

December 11, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR

the only ruling which was necessary to the resolution of the issue presented by the Brotherhood. While the Arbitrator has difficulty understanding how an employee could book rest beyond the minimum while maintaining an undiminished maintenance of earnings, in such a way as to achieve a situation more advantageous than would be available to a regularly assigned employee, that circumstance has not materialized in the context of any grievance. It need not be commented upon, therefore, save to say that employees should not expect that the concept of maintenance of earnings can be applied beyond the purpose for which it was originally intended. That purpose is to compensate employees for the loss of work opportunities which, but for the Corporation's operational and organizational change, would have been available to them.

The Brotherhood took the position that the Arbitrator should not deal with the second issue, as to whether not being called can be deemed to be booking rest, on the basis that it was beyond the contents of the original joint statement of issue. With that I cannot agree. The original grievance came to this Office partly because the Corporation adopted a policy of reducing the incumbency of employees who booked rest. Implicit in the resolution of the grievance is some reasonable understanding of what constitutes booking rest. In the circumstances, therefore, I deem it appropriate to deal with the question put by the Corporation with respect to this issue.

With respect to the merits of the Corporation's question as to whether an employee who remains available for a call but does not work is to be considered on a layover day to be included in the computation of eight days specified in article 4.13, the response must be in the negative. The collective agreement plainly makes a distinction as between days on which an employee books rest and days on which a spare employee is available for a call. While the Arbitrator appreciates that article 4.13 is generally intended to apply to regularly assigned employees, the intent of the Special Agreement is to preserve to the employees who were formerly in that category certain minimum protections. In the Arbitrator's view it would be inconsistent with the Special Agreement and with the award of July 18, 1992 if the Corporation were to calculate a day upon which an employee stands by for a call and remains available for work, but is not called, as a day of booked rest for the purposes of the equivalent of the eight days contemplated under article 4.13 of the collective agreement. The Arbitrator's conclusion in that respect, however, has no bearing on the very different circumstance, noted above, of an employee who makes himself or herself unavailable for work on a day or days in excess of the minimum of eight days for which he or she is entitled to book rest.

The next issue is the matter of the compensation of employees for wages and benefits lost by reason of the application of the Corporation's policy. The Corporation proposes the following:

QQINDENT1. QQINDENTthat incumbency payments will be resto92

(Sgd.) MICHEL G. PICHER

ARBITRATOR