CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2415

Heard in Montreal, Wednesday, 10 November 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY

and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

DISPUTE:

Appeal the discharge of Locomotive Engineer J. H. Rousseau, Hornepayne.

JOINT STATEMENT OF ISSUE:

Following an investigation into circumstances surrounding the fraudulent movement of CN North America equipment on the Caramat Subdivision, Locomotive Engineer Rousseau was discharged for his "responsibility in connection with providing or arranging for the use of CN property along with rail transportation, switching and other additional services and facilities without charge resulting in lost revenues and additional costs to the Company during 1990, 1991 and 1992 which included the improper handling and transport of dangerous goods; withholding or providing misleading information during internal Company investigation into the above noted use of transportation services."

The Brotherhood contends that the discipline of J. Rousseau is not justified, citing that the discipline has been assessed on hearsay evidence. The Brotherhood additionally contends that J. Rousseau's investigation was not conducted in a fair and impartial manner.

The Brotherhood requests that J. Rousseau be reinstated and compensated for all monetary losses incurred.

The Company disagrees with the Brotherhood's contentions and has declined the Brotherhood's request.

FOR THE BROTHERHOOD: FOR THE COMPANY:
(SGD.) C. HAMILTON (SGD.) A. E. HEFT
GENERAL CHAIRMAN FOR: VICE-PRESIDENT, GREAT LAKES REGION

There appeared on behalf of the Company:

K. Peel - Assistant Regional Counsel, Toronto
A. E. Heft - Manager, Labour Relations, Toronto
R. Bateman - Labour Relations Officer, Toronto
D. W. Coughlin - Manager, Labour Relations, Montreal
V. J. Vena - Coordinator, Transportation, Montreal
J. Polley - Assistant Superintendent, Toronto
P. Malloy - Witness
R. Walton - Witness
D. Ellickson - Observer

And on behalf of the Brotherhood:

J. Shields - Counsel, Ottawa
C. Hamilton - General Chairman, Toronto
T. G. Hucker - Vice-President, Ottawa
R. Robinson - Local Chairman, Hamilton

R. Woehl - Local Chairman, Hornepayne
J. H. Rousseau - Grievor

AWARD OF THE ARBITRATOR

On the basis of the record, and having particular regard to the statements of former Trainmaster P. Malloy and Conductor Rob Walton, the Arbitrator is satisfied that Locomotive Engineer Rousseau, while exercising his prior responsibilities as Assistant Superintendent at Hornepayne, knowingly arranged for the carriage of goods, some of which are classified as dangerous, to Mile 20 on the Caramat Subdivision for transfer overland to a tourist camp operated nearby by Conductor Walton. The record establishes that Conductor Walton acquired the lodge in 1989, and that he had need of supplies to be taken to it by rail, including large quantities of fuel in 45 gallon drums. In 1989 the transfer of his goods was arranged in the normal fashion, with the issuance of a bill of lading, at a cost of some $685.00 to Conductor Walton.

In 1990 Mr. Walton approached then Assistant Superintendent Rousseau to once again arrange for the transfer of supplies to the same location. The statement of Mr. Walton, corroborated by the statement of Trainmaster Malloy, confirms to the satisfaction of the Arbitrator that Mr. Rousseau arranged for Mr. Walton's supplies to be placed in a car, referred to as a "chip car" which was being returned as an empty from Hornepayne to Longlac, in the direction of Mr. Walton's lodge. According to Mr. Walton's statement, some three or four days after the transfer of the goods, he went to Assistant Superintendent Rousseau's office to ask about payment. Mr. Rousseau then advised him that the car was not billed through the Company's Customer Service Centre, and was merely documented as a returning empty. He explained to Mr. Walton that there would therefore be no charge for the car, adding that because of his work as a trainman on Train 335 and the good service his crew provided the Weldwood Company, as long as Mr. Rousseau was Assistant Superintendent it would be "business as usual" whenever Mr. Walton wanted the free use of a car.

The statement of Mr. Walton is confirmed by the statement of Ms. Wanda Whent, who worked in the outer office at the time. As Mr. Walton left his encounter with Mr. Rousseau he had a smile on his face, which caused Ms. Whent to inquire as to why. Mr. Walton replied: "I went to see about payment for the car, and the boss said I don't have to pay. This is my lucky day."

The evidence before the Arbitrator establishes, on the balance of probabilities, that the arrangement initiated by Mr. Rousseau in 1990 continued through 1991, 1992 and culminated in the discovery of the scheme in 1993, at a time after Mr. Rousseau had returned to service as a locomotive engineer. The events of 1993 led to the discharge of Trainmaster Malloy and the assessment of substantial suspension against Mr. Walton. It further appears that on March 29, 1993 criminal charges were laid against Conductor Walton, Mr. Malloy and Conductor R. Beatty for the fraudulent use of railway cars to ship dangerous goods to Mileage 20 on the Caramat Subdivision in that year. As Mr. Rousseau was no longer involved, he was not the subject of any criminal charge.

The evidence before the Arbitrator discloses, beyond

controversy, that as a result of Mr. Rousseau's actions in 1990, and their confirmation in 1991 and 1992, a Company employee had the benefit of the fraudulent use of Company equipment for his own personal advantage. The goods were moved without proper documentation and billing and, in all but one of the years, without proper compliance with the requirements for the movement of dangerous goods. The freight revenues lost to the Company by reason of the scheme authorized by Mr. Rousseau are in excess of $2,000.00

The fraudulent and unauthorized use of Company equipment is plainly a serious offence. In his former position of Assistant Superintendent at Hornepayne, Mr. Rousseau occupied the highest management position at that location. he had the first and final responsibility to oversee the observance of all Company rules and procedures. As the evidence discloses, he failed gravely in that regard by abusing his position of authority to approve the surreptitious and fraudulent movement of goods for the benefit of Conductor Walton. As noted, this resulted in the misuse of Company equipment and the repeated violation of operating rules governing the movement of hazardous goods. In the Arbitrator' view, the submission of counsel for the Brotherhood to the effect that Mr. Rousseau cannot be held responsible for the actual method used in transferring the goods, and the rules violations involved, is not persuasive. While he may not have been involved in the handling of the rail cars utilized, having authorized an irregular and apparently unlawful action, he cannot now be heard to deny responsibility for the manner in which it was ultimately carried out. His actions resulted in direct economic loss to the Company and the creation of potentially dangerous train movements. On the whole, I am satisfied that his actions were deserving of the most serious of disciplinary responses. As noted above, Mr. Malloy, the second ranking member of management at Hornepayne, was discharged for his involvement in the scheme.

The Arbitrator cannot accept the suggestion of Counsel for the Brotherhood that the grievor's discharge was based solely on hearsay evidence. As noted above, the direct statements of Mr. Malloy and Mr. Walton reflect a clear and uncontradicted picture of Mr. Rousseau's actions. Nor can I accept the suggestion that the discipline assessed against Mr. Rousseau was in some manner discriminatory. Mr. Walton's involvement was substantially less serious, to the extent that he merely accepted the favour which Mr. Rousseau initiated to his advantage. Indeed, as Mr. Walton put it in 1990 he offered to pay and Mr. Rousseau declined. Upon some reflection, the Arbitrator is satisfied that the suspension assessed against Mr. Walton is reflective of his lesser degree of responsibility. On the other hand, the discharge assessed against Mr. Malloy is, in my view, well in keeping with the severity of the infraction disclosed, and would be an equally appropriate disciplinary response as regards Mr. Rousseau.

The final issue to be dealt with the Brotherhood's allegation that Mr. Rousseau was denied a fair and impartial hearing. The Arbitrator can find nothing in the record which substantiates that allegation. As the evidence indicates, Mr. Rousseau was given notice of his own disciplinary investigation, and indeed was afforded the opportunity to attend the investigation of Mr. Walton when it appeared that his name would be raised. He waived the right to have union representation at his own investigation

and confirmed to the investigating officer that he had received proper notice of the proceedings. The record further discloses that he was provided with copies of all relevant statements which were in the possession of the investigating officer and which could be used against him. Mr. Rousseau, who is experienced in the protocols of Company investigations, did not request any adjournment to examine the full documentation provided to him or to have the opportunity to question the persons whose statements were tabled in evidence.

Article 71 of the collective agreement provides as follows:

> 71.1 When an investigation is to be held the locomotive engineer whose presence is desired will be properly advised, in writing, as to the time, place and subject matter, which will be confined to the particular matter under investigation.
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> 71.2 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his or her responsibility established.
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> 71.6 A locomotive engineer and his or her accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on the locomotive engineer's responsibility to offer rebuttal through the presiding officer by the accredited representative. The Local Chairman and /or General Chairman to be given a copy of statements of such witnesses on request.

The record reveals that Mr. Rousseau was initially contacted by telephone with respect to the time and place of his investigation. He was, however, provided with a written notice in due course, prior to the commencement of the investigation. It would also appear that there was compliance with the terms of article 71.6 of the collective agreement, in that Mr. Rousseau was notified, and indeed was directed, to attend at the investigation of other persons when his name was in fact raised. In the result, I am satisfied that the Company made every reasonable effort to allow Mr. Rousseau to be present during the examination of witnesses whose evidence might bear on his responsibility. I can find no violation of article 71 of the collective agreement.

The Arbitrator is satisfied, on the balance of probabilities, that in 1990, and in several years thereafter, Mr. Rousseau knowingly authorized and condoned the fraudulent use of railway equipment, without charge, by an employee. Even if one discounts his alleged ignorance of the violation of the operating rules, his actions are, at a minimum, a grave breach of trust which would justify the Company's decision to terminate his services. Such a decision is commensurate with the gravity of the offence, is consistent with the treatment accorded to Mr. Malloy and must be judged to have been appropriate in all of the circumstances. For the foregoing reasons the grievance must be dismissed.

12 November 1993 (Sgd.) MICHEL G. PICHER
ARBITRATOR