

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2779

Heard in Montreal, Wednesday, 9 October 1996

concerning

CANADIAN PACIFIC LIMITED [ST. LAWRENCE & HUDSON RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim on behalf of Mr. R.B. Neadow (13-218).

JOINT STATEMENT OF ISSUE:

On November 14, 1995, the Company issued a Form 104 which provided that the grievor had been "dismissed from Company service for submitting fraudulent wage claims for the months of July, August and September, 1995 ..."

The Union contends that the discipline assessed was unwarranted and excessive in the circumstances.

The Union requests that the grievor be returned to his former position forthwith without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contention and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. MARTEL

FOR: DISTRICT MANAGER, ENGINEERING, STL&H

There appeared on behalf of the Company:

R. Martel	– Labour Relations Officer, Toronto
J. Favreau	– Manager, Track Maintenance, Toronto
K. King	– Track Program & Equipment Coordinator, Port Coquitlam
T. Yamashita	– Project Engineer, Project Planning & Design, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. W. Brown	– Sr. Counsel, Ottawa
H. McLauchlan	– Local Chairman, Smiths Falls
R. B. Neadow	– Grievor

AWARD OF THE ARBITRATOR

The Company alleges that the grievor submitted fraudulent wage claims on a number of occasions in July, August and September of 1995. The incidents giving rise to the charge relate to the service of Mr. Neadow as a flagman assigned to an independent contractor performing work on the Harmony Road overhead bridge widening project in Oshawa, Ontario in the summer of 1995. As flagman, it was Mr. Neadow's responsibility to be at the worksite during the course of the working day, to obtain track occupancy permits as necessary to protect the contractor's workers on site, and to generally oversee the safety and security of the Company's property at that location.

The first head of discipline raised by the Employer concerns the fact that Mr. Neadow remained at home on four separate days, and did so without advising any Company supervisor, although he nevertheless claimed wages for the four days in question. In explanation of his actions Mr. Neadow relates that he believed that he was following normal and accepted practice when he stayed home, on the instructions of the contractor with whom he was working. The evidence adduced by the Brotherhood, both through Mr. Neadow and through Local Chairman Hugh McLauchlan, establishes that while working on a prior long-term project with an outside contractor, referred to as the Sprint project involving the installation of a fibreoptic system on a Company right of way, both Mr. Neadow and Mr. McLauchlan found themselves in circumstances where, for various reasons, the contractor's work crews to which they were attached did not have any functions to perform on certain days. Both Mr. Neadow and Mr. McLauchlan relate that when those circumstances first arose during the Sprint project, upon advising their supervisors of the situation they were simply told that they should stay at home, on call, available to return when instructed by the contractor. It is not disputed that they claimed payment for the days in question, without objection by the Company. Mr. Neadow relates that he believed that the same routine would operate insofar as his work with the contractor on the Harmony Road project was concerned. There is, moreover, no suggestion on the part of the Company that Mr. Neadow would have been otherwise assigned on the days when the contractor's crews were idle. The sole real objection which appears to be raised by the Company is that Mr. Neadow failed to advise anyone that he was at home on the dates in question.

The second aspect of the Company's allegations relates to the time recorded by Mr. Neadow on a number of days when he did perform work as a flagman. The general assertion is that he recorded overtime hours in excess of those which he actually worked. There is, very simply, no evidence before the Arbitrator which compellingly establishes that allegation. By Mr. Neadow's own account, he was, on a number of days, required to attend at the Harmony Road site early in the morning, before the start time of the contractor's crews, to work in conjunction with the crews of a sub-contracting steel company. Further, according to his own evidence, which is substantially unchallenged, he was required on most days to remain on the site for some time after the cessation of work by the contractor's crews, as tools were being put away, and the premises secured with safety barriers. Significantly, the evidence discloses that the employee who succeeded Mr. Neadow on the same project, after his discharge, consistently recorded similar hours of overtime on the same project. While that is not direct evidence as to the hours worked by Mr. Neadow, it does tend to lend support to his unchallenged evidence with respect to his day-to-day routine, and the hours which he did in fact put in. Unfortunately, the Company draws inferences with respect to the hours worked by Mr. Neadow from the log entries of work activity found in a construction inspector's diary. A close examination of those documents, however, leaves substantial question as to the meaning of the inspector's notations, and indeed the hours at which he himself was present on site, as compared to the grievor.

On the whole, the Arbitrator cannot find that the Company has proved the allegations made against Mr. Neadow, either in respect of the days he remained at home, or his recording of overtime hours worked. The grievor, an employee of twenty years' service, whose entire disciplinary record consists only of ten demerits assessed on one occasion in 1991, appears to the Arbitrator to be an honest and forthright individual. His explanations for his understanding of how he should proceed on days when the contractor instructed him to stay home, based on his prior experience on the Sprint project, appear to the Arbitrator to be both plausible and reasonable. Clearly, there was no attempt on the part of Mr. Neadow to conceal his movements or whereabouts from any member of management; indeed, by his own account he was quite open with his supervisors in relating his activities and the progress of work on the project. Secondly, the evidence advanced by the Company with respect to the alleged padding of overtime time is flawed, at best. I cannot conclude, on the balance of probabilities, that the hours worked by the grievor were other than those which he recorded, and which he explained in his own evidence at the hearing. No direct evidence in contradiction to the grievor's evidence was called by the Company. The Company's hearsay evidence, in the form of the inspector's notes, must be characterized as both unclear and unexplained. An employer alleging conduct tantamount to theft must obviously provide something better to meet the standard of clear and cogent evidence required in such cases.

For all of the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment, with compensation for all wages and benefits lost, and without loss of seniority.

October 11, 1996

(signed) MICHEL G. PICHER
ARBITRATOR