

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2780

Heard in Montreal, Thursday, 10 October 1996

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA [CAW-CANADA]**

DISPUTE:

Discipline assessed to Mr. Sean Donovan.

JOINT STATEMENT OF ISSUE:

Following an investigation, the grievor was assessed with sixty (60) demerit marks for falsifying his time record sheet on October 17, 1995, resulting in dismissal.

The Union contends that the grievor did not falsify his timesheet, that he had not attempted to leave work and claim extra time, therefore, Mr. Donovan had been dismissed for an innocent error.

The Corporation declined the grievance and maintains that the discipline was warranted in that the grievor was aware of the seriousness of the offence, as he had been disciplined for similar conduct in the past.

FOR THE UNION:

(SGD.) A. S. WEPRUK
NATIONAL CO-ORDINATOR

FOR THE CORPORATION:

(SGD.) B. E. WOODS
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock	– Senior Officer, Labour Contracts, Montreal
B. Leblanc	– Manager, Terminal Services, Toronto
R. Tonkens	– Senior Counter Sales Agent, Toronto

And on behalf of the Union:

M. L'Esperance	– Regional Coordinator, Toronto
S. Donovan	– Grievor

AWARD OF THE ARBITRATOR

The Corporation alleges that the grievor knowingly and deliberately falsified his time sheet on October 17, 1995. It bears the burden of proof in respect of that issue, and to the extent that the allegation made is quasi-criminal conduct viewed as tantamount to theft, in accordance with established arbitral jurisprudence, the standard necessary to sustain such an allegation before a board of arbitration must be on the basis of clear and cogent evidence. (*See Re Indusmin Ltd. and United Cement, Lime and Gypsum Workers International Union, Local 488, (1978) 20 L.A.C. (2d) 87 (M.G. Picher); Re Corporation of the City of North York and Canadian Union of Public Employees, Local 94 (1944) 43 L.A.C. (4d) 52 (Solomatenko); CROA 1703, 2003, 2620 and SHP 311.*)

Certain of the facts are not in substantial dispute. On October 17, 1995 the grievor was scheduled to work at Toronto's Union Station as a baggage attendant and station services attendant on a 14h30–22h30 shift. At 15h15 Senior Counter Sales Agent R. Tonkens noticed that Mr. Donovan had not yet signed in for his tour of duty. He informed Manager, Customer Services B. Leblanc of that fact, which caused Mr. Leblanc to inquire of the in-charge employee in the baggage room as to the time the grievor had reported for work. He was then advised that Mr. Donovan came in at 15h10. It is not disputed that at 16h55 the grievor proceeded to the manager's office and said that he wished to correct his sign-in sheet for that day, which request was denied.

The position of the Corporation is that the grievor arrived late for his tour of duty sometime after 15h00 and had nevertheless recorded 14h45 as his sign-in time, before he proceeded to work. In the Corporation's submission Mr. Donovan only thought to correct the sign-in sheet after he must have learned that Mr. Leblanc was inquiring as to his whereabouts and precisely when he had reported for work.

The grievor denies the interpretation advanced by the Corporation. According to his evidence, he did not deliberately falsify any sign-in records. He states that he used his own watch, which had stopped at a reading of 14h45, when he signed in. It is common ground that there is no clock visible from the location in the sign-in room where Mr. Donovan recorded his arrival time. He states that it was only shortly afterwards, when he realized that the first train he was assigned to unload baggage from had already arrived, that he became aware that his watch was in fact not functioning. He relates that he proceeded to unload the train, arriving from Montreal, and further to load baggage on the same train which was to depart for London, before he had an opportunity to return the Mr. Leblanc's office to correct his sign-in time. Notwithstanding the explanation provided by Mr. Donovan, following an investigation the Corporation concluded that he had deliberately falsified his time sheet. Having regard to the fact that he had previously been disciplined for a discrepancy in the recording in his working time in 1992, the decision was made to terminate his services.

The Arbitrator has some difficulty with the case advanced by the Corporation. Firstly, as argued by the grievor's representative, Mr. Donovan was obviously not attempting to hide the fact that he had arrived for work late, as the time of 14h45 which he recorded was plainly late in relation to the 14h30 time at which he was scheduled to commence his shift. There is, therefore, some reason to give credence to his explanation of having read the incorrect time off his own watch. Secondly, there is nothing by way of direct evidence offered by the Corporation to confirm that Mr. Donovan in fact learned from anyone that Mr. Leblanc had been inquiring as to his whereabouts and when he had reported for work. The conclusion that he had such knowledge is surmise on the part of the Corporation, and the only evidence on this matter before the Arbitrator is the direct testimony of Mr. Donovan denying that he had any such knowledge at the time he proceeded to the manager's office to attempt to correct his sign-in sheet.

What, then, does the case disclose? Firstly, it cannot be disputed that the grievor is an employee who was previously disciplined for failing to properly record his working time. It appears that in 1992, Mr. Donovan, along with a number of employees, absented himself for a union meeting without signing out, as he was required to do. It also does not appear disputed that he was reminded of the need to keep proper records with respect to his working time in February of 1995. Mr. Donovan did, in fact, enter incorrect information on the sign-in sheet on the day in question, a matter which is not in dispute. In light of his prior record, that action caused the Corporation to undertake an investigation and to draw conclusions adverse to the grievor.

The Arbitrator finds the grievor's evidence to be credible, and must conclude that the Corporation has not proved, on the balance of probabilities, that Mr. Donovan intended to falsify his time sheet on the day in question.

By the same token, it is undeniable that he engaged in a degree of negligence in two respects. Firstly, he was obviously late for work. Secondly, and more significantly, he erroneously recorded the time on his sign-in sheet, creating a circumstance which obviously led to the instant dispute. In some degree, therefore, the grievor can be said to have been the author of his own misfortune. As a person previously disciplined for irregular time keeping, and one recently reminded of its importance, Mr. Donovan knew, or reasonably should have known, that he must be careful and accurate in the times recorded with respect to his arrival and departure on a tour of duty. For that alone, he was susceptible of discipline.

Having regard to the equities of the case, the Arbitrator is satisfied that although the grievor did create a circumstance which led to his discharge, the Corporation has not established that he had the deliberate intent to falsify his attendance records and obtain payment for work not done. He was, nevertheless, guilty of a serious degree of negligence in failing to ensure that he made accurate notations as to his signing in time on the day in question, an error that is particularly egregious in light of his prior disciplinary record. In the circumstances the Arbitrator is satisfied that this is a case of shared responsibility, having regard to both the grievor's error and the employer's over-reaction. In the circumstances an order of reinstatement with partial compensation is appropriate. The grievor must realize, however, that in the future there can be no equivocation in respect of the accuracy of his recording of his time at work.

The Arbitrator therefore directs that the grievor be reinstated into his employment, without loss of seniority and with compensation for half his wages and benefits lost from the time of his termination to the date of his reinstatement, subject to the application of normal principles of mitigation.

October 11, 1996

(signed) MICHEL G. PICHER
ARBITRATOR