

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2847

Heard in Montreal, Thursday, 10 April 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TRANSPORTATION COMMUNICATIONS UNION

JOINT STATEMENT OF ISSUE:

The holding out of service of Terrance Sellier from October 22 to November 19, 1996, and the subsequent assessment of 15 demerits for sleeping on duty, resulting in his dismissal from company service for accumulation of demerits.

JOINT STATEMENT OF FACT:

Train Machine Clerk Terrance Sellier was held out of service during the course of his shift on October 22, as a result of a report that he was sleeping on duty. An investigation into this incident was commenced on October 30, and discipline, in the form of 15 demerits was assessed on November 19. As a result of the assessment of the demerits, he was dismissed from company service for accumulation of demerits.

JOINT STATEMENT OF DISPUTE:

The Union progressed two grievances. In the first grievance, the Union claimed that the infraction being investigated was not sufficiently serious to justify holding the grievor out of service, and that, in any case, the collective agreement limits the time to be held out of service to five days and only when it is necessary. Claiming that it was not necessary to hold the grievor out of service, and that in any event he was held out of service for an excessive amount of time, the Union progressed a grievance for all lost wages and benefits for the period of October 22 until November 19.

On November 19, 1996, the Company dismissed Mr. Sellier. The Union progressed a grievance disputing the dismissal, claiming that the Company had not demonstrated on the balance of probabilities that Mr. Sellier had been sleeping on duty, and that therefore the fifteen demerits should be removed from his record and that he should be returned to service. The Union also claimed all lost wages and benefits, including lost overtime opportunities, shift differential, interest, and a gross up for any extra tax liability. As Mr. Sellier's job was under notice for abolishment as per a notice issued under article 1.1(a) of the Income Security Agreement, the Union also claimed a transfer of benefit for Mr. William Hull to be offered bridging to early retirement under Option 2A of article 4 of the Income Security Agreement, claiming that Mr. Hull would have received such a benefit had Mr. Sellier not been dismissed.

The Company declined both grievances.

FOR THE UNION:

(SGD.) P. J. CONLON

ASSISTANT DIVISIONAL VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) D. J. DAVID

FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

D. J. David	– Labour Relations Officer, Montreal
A. de Montigny	– Labour Relations Officer, Montreal
R. Lumsden	– Area Manager, Toronto

C. Chapell	– Assistant Manager, Train Yard Operations, Toronto
B. R. Fielding	– Manager, Administration Eastern Canada (Observer)
R. Galloway	– Area Manager, Montreal (Observer)

And on behalf of the Union:

P. J. Conlon	– Assistant Division Vice-President, Toronto
R. Pagé	– Executive Vice-President, Montreal
N. Lapointe	– Assistant Division Vice-President, Montreal
T. Sellier	– Grievor

AWARD OF THE ARBITRATOR

This case raises an issue of factual dispute. The Company maintains that on the midnight shift of October 22, 1996 Train Machine Clerk Terrence Sellier was observed sleeping at his desk. The grievor denies that he was asleep, and claims that he put his head down on his desk because he had a headache.

The case resolves itself into a contest of testimony between two people. General Yardmaster Colleen Chapell relates that at approximately 02:30 hours she entered the office area and observed the grievor with his head down on his desk. She states that she left the area with other employees, after some brief conversation, to share a cigarette break in an adjacent location. According to Ms. Chapell, when she returned to the office with the other employees, at approximately 02:45, she found Mr. Sellier in the same position. She spoke to him in a loud voice, commenting in part that it must be nice to have a job that he could sleep on. She states that he then raised his head, that his eyes appeared puffy and that there were lines or creases on his face. It is not disputed that Mr. Sellier then turned to working on his computer screen, completing work in relation to the assembly of Train 403. An error on his part in respect to the assembly of that train was later noticed by Ms. Chapell, prompting a memorandum to her superiors, including mention of the alleged sleeping incident, as a result of which the grievor was pulled out of service, made the subject of a disciplinary investigation and, ultimately, assessed fifteen demerits, with his consequent dismissal for the accumulation of demerits in excess of sixty.

The Arbitrator has no difficulty with the submission of the Company to the effect that a culminating incident would, in the circumstances, have arguably justified the termination of the grievor, and that fifteen demerits is within a reasonable range of discipline for sleeping on the job, regard being had to the treatment of other employees in similar circumstances, to prior awards of this Office, and to the disciplinary record of the grievor.

The case turns, however, on a question of credibility. Having reviewed the transcript of the disciplinary investigation, and having heard both the grievor and Ms. Chapell speak directly as witnesses at the hearing, the Arbitrator is of the view that this is a rare instance in which the outcome must turn upon the burden of proof. I find the accounts of both individuals to be given in good faith, and both accounts to be plausible and credible. That includes the fact, as related by the grievor, that he overheard Ms. Chapell speaking with other employees as they left for their smoke break. While the perception of Ms. Chapell may be understandable, unlike a supervisor, an arbitrator cannot convert opinion or suspicion into legal conclusions. In the result, the evidence is evenly balanced, and in this circumstance the benefit of the doubt must be resolved against the party with the burden of proof, namely the Company. Specifically, I must conclude that the Company has not proved, on the balance of probabilities, that the grievor was asleep at his desk at the time in question. There was, consequently, no basis upon which to assess discipline for sleeping on the job, or to hold the grievor out of service.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and with compensation for all wages and benefits lost. It is the Arbitrator's further understanding, as agreed at the hearing, that the related issue of the impact of retirements under the Income Security Agreement should be remitted to the parties for resolution, failing which the matter may be spoken to.

April 12, 1997

(signed) MICHEL G. PICHER
ARBITRATOR