

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2854

Heard in Calgary, Wednesday, 14 May 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Appeal the discharge of Locomotive Engineer G.C. Garbolinsky of Saskatoon, Saskatchewan effective November 15, 1996.

JOINT STATEMENT OF ISSUE:

Effective November 15, 1996, Mr. Garbolinsky was discharged for the fraudulent submission of time claims, violation of C.R.O. Rule 13(a) paragraph (iv), C.R.O. Rule 14L # (ii), C.R.O. Rule 105 (Special Instruction) Item 4, G.O.I. Section 5.10 D(1) and Section 6.1 Item 3(a), exceeding permissible zone speed Craik subdivision Item 3.1 Timetable No. 4 dated April 28, 1996, during tours of duty on train 546/548 on October 25, 1996.

It is the Brotherhood's position that the discharge of Mr. G.C. Garbolinsky was unwarranted and he be compensated for all wages and benefits lost.

The Company does not agree.

FOR THE COUNCIL:

(SGD.) M. W. SIMPSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Morris	– Labour Relations Officer, Edmonton
J. Torchia	– Manager, Labour Relations, Edmonton
S. Michaud	– Assistant Manager, Labour Relations, Edmonton
D. Van Cauwenbergh	– Labour Relations Officer, Edmonton
S. Blackmore	– Labour Relations Officer, Edmonton
D. Lanthier	– Labour Relations Officer, Edmonton
J. Dixon	– Assistant Manager, Labour Relations, Edmonton

And on behalf of the Council:

D. J. Shewchuk	– Senior Vice-Chairman, Saskatoon
D. E. Brummund	– Vice-Chairman, Kamloops
G. C. Garbolinsky	– Grievor

AWARD OF THE ARBITRATOR

On a review of the materials filed, and the submissions made at the hearing, the Arbitrator is satisfied, on the balance of probabilities, that Locomotive Engineer Garbolinsky was involved in negligent or reckless disregard as to

the movement of his train, which resulted in his crew's time claims falling within the range which would allow the payment of higher yard rates in relation to duty performed on Train 547/548 on October 25, 1996. The Council does not dispute the violation of rules, including the operation of the grievor's train at excessive speeds, alleged by the Company, or that some discipline was deserving for that infraction.

The Arbitrator cannot accept the submission of the Council that in the instant case the Company erred in the manner in which it assessed discipline. Specifically, its representative suggests that the proper charge against Locomotive Engineer Garbolinsky would have been deliberate delay of his train, rather than the making of a false time claim. He submits that in fact the times entered on the time claims prepared by Locomotive Engineer Garbolinsky were accurate as to the location and movement of his train, and that in the circumstances the case is not comparable to one in which false times are deliberately entered on a time claim. The Arbitrator finds that argument to be overly technical, as a matter of general principle. It would seem to me that in an appropriate case the Company may well be entitled to take the view that the gerrymandering of work and meal times by a crew, in furtherance of a deliberate intent to bring their train's movement within a time frame which would allow the claiming of higher wage rates can, of itself, constitute a form of fraudulent conduct, in violation of the obligation of trust which unsupervised running trades crews owe to the Company. The Arbitrator can appreciate the Company's opinion that the grievor deliberately delayed his train to obtain additional wages. However, while the matter is not without some difficulty, in the instant case the evidence fall short of proving a shared conscious intention to perpetrate a deliberate fraud by the grievor and his crew. I do conclude, however, that the grievor was grossly negligent or indifferent in the timely performance of his duties, so as to attract discipline.

The sole issue to be resolved is the appropriate measure of discipline, in the circumstances. There are mitigating factors to be considered. Firstly, the Council is correct in suggesting that the actions of the grievor are not proved to be directly fraudulent, and therefore are not comparable to the submission of false times, conduct which has previously been found to be a dismissible offence (**CROA 461, 478, 899, 1472, 1474, 1835 and 2119**). The conduct engaged in by the grievor in the instant case is more in the nature of carelessness or indifference in the progressing of his crew's activities, resulting in their claim to the higher rates payable for yard service in relation to the time spent at Davidson, during the course of their tour of duty on October 25, 1996.

The grievor is an employee of long service, having first been hired as a trainman in June of 1976. His disciplinary record was clear at the time of the incident, and is devoid of any incidents involving the falsification of time claims or any similar breach of trust in his relationship with his employer. Further, the Arbitrator has some concern with the treatment of the grievor as compared with other members of the crew who, the Company admits, were equally involved in the delay of work on the day in question. Specifically, it is not disputed that, although the crew's conductor, Mr. J.D. Gehon was also discharged, Assistant Conductor D.W. Wasylenchuk was assessed only forty-five demerits, with time held out of service to count as a suspension. Even if, as the Company states, the reason for termination in a case such as this was a breach of the bond of trust between employer and employee which is inconsistent with further employment, because of participation in an act of dishonesty, it would be difficult to reconcile the treatment of the grievor with the more lenient outcome visited upon the assistant conductor, who would appear to have been no less involved. As noted above, however, the Arbitrator does not make a finding of deliberate fraud in this case. Nor am I persuaded that the fact that Locomotive Engineer Garbolinsky was the person who signed the time claims would of itself be sufficient to justify his discharge, as compared to the assistant conductor, particularly in light of the length of his prior service, and the fact that his prior disciplinary record, which was clear at the time of the incident, involved no similar misconduct.

On the whole, the Arbitrator is satisfied that this is an appropriate case for a substitution of penalty, in the exercise of the tribunal's discretion. The Arbitrator therefore directs that the grievor be reinstated into his employment, without compensation for wages or benefits lost, and without loss of seniority. Mr. Garbolinsky's disciplinary record shall show his period out of service as a suspension for careless misconduct in relation to the timely performance of work and the submission of related time claims, and shall further record the assessment of twenty-five demerits for the violation of operating rules as cited in the joint statement of issue.

Dated at Montreal, May 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR