

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2862

Heard in Calgary, Thursday, 15 May 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]**

DISPUTE:

Appeal on behalf of A. Lopez of Brandon Manitoba, who was discharged effective 26 September 1996, for: Violation of CRO Rule, General Rule A(iv), on September 26, 1996 and fraudulent submission of time returns dated September 24, 25 and 26, 1996, while employed as Assistant Conductor on Brandon Work Train, Cromer/Lampman Subdivisions.

JOINT STATEMENT OF ISSUE:

The Council submits that the Company has failed to prove that the grievor was aware of any fraudulent times submitted for the tours of duty on 24, 25 and 26 September 1996, and further that the grievor was not in violation of General Rule A(iv) on 26 September 1996.

The Council requests that the grievor be reinstated with full compensation and that his record be made whole.

The Company has declined the Union's request.

FOR THE COUNCIL:

(SGD.) M. G. ELDRIDGE
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) J. T. TORCHIA
FOR: SENIOR VICE-PRESIDENT, CN

There appeared on behalf of the Company:

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| K. Morris | – Labour Relations Officer, Edmonton |
| J. T. Torchia | – Manager, Labour Relations, Edmonton |
| S. Michaud | – Assistant Manager, Labour Relations, Edmonton |
| J. Dixon | – Assistant Manager, Labour Relations, Edmonton |
| D. Lanthier | – Labour Relations Officer, Edmonton |
| S. Blackmore | – Labour Relations Officer, Edmonton |
| D. Van Cauwenbergh | – Labour Relations Officer, Edmonton |
| H. P. Harapiak | – Witness |

And on behalf of the Council:

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| D. Ellickson | – Counsel, Toronto |
| M. G. Eldridge | – Vice-General Chairman, Edmonton |
| T. V. Herbel | – Witness |
| A. Lopez | – Grievor |

AWARD OF THE ARBITRATOR

The material before the Arbitrator reveals that the grievor was assigned to work both as conductor and as assistant conductor on the Brandon work train, operating over the Cromer and Lampman Subdivisions in August and September of 1996. The evidence indicates that at the commencement of the assignment the grievor and his crew had discussions with Assistant Superintendent H.P. Harapiak concerning the urgency of the work, and the method by which the crew would be transported and remunerated for their work. As the work neared its completion the crew were housed in Estevan, and drove between that point and the work site in a Company vehicle provided for that purpose. Although the evidence concerning the progress of the work from Brandon westward towards Estevan is relatively extensive and complex, for the purposes of this grievance it is sufficient to note that Mr. Lopez testified that he formed the opinion that an understanding was reached between the crew and Mr. Harapiak to the effect that the work was urgent, that the crew should be prepared to work long hours and that they would be compensated at or about the rate of sixteen hours a day. Indeed, the time claims returned by the crew's conductor over the period of the work project indicates that was roughly adhered to, without any questions being raised by Mr. Harapiak, or any other member of management.

It appears that the Company instituted a police investigation of employees working in the Estevan area, following reports that CN employees were said to be involved in heavy drinking. As a result of an ensuing investigation Mr. Harapiak came into possession of a CN police report by Special Agent Ray McKinnon, to the effect that on the evenings of August 24 and 25 he had observed the grievor's crew arriving at the Beefeater Inn where they were being housed, at or about 20:00. The Company investigator advised Mr. Harapiak that on the evening of the 25th Locomotive Engineer Boucher and Conductor Herbel were observed consuming alcohol through the course of the evening, until approximately midnight, in the bar of the Beefeater Inn. It appears that Mr. Herbel then went to bed and Locomotive Engineer Boucher continued to drink, both at the Beefeater Inn and later at another establishment in Estevan, until approximately 03:20 on the morning of September 26th. These circumstances, coupled with information that the crew had not proceeded to the work site on the morning of the 26th, caused the assistant superintendent and the police investigator to attend at the hotel where they found Locomotive Engineer Boucher in what is described as an inebriated condition. All three members of the crew were removed from service. It subsequently became known to Mr. Harapiak that, although the crew had returned from the work site to the hotel in Estevan shortly after 20:00 on both the 24th and 25th of September, Conductor Herbel reported them, by telephone, as going off duty at midnight. Based on that information, following a disciplinary investigation, Mr. Lopez was discharged for fraudulent time claims, as well as for an alleged violation of CROR Rule A, for failing to report a fellow employee who was unfit for duty.

The Arbitrator cannot find that the allegation of a violation of rule A is sustained on the evidence, as it relates to Mr. Lopez. Firstly, there is no evidence to suggest that Mr. Lopez was present on the evening prior when Mr. Boucher was allegedly drinking, either at the Beefeater Inn, or at the second bar which he is said to have frequented until 03:20. The evidence establishes that at or about 08:00 on the morning of the 26th Mr. Lopez was given to understand, as advised by Mr. Herbel, that the crew would not be required at the work site before approximately 11:00. In fact, Mr. Lopez did not see Mr. Boucher until very shortly before the arrival of Mr. Harapiak. It seems that the three crew members assembled, pursuant to a telephone direction from Mr. Harapiak, shortly before his arrival. Mr. Lopez indicated that he did not observe Mr. Boucher at that point, having no particular reason to do so. Moreover, it is not disputed that the time that the crew spent together was relatively brief, being approximately only ten minutes, before the assistant superintendent and police investigator arrived. On the balance of probabilities the Arbitrator cannot conclude that the grievor had sufficient knowledge of the prior evening's activities allegedly engaged in by Mr. Boucher, or that he had reason to believe that Mr. Boucher was unfit for duty.

The issue with respect to the fraudulent time claim allegedly made by Mr. Lopez is more difficult. Upon a careful review of the grievor's evidence, as well as that of Mr. Harapiak, I am satisfied that there was no deliberate or fraudulent intent on the part of the grievor to submit false time claims in the circumstances disclosed. There can be little doubt that discussions did take place between the crew and Mr. Harapiak, on more than one occasion, which could reasonably have left the impression in the minds of the work train crew that they were to do what was necessary to service the gang through the entire project on the Cromer and Lampman Subdivisions and would be compensated accordingly. Indeed, it is not disputed that the assistant superintendent expressed to the crew his hope

that they would not book off for miles, in an effort to keep the crew working and get the job done. It also appears that special concessions were made to the crew with respect to the rates which they would be paid for travelling to and from the work site in the Company vehicle. The evidence of Mr. Lopez, supported by the testimony of Mr. Herbel, further indicates that the impression of the crew members was that they were to provide Mr. Harapiak with time claims which would yield to them the equivalent of 350 miles, or approximately 16 hours on a daily basis. Further, the crew appeared to believe that any time spent in the hotel accommodation at Estevan during which the conductor might be obliged to do paper work or make telephone calls in relation to the crew's activities would also form part of their tour of duty.

The assistant superintendent states that he did not give the crew any clear undertaking that they would be remunerated as they believed. However, during the course of his evidence at the arbitration hearing, as well as in the Company's investigation, he conceded that they might have had a misimpression as to how they were to claim their time.

In the Arbitrator's view what the evidence discloses is something substantially less than a fraudulent intent on the part of the grievor. I am not, however, satisfied that the grievor was sufficiently thorough or careful in verifying with his supervisor the basis upon which he was to make his time claims and be paid. This was, in the Arbitrator's opinion, a case of miscommunication between the assistant superintendent and the crew, with a degree of carelessness on both sides. In the result, although I am satisfied that Mr. Lopez was not liable to be disciplined for deliberate fraud in relation to the submission of his time claims, he is liable to a degree of discipline for failing to bring a sufficient degree of care and clarity to the basis upon which his time was being claimed.

In the result, the Arbitrator is satisfied that the grievance must be allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority. In light of the shared responsibility which I have found, as between the grievor and the assistant superintendent, the grievor shall be compensated for one-half the wages and benefits which he lost.

Dated at Montreal, May 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR