

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2896

Heard in Montreal, Thursday, 16 October 1997

concerning

ST. LAWRENCE & HUDSON RAILWAY COMPANY

and

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

DISPUTE:

Appeal of the assessment of twenty (20) demerit marks to Conductor Martin Bangert.

JOINT STATEMENT OF ISSUE:

Conductor Martin Bangert was assessed twenty (20) demerit marks on July 5, 1995 for:

“... using an excessive amount of time, 3 hours and 20 minutes, to lift 37 cars, all on OG66 at CN Oakville Yard, mileage 20.3 on CN Oakville Subdivision on June 17, 1995, while operating as Conductor on 521-15, thus delaying trains, and for employing abnormal and obstructionary process during the investigation procedures resulting in delays to completion of same June 30, July 5, 6, 7, 8 and 9, 1995.”

The Union submitted that the time it took for Mr. Bangert to lift the 37 cars was fully justified in the context of the prevailing circumstances. Moreover, the Union argued that Mr. Bangert should not be subject to discipline because he insists upon working in strict accordance with the CROR, Company bulletins, and other applicable rules and regulations.

The Union requested that the twenty (20) demerit marks be expunged from Mr. Bangert's record.

The Company declined the Union's appeal.

FOR THE COUNCIL:

(SGD.) D. A. WARREN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) G. CHEHOWY
FOR: DISTRICT MANAGER

There appeared on behalf of the Company:

G. Chehowy	– Manager, Labour Relations, Toronto
M. Oliphant	– Labour Relations Officer, Toronto
F. O. Peters	– Manager, Yard Operations, Toronto

And on behalf of the Council:

P. Sadik	– Counsel, Toronto
D. A. Warren	– General Chairman, Toronto
J. N. DeTilly	– Vice-General Chairman, Montreal
M. Bangert	– Grievor

AWARD OF THE ARBITRATOR

The material establishes, to the full satisfaction of the Arbitrator, that the grievor was indeed excessively slow in lifting the thirty-seven cars from track OG66 at the Oakville Yard of CN Rail, on June 17, 1995. The documentary evidence tendered by the Company, and not substantially disputed by the Union, establishes that based on normal operations the time taken to marshall the thirty-seven cars, including twenty minute adjustment for re-marshalling a car which was improperly located, should have taken between one and one and one-half hours. In fact, the grievor took some three hours and twenty minutes to make the moves in question.

The disciplinary investigation is devoid of any proper explanation from Mr. Bangert as to why he took so long to perform the work assigned to him. His work-mate, Locomotive Engineer Brosseau, candidly responded, during the course of his disciplinary interview, that no problems were encountered and that he could not explain the delay taken by Conductor Bangert. Moreover, there can be little doubt that the delay of the train at the yard in question, with a possible ripple effect CN freight and GO train operations in the area, was properly viewed as an extremely serious matter. The grievor's actions caused CN's Chief Rail Traffic Controller, Mr. D.L. McGrath, to direct an e-mail message the Company's supervisor, suggesting that the incident should be inquired into. Further, on July 7, 1995 the Company's Manager of Operations received an electronic letter of complaint from CN's Manager, Train Service, Mr. Philip Marquis which reads as follows:

This letter is in regards to CP Conductor M. Bangert delaying lifts at Oakville. As you are aware CN is extremely concerned over delays CP Trains incur at Oakville when Conductor Bangert is working for example on June 17th train 523-15 took in excess of three hours to lift. Such delays are unacceptable as they cause considerable conflict not only within the yard but also on the Oakville Subdivision mainline where an extremely large number of GO commuter trains, VIA trains and freight trains operate. Should delays continue to trains on which Conductor Bangert is employed CN will be left with no other recourse but to prohibit Conductor Bangert from CN properties as per the provisions of the Joint Section Agreement.

Should you desire to discuss this matter further please feel free to contact the undersigned at your convenience.

Yours truly

Philip Marquis
Manager Train Service

The Company suggests, albeit indirectly, that an attempt to claim duplicate payment for the time occupied in switching at an en route location was the reason for the grievor's actions. Mr. Bangert has not admitted as much, and the Arbitrator need make no determination as to motive. What is painfully obvious, however, is that no good explanation was given by the grievor, nor by Locomotive Engineer Brosseau, to explain the inordinate delay at Oakville on the day in question. I am satisfied, in the circumstances, that the grievor was liable to discipline for his actions. In assessing the appropriate measure of such discipline, it is pertinent to note that in a prior incident, of April 4, 1993, the grievor was assessed fifteen demerits for actions which resulted in unnecessary delay to a rush load to the Ford Motor Co. In the result, the grievor knew, or reasonably should have known, that he was liable to equal or greater discipline in the event of a recurrence of such conduct in the future.

The second aspect of the discipline before the Arbitrator concerns what the Company alleges to be the deliberate frustration of the investigation process by Mr. Bangert. I find it unnecessary to deal with this aspect of the discipline, as in my opinion the twenty demerits assessed against the grievor would be fully justifiable based only on the aspect of the delay of his train. Needless to say, an arbitrator must take great care in drawing conclusions as to the conduct of an employee, and his or her union representative, engaged in attempts to defend the employee against accusations during the course of a disciplinary investigation. There can be little doubt that insubordinate or deliberately obstructionist conduct can justify discipline in such a circumstance. A close review of the material before me suggests that there was a substantial degree of evasiveness in the answers offered by Mr. Bangert during the course of the investigation. Equally apparent, however, is that the investigating officer, when faced with something other than a full admission of guilt, tended to rise to the bait, and pursue questions at undue length when it became obvious that the grievor would not provide what he considered the correct response. It is unclear to the Arbitrator

why, in light of the candid answers given by Locomotive Engineer Brosseau, and the grievor's repeated refusal to provide pertinent information or estimates as to the time of his activities, the Company's investigator allowed the investigation to continue over an extended period of some six days. It is equally unclear to the Arbitrator how the Company can now complain of the fact that the grievor frequently took adjournments of up to ten minutes before answering questions when, as appears from the record, the investigating officer allowed him to do so. In the circumstances, while I am satisfied that the Company had reason to assess some discipline against the grievor for his conduct in the disciplinary investigation, the Company's own contribution to the delay in the process would suggest that no more than a written reprimand would be justified as a measure of discipline for that aspect of the grievor's conduct.

In the result, for the reasons related above, the Arbitrator is nevertheless satisfied that the assessment of twenty demerits against Mr. Bangert is amply justified, based only on his unexplained gross delay of his train movement at CN's Oakville Yard on June 17, 1995. In light of the prior discipline of the grievor some two years earlier, for similar conduct, and the obvious lack of any mitigating factors favouring Mr. Bangert, the Arbitrator can see no basis to reduce the discipline, save to note that his conduct during the disciplinary investigation would merit a written reprimand.

For the foregoing reasons the grievance is dismissed.

October 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR