

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3212
Heard in Calgary, Tuesday, 13 November 2001
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

Appeal the discharge from Company service of Locomotive Engineer L.G. Winter of Regina, SK, on May 3, 2000 for "verbally abusing your Supervisor with a threat of physical harm, insubordination for refusing to comply with instructions to protect your assignment; and conduct unbecoming an employee while being transported by taxi from Melville to Regina."

JOINT STATEMENT OF ISSUE:

On March 14, 2000 Locomotive Engineer Winter was ordered in straightaway service to Melville from Regina. Shortly after arrival at Melville on March 15, 2000, the grievor was released to deadhead. The Company subsequently changed their mind with respect to the deadhead after Mr. Winter had departed Melville. After arriving at Regina, Locomotive Engineer Winter was approached by a Company officer, and asked to return to Melville by taxi.

The grievor was removed from service pending an investigation that commenced on March 27, 2000 and was subsequently discharged from Company service on May 3, 2000.

The Brotherhood contends that, first, Locomotive Engineer Winter was not contractually required to return to Melville. Secondly, the Brotherhood submits that the alleged altercation between the grievor and the supervisor does not warrant the severe measure of discipline that was assessed in the instant case. And, last, the Brotherhood submits that Locomotive Engineer Winter did not receive a fair and impartial hearing as contemplated in article 86 of agreement 1.2.

Accordingly, the Brotherhood requests that the grievor be reinstated into his former position without loss of seniority and benefits, and that he be made whole for all compensation lost during the time held out of service and during the period of discharge.

The Company has declined the appeal.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) D. E. BRUMMUND	(SGD.) D. VAN CAUWENBERGH
FOR: GENERAL CHAIRMAN	FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:
D. Van Cauwenbergh - Human Resources Associate, Winnipeg
B. Laidlaw - Human Resources Associate, Winnipeg
B. Grass - Witness

And on behalf of the Council:
D. E. Brummund - Vice-General Chairman, Edmonton
D. J. Shewchuk - General Chairman, Edmonton
R. J. Ermet - Local Chairman, Jasper
R. R. Shack - Local Chairman, Edson
L. Winter - Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator does not establish, as the Company alleges, that the grievor threatened physical harm to his supervisor. While it is clear that he repeatedly used a four letter word and exhibited obvious anger in his confrontation with his supervisor, and refused to obey a directive to return to Melville from Regina to handle a train in a manner that did constitute insubordination, there is no evidence of what can fairly be characterized as an overt threat of physical harm to the grievor's supervisor. Moreover, as appears from the evidence, several hours later, having had some sleep, the grievor telephoned his supervisor and apologized for his conduct.

The evidence in the case at hand does sustain the view that Mr. Winter rendered himself liable to a serious degree of discipline. In my view, however, his actions did not merit discharge, and that should have been apparent to his employer. The evidence discloses that the grievor left Melville for Regina, deadheading by taxi as instructed. When orders were conveyed to him through the taxi dispatcher to return to Melville to handle a train, he effectively instructed the taxi driver to disregard the message, turn off his cell phone and to carry on to Regina. It is upon arrival at Regina that he had his heated confrontation with his supervisor, Transportation Supervisor Brad Grass.

In the Arbitrator's view the grievor's conduct would have justified discipline in the nature of a thirty day suspension. Given his relatively long service, and the fact that his disciplinary record was clear at the time, discharge was plainly not justified. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for wages and benefits lost, and without loss of seniority, subject to the deduction of a period of suspension of thirty days for his insubordination towards Supervisor Grass, and his failure to respond to the communication delivered to him while being deadheaded by taxi. The order of compensation in favour of Mr. Winter is obviously subject to the normal duty of mitigation and the deduction of any wages or revenue earned elsewhere.

November 16, 2001

MICHEL G. PICHER
ARBITRATOR