

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3358**

Heard in Edmonton, Thursday, 10 July 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS
UNION OF CANADA (CAW-CANADA)
EX PARTE**

DISPUTE:

Discipline & subsequent dismissal of Calgary Intermodal Clerk Lee Horsman.

UNION'S STATEMENT OF ISSUE:

On or about May 6, 2002, Intermodal Clerk Lee Horsman was returned to duties under the conditions set out in an agreement signed between the Company and the Union on April 25, 2002.

Said agreement set certain conditions for Mr. Horsman to adhere to. The agreement also required the Company to place Mr. Horsman on a different position for a period of up to six months until he was deemed ready to return to his regular duties.

After an investigation on November 1, 2002 concerning "an incident in South Kiosk Friday morning, October 25, 2002", Intermodal Clerk Lee Horsman's record was debited 15 demerits for:

"unacceptable behaviour toward a co-worker on October 25, 2002."

After another investigation on November 28, 2002 concerning "Your condition while on duty on November 21, 2002 and November 25, 2002", Intermodal Clerk Lee Horsman's record was debited a further 20 demerits in relation to a complaint filed on November 26, 2002 by an outside cartage driver for OCTS Transportation.

On or about November 29, 2002, Intermodal Clerk Lee Horsman was dismissed from service account his discipline record exceeding 60 demerits.

It is the contention of the Union that: **(1.)** the Company did not establish wrong-doing by Intermodal Clerk Lee Horsman sufficient to debit his record with 15 demerits. **(2.)** the Company did not establish wrong-doing by Intermodal Clerk Lee Horsman sufficient to debit his record with 20 demerits. **(3.)** the Company did not establish wrong-doing by Intermodal Clerk Lee Horsman sufficient to give the Company cause to dismiss him. **(4.)** Intermodal Clerk Lee Horsman was treated in an arbitrary, discriminatory and excessive manner in regard to his dismissal.

Therefore, with regard to the foregoing, it is the position of the Union that Intermodal Clerk Lee Horsman should be returned to duty forthwith without loss of seniority, with full redress for all

lost wages, benefits and losses incurred as a result of his dismissal, including, but not limited to, interest on any monies owing.

The Company denies the Union's contentions and claim

FOR THE UNION:

(SGD.) B. MCDONAGH

FOR: PRESIDENT, COUNCIL 4000

There appeared on behalf of the Company:

M. J. Morrison – Human Resources Manager, Edmonton

R. Reny – Senior Manager, Human Resources, Vancouver

L. Rea – General Supervisor

R. Hargreaves – Operations Supervisor

B. Calc – General Supervisor

And on behalf of the Union:

B. McDonagh – National Representative, Vancouver

R. Johnston – President, Council 4000, Montreal

B. Kennedy – Representative, Council 4000

M. Wozniac – President, Local 4001

L. Colby – Local Chairperson, Local 4001

L. Horsman – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, on the balance of probabilities, that the grievor did act in a manner which was unacceptable in his dealings with a fellow employee, on October 25, 2002, and with a customer truck driver on November 21 and 25, 2002. Particularly on October 25 and November 21, Mr. Horsman displayed rudeness, unacceptable impatience and used foul language in a manner inconsistent with the standard of civility to be expected from an employee in his position. The evidence discloses that on the three occasions in question he was assigned to an entry kiosk at the Intermodal facility where his duties required him to deal with a substantial number of truck drivers of customers attending at the facility, as well as with fellow employees.

The record discloses that Mr. Horsman was previously discharged from his permanent position as a gate clerk at the Calgary Intermodal terminal. He had incurred a number of heads of discipline following complaints from contractors, couriers and drivers between July of 2000 and November of 2001, resulting in his dismissal on December 5, 2001. He was returned to work on the basis of an agreed return to work contract on April 25, 2002. The conditions of his return to work contained a number of provisions, including the following:

Mr. Horsman will present himself for a medical evaluation to an independent medical specialist agreed to by the parties (CN and the local union rep) said medical consultation will be paid for by the Company.

Mr. Horsman will be required to make the parties aware of and follow any/all recommendations made by the independent specialist.

Mr. Horsman will be required on a quarterly basis, to provide evidence acceptable to the parties that he is adhering to the independent medical specialist recommendations as well as attending any/all programs recommended.

Mr. Horsman will perform clerical duties (inside clerical) and be required to protect various shifts. Advice of shift changes will be provided 10 workdays prior to the shift changes. Shifts worked will recognize the need to support any programs that Mr. Horsman has embarked upon and provided suitable corroboration of same.

Mr. Horsman will make every effort to adhere to the standards of the company with regard to the treatment of customers and employees.

In the event there are allegations of similar poor behaviour in relation to the handling and communication with customers and/or other employees the provisions of article 23 will apply.

In the event Mr. Horsman is deemed unfit to return to his former occupation after a period of six months has elapsed, a medical review (paid for by the company) will be undertaken to determine a prognosis for his eventual return. The company officer in conjunction with the designated union rep will discuss the go forward plan to ensure that there is a reasonable time frame for his return to his former occupation.

In the event there is no accord reached (in the above paragraph) between the two parties the matter will be escalated to the appropriate Manager H/R and the President of National Council 4000 for final resolve.

Failure by Mr. Horsman to meet the conditions outlined herein will subject Mr. Horsman to discipline up to and including dismissal

The agreement so fashioned was agreed to be in effect for a period of one year from the date of its execution.

The evidence before the Arbitrator confirms that Mr. Horsman was initially assigned to an inside clerical job at the intermodal facility. Before the expiry of six months, however, he was permanently assigned back to a gate kiosk, the assignment which he held at the time of the events leading to his termination. The Union submits, among other things, that the return of Mr. Horsman to the more stressful working environment of the kiosk was out of keeping with the return to work protocol negotiated between the parties. The Union officer involved in the negotiation of that agreement, Mr. R. Johnston, testified to the effect that the intention of the agreement was to provide Mr. Horsman the quieter environment of an inside clerical position for a period of six months before re-introducing him to his permanent assignment in the gate wicket. The Company offered no evidence to the contrary, as its officer involved in negotiating the agreement was not present at the hearing. Its representatives submit, however, that the agreement can be interpreted in a different fashion and does not expressly require an assignment away from the grievor's former occupation for a period of not less than six months.

The Arbitrator has some difficulty with this aspect of the Company's submission. The paragraph concerning the possibility of Mr. Horsman being deemed unfit to return to his former occupation after a period of six months clearly reveals the overarching intention of the agreement. It is fashioned to ensure, insofar as possible, that the "go forward plan" would ensure an appropriate time frame before the grievor would be returned to his former occupation. Contrary to the intention of the document, however, Mr. Horsman appears to have been assigned sporadically to kiosk work, albeit on a relief basis, from the earliest weeks of his return to work, and was returned to his permanent assignment at the gate in the north kiosk on September 24, 2002, some four to five months after his return to work. Most significantly, there does not appear to

have been any discussion between the parties at that time with respect to the appropriateness of that adjustment in his work assignment before the expiry of six months.

In the result, the Arbitrator is satisfied that while the Company did have grounds to discipline Mr. Horsman, in light of the overall circumstances this is an appropriate case for a substitution of penalty. The grievor is a long service employee, having entered service in September of 1977. It is not disputed that he was disciplined only once over a period of over twenty years of service. While the Arbitrator appreciates that the Company has endeavoured to extend a substantial measure of fairness in returning Mr. Horsman to the workplace under the terms of the agreement executed on April 25, 2002, it is less than clear that the spirit of that agreement was fully understood and respected by the grievor's immediate supervisors at the intermodal facility. In the result, I am satisfied that this is an appropriate case for a substitution of penalty, albeit not one for compensation.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. The period between the grievor's dismissal and reinstatement shall be registered as a suspension for the incidents of October 25, November 21, and November 25, 2002, with Mr. Horsman's disciplinary record to be returned to the level of forty demerits. For the first two months following his reinstatement he shall be employed in an inside clerical position in accordance with the agreement of April 25, 2002.

The grievor should appreciate that the instant award does not condone his conduct. He must realize that further incidents of a nature similar to those which gave rise to the discipline which is the subject of this grievance may have the most grave consequence for his employment.

July 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR