CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3409

Heard in Calgary, Tuesday, 9 March 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:
The dismissal of J.S. Kowalchuk for submission of fraudulent time claims.

UNION'S STATEMENT OF ISSUE:
Mr. Kowalchuk was party to an agreement regarding a period of suspension from May 9th through May 28th, 2003. The collective agreement provides for payment for time held out of service pending an investigation. Mr. Kowalchuk, misunderstanding these provisions, submitted time claims for days that were to serve as suspension. Mr. Kowalchuk was mistakenly under the impression that if these time claims weren't permissible, they would simply be cut.

Following an investigation, Mr. Kowalchuk was dismissed. The Union submits that this is a case of an incorrect application of the collective agreement and not fraud. Accordingly, the Union requests that Mr. Kowalchuk be reinstated without loss of seniority and that he be made whole for all losses.

The Company disagrees.

FOR THE UNION:
(SGD.) R. A. HACKL
FOR: GENERAL CHAIRPERSON
There appeared on behalf of the Company:
S. Ziemer – Manager, Human Resources, Vancouver
R. Reny – Senior Manager, Human Resources, Edmonton
E. Blotzyl – Superintendent, BC South Zone
B. Laidlaw – Manager, Human Resources,
R. Dilssner – Assistant Manager, Crew Management Systems
And on behalf of the Union:

M. A. Church - Counsel, Toronto
R. A. Hackle - Vice-General Chairperson, Edmonton
B. Boechler - General Chairperson, Edmonton
A. Whitfield - Local Chairperson, Vancouver
D. Finnson - Vice-General Chairperson, UTU-CPR, Calgary
J. Kowalchuk - Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are described, in substantial part in the decision of this Office in **CROA 3401** and need not be repeated here. Suffice it to say that the grievor was given a twenty day suspension by reason of an agreement dated May 28, 2003 between himself, his Union representative and the Company. By the terms of that agreement his period held out of service between May 9 and May 28, 2003 was to be treated as a suspension. In that regard the agreement concludes with the sentence: "Mr. Kowalchuk will not be compensated for time held out of service during this suspension period."

The evidence discloses that sometime later the grievor had some uncertainty as to his entitlement to wages for the period between May 9 and May 13, 2003, the date an ultimatum was put to him by his supervisor with respect to signing a continuing employment contract which subsequently was viewed by both parties as inappropriate. He therefore inquired with his Union local chairperson as to whether he should submit a claim for the days in question, bearing in mind that there are certain conditions relating to the time for which a person can be held out of service pending investigation, as provided under the collective agreement.

The issue in the case at hand is whether the grievor sought, as the Company alleges, to defraud or deceive the employer. The evidence leaves that issue very much in question, on the balance of probabilities. Significantly, the nature of the claim made by the grievor, being a Code 13 or "run-around" was such that it would, without exception, be examined and approved or disapproved by a Company officer. The evidence before the Arbitrator confirms that a Code 13 claim is not, like other kinds of claims, subjected to only random or periodic audits. Each and every such claim is examined by the Company and is either accepted or rejected on its specific merits. Most importantly, filing a Code 13 claim is not unlike calling a supervisor to ask about the claim an employee wishes to make, as in either case the claim will be revealed to the employer and considered.

On what basis can it then be said that what the grievor did was an act of fraud? Fraud is a serious allegation which, like theft, must be established by the party bearing the burden of proof, on the basis of clear and cogent evidence. Whatever the suspicions or views of the Company, the evidence before the Arbitrator does not disclose the actions of a person who sought to manipulate or deceive the Company to obtain payments which he knew he was not entitled to receive. The evidence confirms that the grievor was uncertain as to whether he had the protection of the collective agreement for at least a period of days during which he was held out of service, as provided under the collective agreement. When he inquired of his local chairperson the advice he received was to make the claim. Unfortunately that union officer had not been privy to the specific terms of the agreement of May 28, 2003. In the result, in the larger picture, that was erroneous advice. Most significantly, however, for the merits of this grievance, the overall evidence does not support the Company's theory of an attempt at fraud, concealment or the equivalent of theft on the part of the grievor.

In the Arbitrator's view, when the facts of this case are considered in tandem with those reviewed in greater detail in **CROA 3401**, what emerges is an unfortunate lack of judgement of the part of both the grievor and his superintendent, Mr. Eric Blotzyl. At the outset, it was Mr. Blotzyl's ill considered proposal of a continuing employment contract which placed the grievor's status into what can fairly be characterized as a confused state during the events of May, 2003. It is also significant that the grievor is an employee of relatively long service, being in his twentieth year of employment. There is nothing in his prior disciplinary record to suggest that he has been dishonest or reckless with the truth in his dealings with the Company.

That is not to say that the grievor is without fault in the case at hand. Clearly he knew, or reasonably should have known, by the terms of the agreement of May 28, 2003 that he was not to be compensated for the period of his suspension. While I am satisfied that there was a genuine degree of confusion in the mind of the grievor as to the actual dates of that period of suspension and that he did not act out of dishonesty, the fact remains that he committed a serious error of judgement or carelessness, the nature of which was bound to cause the Company understandable concern as to his willingness to adhere to the terms of the agreement which he signed, if not to his good faith and honesty.

In the result, the Arbitrator is satisfied that by reason of the grievor's serious error in judgement, this is not an appropriate case for compensation. It is, however, an appropriate case for reinstatement, as I am satisfied that the Company has not established a basis upon which to claim that the bond of trust between the grievor and the Company is irrevocably broken. On the contrary, no fraudulent intent on the part of the grievor is established on the evidence. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation and without loss of seniority, with his disciplinary record to stand again at the level of forty-five demerits.

March 15, 2004 (signed) MICHEL G. PICHER
ARBITRATOR