CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2454

Heard in Montreal, Thursday, 10 February 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Discipline assessed to, and discharge of, Mr. R. S. Gugay.

JOINT STATEMENT OF ISSUE:

On June 3, 1993, the grievor was assessed the following discipline: **1.)** Twenty demerits for claiming *per diem* expenses on $68.00 while working on Gang 137 while, allegedly, not entitled thereto; **2.)** Discharge for: **(a)** alleged unauthorized payment of wages for work not performed by B.S. Dhillon **(b)** alleged misappropriation of employees' time for personal use; and **(c)** alleged unauthorized possession of Company property at the grievor's place of residence and his further attempt to dispose of any other Company property from that residence

The Brotherhood contends: **1.)** That the *per diem* expenses received by the grievor were openly claimed for and knowingly approved by the Company; **2.)** That there were mitigating circumstances that should act to limit the discipline assessed for the alleged unauthorized payment of wages to B.S. Dhillon **3.)** That the grievor never misappropriated the time of employees for personal use; **4.)** That the grievor never stole, or knowingly possessed in an unauthorized manner, any Company property; and **5.)** That the grievor was unjustly dealt with in violation of Article 18.6 of Agreement 10.1.

The Brotherhood requests: That the grievor be reinstated forthwith, that the discipline in question be removed from his record, and that he be fully reimbursed for all financial loss incurred as a result of this matter.

The Company has denied the Brotherhood's contentions and denies its requests.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) G. SCHNEIDER	(SGD.) D. J. NOYES
SYSTEM FEDERATION GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

J. Hinkle	– Labour Relations Officer, Winnipeg
B. Jones	– CN Police, Vancouver
R. Gregory	– Manager Production W/C, Edmonton
C. Fontaine	– Machine Operator, Vancouver
M. A. King	– Counsel, Edmonton
B. Thibault	– Plant Production Supervisor, Winnipeg

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg
D. Brown	– Senior Counsel, Ottawa
J. Brar	– General Chairman, Vancouver
S. S. Cheema	– Witness
R. S. Gugay	– Grievor

AWARD OF THE ARBITRATOR

The first head of discipline concerns the twenty demerits assessed against Mr. Gugay for claiming expenses of $68.00 per day while working on Gang 137 at Vancouver. It is common ground that Mr. Gugay's permanent position is that of Track Maintenance Foreman at Boston Bar, B.C. He succeeded in obtaining the position of Extra Gang Foreman on Gang 137 pursuant to a bulletin dated January 28, 1993, following which he commenced work on the gang on February 7, 1993. Mr. Gugay had previously had family accommodation at Boston Bar which he surrendered, and in respect of which he claimed and obtained reimbursement of $100.00 rent paid for the month of March, 1993. The evidence discloses that while working on the extra gang at Vancouver Mr. Gugay resided, along with his family, at a private residence in Vancouver.

On a review of the facts there can be little doubt that the grievor was not entitled to the *per diem* allowance which he claimed. The sole issue is whether he acted out of a good faith misunderstanding of his rights, as alleged by the Brotherhood, a factor which would be mitigating of discipline. The Brotherhood acknowledges that the grievor established residence in a home in Vancouver at the time he was working out of Thornton Yard. It submits, however, that Mr. Gugay also continued to maintain a residence of record at Boston Bar, in keeping with the Company's own rules. In this regard, counsel for the Brotherhood points to Production Bulletin No. 1/93 which, in part, defines residency as "the residence that CN has on file." It does not appear disputed that the address that CN had on file for the grievor was Box 28, Boston Bar, B.C.

The Arbitrator is not persuaded by the submission of the Brotherhood. The definition of residency relied on by the Brotherhood in the production bulletin is found under the heading "travel assistance". That assistance provides for the payment of monies when an employee is required to travel some distance between the designated assembly point and his or her place of residence. It has no bearing upon the issue at hand, which concerns the grievor's claim for a separate allowance in respect of accommodations and meals. The language relating to that provision expressly provides that the assistance is limited to employees who live away from home as they are required to work at a location not less than forty miles away from their residence.

By the grievor's own admission, he maintained no residence in Boston Bar at the time of his work assignment in Vancouver, and in fact resided with his family in that city. In the Arbitrator's view the grievor knew, or reasonably should have known, that he was not entitled to claim a living allowance in the circumstances disclosed. I find it implausible that the grievor believed, in good faith, that maintaining a post office box mailing address in Boston Bar, while residing with his family in Vancouver while he worked in Vancouver, entitled him to claim an away from home living allowance. By his own admission, he had no home in Boston Bar, and was making his home in Vancouver at the time of the assignment in question. The most probable inference to be drawn is that an employee of Mr. Gugay's experience was aware that he was not entitled to the allowance. That inference is particularly strong in the case at hand, given that Mr. Gugay was investigated and warned by the Company in relation to a similar claim in May of 1987. In the case at hand, whether the grievor claimed the allowance deliberately or out of negligence, I am satisfied that he was deserving of discipline for his actions. In the Arbitrator's view, given the prior incident and warning in 1987, the assessment of twenty demerits was within the range of appropriate disciplinary response in the circumstances. This aspect of the grievance must, therefore, be dismissed.

The second aspect of the case concerns the grievor's discharge for three separate actions: the authorizing of the payment of wages to an employee for work not done by him; the use of Company employees and equipment to do work at the grievor's residence; and, lastly, the unauthorized possession of Company property at Mr. Gugay's home.

It is not denied that Mr. Gugay authorized the payment of seven hours' wages for an employee in his gang, Mr. B.S. Dhillon on March 3, 1993. It is common ground that Mr. Dhillon did not perform work on that day. According to the grievor, he felt that it was appropriate to authorize payment of Mr. Dhillon for the seven extra hours because the employee had in fact been underpaid previously. Specifically, he had performed certain drilling work which was payable at a rate higher than the labourer's rate, but which he did not receive. As well, he had performed work in the nature of overtime for which he had not been compensated. Mr. Gugay maintains that he discussed the possible extra payment with the employee as a means of compensating him, and that they agreed upon the payment of seven hours.

The Arbitrator has difficulty with several aspects of Mr. Gugay's explanation. Firstly, it appears that other employees who also did drilling work were not accorded the same treatment as Mr. Dhillon. For example, Mr. Claude Fontaine, a labourer in the grievor's crew, testified that he performed a substantial amount of drilling work,

as did other employees, and was told by Mr. Gugay that Supervisor Wilson declined to authorize the payment of the work at the higher rate (Group III Machine Operator) payable for that work. Under oath Mr. Wilson stated that he could not recall any such statement or conversation with Mr. Gugay. He acknowledged that a practice exists in the field whereby employees are sometimes given compensatory time, even though it might not be worked, rather than an upgrade. He states, however, that this is done by crediting an additional hour worked at the end of an employee's day, a practice which in the case at hand would have brought Mr. Dhillon's wages into line with the amount which was properly owing. There is nothing in the evidence of Mr. Wilson, however, to confirm the legitimacy of entering the equivalent of a full day's work for an employee as a compensatory measure.

On the whole, the Arbitrator is satisfied that the grievor did violate his obligation to the Company in the manner in which he dealt with Mr. Dhillon's time keeping. Given the slight degree of laxity apparently applied in the granting of compensatory time, the Arbitrator might be inclined to view the gravity of the offence as mitigated, if this were the only action in respect of which Mr. Gugay had been disciplined. If this had been his only offence, in light of Mr. Wilson's evidence, I might have been inclined to reduce the penalty. For other reasons related below, however, I am satisfied that the Company was ultimately justified in viewing that the bond of trust between itself and Mr. Gugay was irrevocably broken.

The event which leads to that conclusion concerns the next allegation, that Mr. Gugay used employee time and Company equipment for his own personal advantage. The evidence of Mr. Fontaine is that on or about March 8, 1993 he was instructed by Mr. Gugay to take the Company's half ton truck to complete an assignment along with another employee, Mr. S.S. Cheema. Mr. Fontaine relates that Mr. Cheema directed him to drive the Company truck to the residence of the grievor's father, who is also a CN employee. According to Mr. Fontaine, at that location, under the direction of Mr. Gugay's father, he and Mr. Cheema loaded trash into the truck, and subsequently drove the truck in the company of Mr. Gugay's father to a dump site where it was unloaded, after which they returned to the residence. According to Mr. Fontaine Mr. Cheema then suggested that the two employees would then operate a roto-tiller in the garden of the residence, at which point Mr. Fontaine refused and insisted that they return to work.

Mr. Gugay denies having given Mr. Fontaine and Mr. Cheema the instructions, as alleged. Mr. Cheema also denies the account of events related by Mr. Fontaine. The suggestion advanced on behalf of the grievor is that Mr. Fontaine falsified his evidence because he had personal antagonism towards Mr. Gugay, and had, on occasion, addressed racial slurs towards him.

On a careful review of the evidence the Arbitrator finds the account of events related by Mr. Fontaine to be credible. Firstly, documentary evidence obtained from the dump by a CN Police investigator confirms that a truck of the size of the Company's truck did attend at the dump site at the times and for the period coinciding with the times related by Mr. Fontaine. Secondly, it appears that Mr. Fontaine expressed his anger at having been required to perform personal services for Mr. Gugay immediately upon his return to the job site on the afternoon of March 8, 1993. The evidence of Mr. Fontaine, corroborated by the statement of employee Wayne Musgrove, reveals that upon his return to work he related to Mr. Musgrove what he had just done. According to Mr. Musgrove's statement "... he come back in the afternoon and he was very mad and upset, he said Randy Gugay made him take the one ton and went to his house to clean up his yard."

In the Arbitrator's view Mr. Fontaine was a fair and candid witness. In my view his evidence is to be preferred to that of Mr. Cheema and Mr. Gugay. I am not persuaded by the argument of the Brotherhood that Mr. Fontaine was motivated by animosity towards Mr. Gugay, or by the suggestion, rebutted by the evidence of Mr. Wilson which I do find credible, that Mr. Cheema would have been incapable of articulating street directions to Mr. Fontaine in English. Regrettably, I am compelled to conclude that Mr. Cheema and Mr. Gugay have lied in an attempt to cover up the grievor's wrongdoing in this matter.

The foregoing conclusion is, I think, self-evident for what it suggests of the relationship of trust between the employer and the Company. Whatever mitigating factors may have attached to the incident involving the time sheets for Mr. Dhillon, I can see nothing that would mitigate the decision to discharge Mr. Gugay for his deliberate misuse of Company equipment and manpower to perform work to his personal advantage at his father's residence.

I am also satisfied that the final allegation against the grievor is made out, on the balance of probabilities. The evidence discloses that police investigators found two Company shovels in the grievor's possession, at his home. The Arbitrator does not find the grievor's explanation for the presence of the shovels at his home to be credible. The issue of credibility is not assisted by the fact that prior to the visit to the home with the police officers, Mr. Gugay

asked Supervisor Wilson to telephone his father to warn him that the police were coming. The suggestion of counsel for the Brotherhood that the request was for the call to be made as a "courtesy" to avoid any undue surprise to the grievor's father is simply not persuasive. I am satisfied that Mr. Gugay was aware that he was in unauthorized possession of Company property and was attempting to avoid detection.

The evidence before the Arbitrator discloses that in a number of respects, particularly in relation to the abuse of Company equipment and personnel for his personal advantage and the unauthorized possession of Company property, the grievor has been dishonest with the Company, to a degree that effectively destroyed the relationship of trust implicit in his position as an extra gang foreman. The Arbitrator is drawn to the conclusion that his discharge was justified in the circumstances, that there are no compelling factors in mitigation. Although no argument was addressed directly to the issue by the Brotherhood, I am also satisfied that Mr. Gugay was not unjustly dealt with in violation of article 18.6 of the collective agreement. For these reasons the grievance must be dismissed.

11 February 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR