CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2047

Heard at Montreal, Thursday, 12 July 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Termination of employment of Trainperson T.L. Smith of Hornepayne.

JOINT STATEMENT OF ISSUE:

On 16 February 1990, Trainperson T.L. Smith was notified of the Company's decision to terminate her employment during her probationary period as a result of her inability to perform the duties of her position in a proper and safe manner.

The Union contends that the termination of Trainperson Smith's employment was unjust on the basis that the Company's action was unwarranted in consideration of all the material circumstances and, in any case, was too severe.

The Company has declined the Union's appeal.

FOR THE UNION:

(SGD) T. G. HODGES
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD) J. B. BART
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

S. F. McConville – Labour Relations Officer, Montreal
J. B. Bart – Manager, Labour Relations, Montreal
M. Hughes – Labour Relations Officer, Montreal
M. S. Fisher – Co-Ordinator, Special Projects, Montreal
J. Kelly – Labour Relations Officer, Toronto
R. S. Bart – Master Mechanic, Hornepayne
I. P. McDonough – Witness

And on behalf of the Union:

T. G. Hodges – General Chairperson, St. Catharines
M. P. Gregotski – Vice-General Chairperson, St. Catharines
R. Beatty – Local Chairperson, Hornepayne
J. D. Pickle – General Chairman, BLE, Sarnia
C. Hamilton – Vice-General Chairman, BLE, Montreal
T. Smith – Local Chairman, BLE, Hornepayne
T. L. Smith – Grievor

AWARD OF THE ARBITRATOR

On 16 February 1990 the grievor, a probationary employee was advised that her services were terminated by reason of her "... failure to safely and properly carry out (your) duties while employed as Front Trainperson on Extra 5181 East on 5-6 February 1990." Specifically, the Company alleges that the grievor slept while on duty, and failed to perform switching in an efficient manner, in accordance with instructions from her locomotive engineer and conductor, en route at Oba.

The standard of proof in a grievance such as this, as well as the standard of review to be applied by a board of arbitration, was reviewed in **CROA 1931**. It was there reiterated, as stated in **CROA 1568**, that the termination of a probationary employee must not be arbitrary, discriminatory or in bad faith.

It is not disputed that running trades employees who work irregular hours can occasionally suffer a shortage of sleep, and experience problems with dozing inadvertently and momentarily during a run. This is not, of course, condoned and Company and Union alike acknowledge the risk to safety inherent in an employee working while suffering from a deficiency of sleep an inability to remain awake while on duty. It is also not disputed, however, that when employees work together in a locomotive as head end brakeman and locomotive engineer, in the event that one of them should appear to have difficulty staying awake momentarily, the other makes every reasonable effort to arouse his or her mate and assist them in overcoming the problem. Alternatively, if the crew member's inability to remain awake is insurmountable, the other person on duty in the locomotive is under an obligation to take such steps, up to and including stopping the train, if running safely requires that they do so.

The material in the instant case establishes that prior to the commencement of her tour of duty on February 5-6, 1990 Ms. Smith had worked a total of 227 hours on duty in the previous thirty day period. She was, moreover, called for duty on a run which commenced at 2345 hours on February 5. Having had a full night's sleep the night prior, she was not able to gain any meaningful rest prior to going on duty, with the result that she began to experience difficulty with inadvertent dozing off as Extra 5181 East progressed from Hornepayne to Foleyet on the night in question.

What then transpired in the cab of the locomotive, however, is different from the norm. Rather than assist the grievor to overcome her problem with sleep, Locomotive Engineer I.P. McDonough simply observed her and made notes of the times at which she dozed off, all of which he subsequently reported to the Company, which resulted in the ensuing investigation an her eventual dismissal. When asked why he had not taken the usual steps to help her to stay awake, he suggested that he might be the subject of sexual harassment if he had attempted to do so. While it appears that at one point Mr. McDonough sounded the cab's crew alert system without waking her, it seems that he did this more with a view to proving she was asleep that in a good faith attempt to help her or to return his train to a safer operating standard.

The decision to discharge the grievor was also based in part on Locomotive Engineer McDonough's allegation that the grievor had failed to follow instructions in switching at Oba, which resulted in a delay of the train. As noted by the Union representative, the Company brought no documentary evidence or dispatch tapes, which would be the best evidence, to establish the truth of that allegation. It merely relied on the account of Locomotive Engineer McDonough, corroborated, at least in respect of the switching activity, by Conductor C.H. Knight, who, it appears, never attempted to assist this relatively new employee in what was apparently only her second exposure to switching operations at Oba.

The Union submits that what is disclosed in this case is the directing of ill will, and a degree of bad faith, from Mr. McDonough and Mr. Knight towards the grievor, which trigger the investigation and her ultimate discharge. On the whole of the material before me I am regrettably compelled to conclude that it is correct in that assessment. Without analyzing the complex of motives alleged by the Union to be operating in this case, I am satisfied that the approach taken to Trainperson Smith by Locomotive Engineer McDonough is tantamount to entrapment by the deliberate desertion of a fellow employee in obvious difficulty. By failing to offer any constructive help to her in respect of her obvious problem with sleep, as a workmate normally would have done, he knowingly allowed her to place her job security in jeopardy and arguably placed his own train movement in a situation of avoidable and unnecessary risk.

The Company did not participate in the acts of bad faith exhibited by Mr. McDonough. However, in my view in relying as it did on the account of Mr. McDonough, both with respect to the grievor's nodding off while on duty, and her failure to properly perform switching functions causing a delay, without recourse the confirmation of

documentary material or tapes, in the result the Company terminated Ms. Smith's employment in a manner inconsistent with the standard described in **CROA 1931** and **1568**. While there is no basis for the Arbitrator to conclude that there was any conscious ill will or bad faith on the part of any Company officer directed towards the grievor, the discriminatory treatment of Trainperson Smith by Locomotive Engineer McDonough and Conductor Knight did, in my view, cause both an arbitrary and discriminatory result which would not, in the normal course, have befallen another employee in a similar situation.

In the exceptional circumstances of this case, I am satisfied that the Company has failed to meet the admittedly lower standard of proof with respect to the issue of whether it had cause to terminate the grievor as a probationary employee. By the same token, however, I am not satisfied that the grievor's conduct is entirely without fault, and undeserving of some discipline. It appears that she clearly did report for work in an unfit condition as regards her ability to remain awake. On the whole I am not satisfied, therefore, that this is a case for an order of compensation.

For the foregoing reasons the grievance is allowed, in part. Ms. Smith shall be reinstated into her employment, without compensation and without loss of seniority, to stand as a probationary employee with the same amount of credited service as she would have had but for her termination. The issue of whether Ms. Smith should be considered for assignment at another location, as suggested by the Union, is a matter which the Arbitrator deems best remitted to the parties for discussion between them.

July 13, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR