CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3157

Heard in Calgary, Tuesday, November 14, 2000

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

Appeal the discipline of thirty (30) demerits assessed the record of Locomotive Engineer J.R. Conroy of Vancouver, B.C. for the unsatisfactory work performance of the 07:30 Lulu Island Dock yard assignment on Wednesday, October 21, 1998 between 07:00 and 18:50 PDT.

JOINT STATEMENT OF ISSUE:

On October 21, 1998, Mr. Conroy was employed as the locomotive engineer on the 07:00 Lulu Island Dock yard assignment. On October 23, 1998, Mr. Conroy was served a notice to appear for an employee investigation and did provide an employee statement on October 29, 1998, in connection with the circumstances surrounding the alleged unsatisfactory work performance of the 07:00 Lulu Island Dock yard of Wednesday, October 21, 1998. Following the investigation process, Locomotive Engineer Conroy was assessed thirty (30) demerits.

The Brotherhood appealed the assessment of discipline to locomotive engineer Conroy on the grounds that the grievor was not provided a fair and impartial investigation as provided for in article 86 of agreement 1.2 nor has the Company established Mr. Conroy's responsibility during the aforementioned tour of duty. In addition, of the three members of the crew, two were disciplined and Mr. Conroy is the only member of the crew who has retained his discipline.

The Brotherhood therefore requested that the discipline assessed Locomotive Engineer Conroy be removed from his personal record.

The Company denied the Union's appeal.

FOR THE COUNCIL:	**FOR THE COMPANY:**
(SGD.) D. J. SHEWCHUK	**(SGD.) R. RENY**
FOR: GENERAL CHAIRMAN	**FOR: VICE-PRESIDENT, LABOUR RELATIONS**

Appearing on behalf of the Company:

R. Reny	– Human Resources Associate, Vancouver
S. Michaud	– Business Partner, Human Resources, Vancouver
S. Blackmore	– Human Resources Associate, Edmonton
S. Ziemer	– Human Resources Associate, Vancouver
R. Eisenman	– Transportation Supervisor, Vancouver
D. C. McDonnell	– Legal Counsel, Montreal

Appearing on behalf of the Council:

D. J. Shewchuk	– Vice-General Chairman, Saskatoon

D. E. Brummond – Vice-General Chairman, Kamloops
G. Broda – GST, Yorkton
B. Shack – Local Chairman, Edson
R. Ermet – Local Chairman, Jasper

AWARD OF THE ARBITRATOR

Upon a review of the evidence the Arbitrator is satisfied that Locomotive Engineer Conroy did engage in a deliberate pattern of unsatisfactory and unduly slow work performance on his assignment of October 21, 1998.

The material before the Arbitrator confirms that there was discontent among the locomotive engineers in the Greater Vancouver terminal following the introduction of productivity initiatives by the Company in the summer of 1998. The objective evidence confirms that Locomotive Engineer Conroy and the conductor with whom he worked on October 21, 1998 had worked together as a crew on the 07:00 Lulu Island yard assignment for some one and one-half months prior to the incident in question. The evidence confirms that the method of working adopted by Mr. Conroy and crew on the night in question was grossly inefficient, resulting in the failure to accomplish significant amounts of work which normally should have been done. For example, on two separate occasions, the grievor stopped his train on a grade on either side of the Lulu Island bridge, virtually assuring that his train consist could not restart and move up the grade, thereby requiring the breaking up of the cars and their movement piecemeal, consuming considerable time. Download evidence also confirms that the grievor proceeded at speeds which were unduly slow and, on at least one occasion, applied both the throttle and train brakes in a contradictory fashion, which obviously slowed his movement and could have resulted in equipment damage.

The Council submits that the Company failed to provide the grievor with a fair and impartial investigation, contrary article 86 of the collective agreement. The Arbitrator has some difficulty with that submission. The record discloses that the grievor and his union representative were, to say the least, uncooperative with the investigation process. For example, when the grievor was asked to comment on the statement taken separately from the conductor who worked with him on the tour of duty in question, his union representative counselled him not to answer, declaring that the question was irrelevant. While the Arbitrator appreciates that investigations are not proceedings conducted to the standard of the legally trained, absent an obstructionary motive, it defies the most minimum common sense to understand on what basis the statement of the only other witness to the events could be objected to as irrelevant and inadmissible. The grievor refused to answer that question at his own considerable peril.

It appears that the impasse over the conductor's statement arose some seven hours into the investigation, a tortured process in which the Company was able to cover only six questions. Understandably frustrated with the conduct of the grievor and his Union representative, the Company's investigating officer simply concluded the investigation, and advised that the Company's decision would be based on the information which was then available to it.

As prior awards of this Office have confirmed, the disciplinary investigation process is an intrinsic part of the expedited system of arbitration utilized within the railway industry in Canada. Its integrity must be respected if the arbitration system of this Office is to itself be reasonably efficient and able to rely on information gathered within that process. An examination of the record causes the Arbitrator to conclude that the grievor and his representative were openly contemptuous of the investigation process. They were unresponsive to a degree which gave the investigating officer a reasonable basis to conclude that any further attempt at questioning the grievor would only meet still more frustration.

Moreover, it cannot be said that the grievor was denied his rights under article 86 of the collective agreement. He was duly presented with all of the statements and documentation in the possession of the Company, and upon which the Company intended to rely, absent any satisfactory explanation or rebuttal on his part. A central purpose of the investigation process is to give the employee the opportunity to know and respond to the evidence in the possession of the Company. For reasons which the grievor and his representative best appreciate, they chose to squander that opportunity. The manner in which the grievor and his representative responded to the Company's attempt to conduct an orderly investigation, which in my view bordered on abusive, was tantamount to a waiver of the grievor's rights to pursue the matter any further.

The Company had adequate information before it on which to base its decision. In keeping with the requirements of article 86, it made the content of that information fully known to the grievor and his union

representative. There was no obligation upon the Company to endure continued frustration of the process by the grievor and his representative in an effort to understand whether he had any reasonable rebuttal to offer.

In the result, I am compelled to conclude that the case presented by the Council, both as to the preliminary objection and the alleged misconduct itself, is entirely without merit. While the assessment of thirty demerits against an employee of twenty-nine years' service is a serious matter, so too is the deliberate sabotage of a work assignment, aggravated by an equal willingness to sabotage the ensuing disciplinary investigation. The grievance must therefore be dismissed.

November 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR