CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3194

Heard in Calgary, Wednesday, 9 May 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

Appeal the discharge of Locomotive Engineer Frank Schultz of Vancouver, B.C.

COUNCIL'S STATEMENT OF ISSUE:

Effective February 23, 2001, Locomotive Engineer Schultz was assessed thirty (30) demerits for failure to comply with the reasonable instructions of a Company supervisor on February 23, 2001, which in turn led to his personal record being assessed with a discharge from employment with Canadian National Railway, effective on Monday, March 26, 2001, for having accumulated in excess of sixty (60) demerits.

On Friday, February 23, 2001, Locomotive Engineer Schultz was assigned to the 14:00 Tilbury Yard Assignment (YTNS-30). During the course of the tour of duty the yard crew requested that they be allowed to have a hot meal as provided for under the provisions of the collective agreement. While Locomotive Engineer Schultz was engaged in the performance of his duties, his train was blocked by an SRY movement. At that time a Company officer instructed the crew to secure their train and transportation would be supplied. Upon returning from eating, Locomotive Engineer Schultz was removed from service at Thornton Yard pending an investigation.

After a subsequent investigation, Locomotive Engineer Schultz was discharged from Company service.

The Brotherhood contends that Locomotive Engineer Schultz did comply with the reasonable instructions of a Company supervisor on February 23, 2001. Specifically, those instructions were to secure the train in order that the yard crew could go to eat by way of the transportation supplied by the Company.

It is the Brotherhood's position that the discharge of Locomotive Engineer Schultz is unwarranted and excessive in the circumstances and that he should be reinstated into his former employment and compensated for all wages and benefits lost.

The Company has declined the appeal.

FOR THE COUNCIL:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. Reny	– Human Resources Associate, Vancouver
R. Ryhonhuk	– Transportation Supervisor
T. Jones	– Transportation Supervisor
S. Zeimer	– Human Resources Associate
S. Blackmore	– Labour Relations Associate, Edmonton

And on behalf of the Council:

D. E. Brummund	– Sr. Vice-General Chairman, Kamloops

F. Schultz – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor's yard assignment movement on February 23, 2001 was in the process of pulling approximately forty-four cars from Thornton Yard to Fraser Surrey Dock when it was required to stop at the SRY diamond, a grade crossing intersection between a CN line and a line of the Southern Railway of British Columbia. At that point the grievor contacted the Traffic Coordinator requesting a hot meal break, in accordance with what he apparently believed was his right pursuant to article 48.2 of the collective agreement. While the language of that provision is not directly at issue, it would appear to the Arbitrator that the position of the Company is well-founded, in that in fact the grievor and crew were not then entitled to a hot meal.

The account of the grievor, supported by the evidence of the yard foreman on his crew, Wes Zidkovich, is that the grievor's movement was then blocked by a Southern Railway switcher which was working out of an adjacent industrial track. According to their account they believed that they were entitled to a hot meal, that the delay which they were encountering would be an appropriate occasion to take one, and that leaving their train at that location would not be an impediment to other movements.

While the grievor's train was stopped at the diamond Mr. Schultz was contacted by radio by Transportation Supervisor Trevor Jones. It does not appear disputed that at no time did Mr. Schultz relate to Mr. Jones that his movement was blocked by the SRY switcher. During the course of their conversation, Mr. Jones repeatedly instructed Mr. Schultz to move his train through the diamond, clear the Brownsville lead and yard his train at Fraser Surrey Dock, a distance of less than one mile. Rather than explain to Mr. Jones that he could not move forward because of the blocking movement of the SRY train, Mr. Schultz chose to debate his supervisor with respect to his entitlement to a hot meal. On at least two occasions when Mr. Schultz was instructed to move forward by Mr. Jones, the grievor responded by asking his supervisor whether he intended to violate his collective agreement rights. It appears that on the second occasion of a tense exchange between Mr. Jones and Mr. Schultz, when Mr. Jones asked the grievor whether he had commenced pulling for Fraser Surrey Dock, he responded to Mr. Jones "… tell me if you intend to violate my agreement first." At that point the supervisor made the decision to pull the grievor and his crew from service and instructed them to secure their train.

A first issue to be determined is whether the grievor's train was in fact blocked by the SRY movement, so as to be unable physically to comply with the directive of Mr. Jones. On that issue of fact, as on all issues in a matter of discipline, the Company bears the burden of proof. On balance, the Arbitrator is satisfied that there is less than compelling evidence supporting the Company's suggestion that there was no impediment to the forward progress of the grievor's train. It appears undeniable that a written report by an SRY supervisor purporting to confirm the time of these events is in fact in error as to the time when the grievor's movement was stopped at the diamond. There is, overall, no reliable evidence to contradict the account of events related by Mr. Schultz and Mr. Zidkovich. On that issue, therefore, I am compelled to give the grievor the benefit of the doubt and to conclude that there was a physical impediment to his movement when he was engaged in his conversation with Mr. Jones.

That, however, does not dispose of the entire issue of whether the grievor merited discipline in the circumstances. Remarkably, there appears to be no dispute that Mr. Schultz never communicated to Mr. Jones the fact that it was impossible for him to move forward by reason of a blocking movement at the diamond. Rather, for reasons which he must best understand, Mr. Schultz felt it appropriate to engage his supervisor in a debate with respect to his entitlement to a hot meal, finally expressing himself in such a way as to make the granting of a hot meal a condition precedent to obeying his supervisor's instructions. Given the grievor's prior disciplinary record, touched upon below, that course of conduct can only be understood as a failure of his obligation to the Company, and a worrisome failure to understand the meaning of the "work now – grieve late" rule. It was obviously incumbent upon Mr. Schultz to clearly advise Transportation Supervisor Jones that it was not possible to comply with his directive because his movement was being blocked by the SRY switcher. By substituting defiance for simple cooperation and openness, Mr. Schultz deservedly precipitated his being removed from service at that point and in the Arbitrator's view rendered himself liable to discipline.

What then is the appropriate measure of discipline in this case? In mitigation of any penalty the Arbitrator must take into account that the grievor is a long-service employee, having first been hired by the Company in 1977. On the aggravating side of the ledger, however, he has recorded a less than enviable record of discipline, particularly since September of 1998. At that time he was assessed twenty-five demerits, upheld at arbitration (**CROA 3095**), for a side-collision. Disturbingly, that incident involved his fleeing the scene of the accident, in violation of his duty to the contrary. An incident on June 24, 1999 resulted in a written reprimand for improperly booking unfit.

Subsequently Mr. Schultz incurred a thirty demerit penalty, along with a number of other locomotive engineers, for his participation in an illegal work stoppage on August 5, 1999.

In the instant case, given the grievor's long service, and the fact that the Company has not satisfied the Arbitrator that the grievor's movement could in fact have safely proceeded forward when directed to do so, I am persuaded that a penalty short of termination can be substituted in the circumstances of this case. However, the substituted penalty should be a measure of sufficient severity so as to bring home to the grievor the need to be cooperative, and not confrontational, in his relations with his supervisors. The grievance is therefore allowed, in part. The Arbitrator directs that the demerits assessed against the grievor be removed from his record, and that his period out of service be registered as a suspension for insubordination and the failure to communicate properly with a supervisor. In addition, the Company, in its discretion, may demote Mr. Schultz to a position of yard foreman, restricted to yard service, for a period of not more than two years.

May 22, 2001

(signed) MICHEL G. PICHER
ARBITRATOR