CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3240

Heard in Montreal, Thursday, 10 January 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

The assessment of 30 demerits to R.J. Robinson of Vancouver, British Columbia for failure to comply with CRO Rule 114a.

COUNCIL'S STATEMENT OF ISSUE:

R.J. Robinson was working an east end assignment in Thornton Yard on January 24, 2000. A car that had been handled by Mr. Robinson was later determined to have been involved in a sideswipe.

An employee statement was commenced during which Mr. Robinson demonstrated that he had in fact protected his movement in accordance with CRO Rule 115 and left the undamaged car at the west end of Track PC 79 clear of the fouling point.

The car was later found damaged with another car added west of it in Track PC79. Despite the presence of this extra car, that Mr. Robinson had not handled, the Company determined that Mr. Robinson was responsible nonetheless.

The Company further indicated that they had relied on information obtained through an employee statement of a foreman working on the west end of Thornton Yard, Brent McCrea. Neither Mr. Robinson nor the Union was advised that this statement had taken place, nor were they allowed to ask questions of Mr. McCrea or provided a copy of the statement. The Company still refused to provide a copy of this statement.

The Union submits that the Company has failed to demonstrate Mr. Robinson's culpability regarding the sideswiped car and that the Company has based their decision on information obtained in violation of the collective agreement. Accordingly, the Union requests that the 30 demerits be expunged from Mr. Robinson's work record or, alternatively, a lesser penalty be substituted as the Arbitrator determines.

FOR THE COUNCIL:

(SGD.) R. HACKL
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:

R. Reny	– Human Resources Associate. Vancouver
S. MacDougald	– Manager, Labour Relations, Montreal

And on behalf of the Council:

R. Hackl	– Vice-General Chairperson, Edmonton
B. J. Henry	– General Chairperson, Edmonton
B. R. Boechler	– Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

The Company raises a preliminary issue of arbitrability. Its representative submits that the instant matter should not be heard, because the Company has removed the discipline which was assessed against the grievor. The Council opposes the dismissal of the grievance on the basis of arbitrability, relating its concern that the Company has withdrawn the discipline by reason of its own recognition of a flaw in the process of disciplinary investigation followed by the Company. The Council objects to what it perceives of as the attempt of the employer to cure what would otherwise have been a fatal flaw in the process, which would otherwise have resulted in the discipline being found to be null and void.

The Arbitrator has some difficulty with the position asserted by the Council. The issue in these proceedings is not whether the Company can properly reinvestigate and re-discipline the grievor. That is a question which would potentially be argued in the event that the employer attempted to re-institute the investigation process and re-impose discipline. As a general rule boards of arbitration, like the courts, do not resolve hypothetical questions or deal with disputes on questions which are purely matters of principle, without any factual or practical application or consequence. There must, in other words, be a genuine *lis* or dispute to be resolved (see, generally, **CROA 843** and **CROA 2826**). It has also been held that an employer cannot insist on arbitrating an issue where the grievance has been withdrawn by the union (e.g., **Great Atlantic & Pacific Co. of Canada Ltd.** (1991), 22 L.A.C. (4th) 72 (M.G. Picher); **Reliacare Inc. (Maitland Manor Health Care Centre)** (1991), 20 L.A.C. (4th) 170 (Dissanayake); **Health Labour Relations Association of British Columbia (Grace Hospital)** (1985), 20 L.A.C. (4d) 247 (Kelleher); **Canadian Red Cross Blood Transfusion Service** (1981) 30 L.A.C. (2d) 23 (Shime)).

As the discipline which the subject of the grievance has been removed from Mr. Robinson's record there is, at the moment, no dispute of substance to arbitrate. As noted above, should the Company purport to re-investigate and again discipline the grievor, it will be open to both parties make submissions as to whether it was permissible for the Company to proceed in that manner, regard being had to the procedural requirements contained within the collective agreement governing the process of employee investigation.

For all of the foregoing reasons the Arbitrator sustains the position of the Company that this matter is not arbitrable.

February 7, 2002

(signed) MICHEL G. PICHER
ARBITRATOR