

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3300

Heard in Calgary, Wednesday, 13 November 2002

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE – UNION:

The demotion of Robert E. Bishop at Walker Diesel Shop from LMU to Labourer.

UNION'S STATEMENT OF ISSUE:

According to the Company's discipline form, on August 15, 2001 Mr. Robert E. Bishop's record was assessed with:

... permanent demotion/restriction from working as LMU.

Also according to the Company's discipline form, Mr. Bishop was demoted for the following reason:

Violation of CROR for shop track locomotive operations employees 12.2(ii) resulting in collision of CN locomotive and buffer end plate on July 21, 2001. The Company will review your demotion/restriction in 24 months from effective date of discipline.

It is the contention of the Union that: **(1.)** the Company did not establish wrong doing on behalf of Robert E. Bishop sufficient to give the Company cause to permanently demote him. **(2.)** Robert E. Bishop was treated in an arbitrary, discriminatory and in an excessive manner in regard to his demotion.

Therefore, with regard to the foregoing, it is the position of the Union that Robert E. Bishop should be returned to his previous duties of LMU forthwith, without loss of seniority, with

full redress for all wages, benefits and losses incurred as a result of his demotion, including but not limited to, interest on any monies owing.

The Company denies the Union's contentions and claim.

DISPUTE – COMPANY:

Labourer Moving Units (LMU) R.E. Bishop of Edmonton who was permanently demoted/restricted from working as an LMU (to be reviewed after 24 months), for the violation of CROR for shop track locomotive operations employees 12.2, resulting in collision of locomotive and buffer end plate on July 21, 2001.

COMPANY'S STATEMENT OF ISSUE:

On July 21, 2001 Mr. R.E. Bishop was working as an LMU in charge of the movement of a locomotive into the diesel shop at Walker Yard. Mr. Bishop contends that his radio communication with his helper was not clear due to static, contrary to the statement obtained from his helper. Despite this, Mr. Bishop continued with the movement of the locomotive and hit the buffer plate at the end of the track.

The Company required that Mr. Bishop attend an employee investigation and he was subsequently assessed discipline in the form of being permanently demoted/restricted from working as an LMU (to be reviewed after 24 months).

The Union contends that: **(1.)** The Company did not establish wrong doing on behalf of Robert E. Bishop sufficient to give the Company cause to permanently demote him. **(2.)** Robert E. Bishop was treated in an arbitrary, discriminatory and excessive manner in regard to his demotion. **(3.)** Therefore, with regard to the foregoing, it is the position of the Union that Robert E. Bishop should be returned to his previous duties of LMU forthwith, without loss of seniority, with full redress for all wages, benefits and losses incurred as a result of his demotion, including but no limited to, interest on any monies owing.

The Company disagrees and has declined the Union's request.

FOR THE UNION:

(SGD.) R. JOHNSON
PRESIDENT, COUNCIL 4000

FOR THE COMPANY:

(SGD.) P. D. PAYNE
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

P. D. Payne	– Manager, Human Resources, Edmonton
R. MacDonald	– Division Mechanical Officer
S. Blackmore	– Manager, Human Resources, Edmonton
R. Reny	– Manager, Human Resources, Vancouver
K. Guiney	– Manager, Human Resources

And on behalf of the Union:

B. R. McDonagh	– National Representative, CAW, Vancouver
B. Kennedy	– Regional Representative, Council 4000,
R. E. Bishop	– Grievor

AWARD OF THE ARBITRATOR

Before dealing with the merits of the grievance the Arbitrator responds to several objections as to procedure and form raised by the Union. Firstly, the Union's representative submits that the grievor was disciplined for the violation of a rule of the CROR which does not apply to him. As is evident from the Union's *Ex Parte* Statement of Issue, the Company viewed that the grievor violated rule 12.2(ii) of the CROR, and relied on that determination in support of its decision to assess a disciplinary demotion. The Union's representative argues that the CROR does not apply to shop track locomotive operations employees. In response the Company has placed before the Arbitrator its own internal rules entitled "*Handbook of Canadian Rail Operating Rules for Shop Track Locomotive Operations Employees*". As is evident from the introduction to the rule booklet, the rules contained within it are selected verbatim from the rules of the CROR, and are adopted by reference as Company rules applying to shop track locomotive operations employees, a group which would include the grievor. The introductory paragraph found on page 1 of the rule book states expressly:

The rules quoted in this hand book were taken verbatim from the Canadian Rail Operating Rules as illustrated in the CN Operating Manual.

Shop track employees whose duties require them to operate or assist in the operation of locomotives, either on tracks designated a[s] shop track limits, or other non-main tracks, must have a copy of this hand book accessible while on duty.

Among the rules contained within that booklet is CROR rule 12.2: Switching by Radio. In the result the Arbitrator is satisfied that the objection raised by the Union's

representative is more technical than persuasive. In fact the grievor was made subject to the application of CROR rule 12.2(ii) by the Company's own incorporation of the CROR rules into the operating rules for shop track locomotive operations employees. The Union's objection based on the application of the CROR rules to the grievor must therefore be rejected.

A second procedural objection raised by the Union's representative concerns the regularity of the disciplinary investigation conducted by the Company. Essentially, the Union expresses concern as to whether a fair and impartial investigation was possible. Firstly, that issue is not raised within the Union's own *ex parte* statement of issue. Given the rules of this Office, it is therefore not a matter upon which the Arbitrator has jurisdiction to rule. Alternatively, if I did have such jurisdiction the Union's objection would not succeed. Its representative submits that the investigative statements were taken by Shift Lead P. Chong, the supervisor of both Mr. Bishop and his helper, Mr. Quirie. The Arbitrator finds nothing irregular in that fact, nor anything in the normal responsibilities of the investigating officer which would have compromised the standard of a fair and impartial investigation in the circumstances.

With respect to the merits of the grievance the Union does not dispute that Mr. Bishop committed an error deserving of discipline. The evidence reflects that on July 21, 2001, the grievor was at the controls of a locomotive pushing a yard engine, a booster and another locomotive to be spotted in the shop at Walker Yard. The grievor's helper, Mr. Quirie, was on the head end of the movement, communicating with Mr. Bishop by

radio with respect to the distance to be covered, first before arriving at the door of the diesel shop, and finally at the ultimate stopping point over pit no. 4. The grievor's evidence, which the Arbitrator accepts, is that because of static during the course of radio communications after the head end of the movement entered the shop he could no longer hear the instructions of Mr. Quirie, which caused the movement to collide with the buffer plate at the farthest extremity of the shop track. It does not appear disputed that being unable to communicate by radio, in the circumstances which prevailed the grievor was under an obligation, pursuant to rule 12.2(iii) of the Company's operating rules governing LMUs (formerly hostlers) to immediately stop his movement. In fact it appears that the actions of the grievor were in violation of rule 12.2(ii) and 12.2(iii) and their appended "Note" read together. They read as follows:

RULE 12.2: SWITCHING BY RADIO

When radio is used to control a switching movement, and after positive identification has been established, the following procedures are required:

...

- (ii) distance to travel must be given with each communication; and
- (iii) movement must at once be stopped if no further communication is received when the movement has travelled one-half the distance required by the last instruction

Note: Doubt as to the meaning of an instruction or for whom it is intended must be regarded as a stop signal.

When the foregoing rule is read it appears clear that the grievor knew, or reasonably should have known, that further communication would be forthcoming from his helper with respect to the distance remaining to be travelled. The failure of any instruction, in light of static on the radio, would have brought the Note, which I am

satisfied applies in relation to both sub-paragraph (ii) and sub-paragraph (iii) into play. In other words, the grievor knew, or reasonably should have known, that his obligation in the circumstances was to stop his movement until he re-established proper communication with Mr. Quirie.

The Arbitrator is compelled to agree with the Company that the grievor's prior record of similar infractions is of grave concern, given the limited amount of time in his employment history he has actually been involved in the physical movement of equipment. In 1997 his negligence caused damage to a CN vehicle, while in 1998 and 1999 serious rules infractions, one causing a derailment, resulted in the assessment of substantial discipline against him. Regrettably, those efforts at progressive discipline did not appear to correct the grievors negligent habits, as evidenced by the events of July 21, 2001. In these circumstances, while the Arbitrator accepts that demotion is an extraordinary form of discipline, it was not unreasonable for the Company to remove Mr. Bishop from the function of LMU for a period of time.

It is important to stress, however, that demotion, involving as it does an effective curtailment of an employee's seniority rights, cannot normally be justified as a permanent measure. Nor does it appear that the grievor's demotion in the case at hand is intended to be indefinite or irreversible. The discipline form addressed to the grievor expressly indicated that his demotion would be reviewed in twenty-four months. It should be stressed that in the Arbitrator's view should the grievor maintain a record of good service over that period, and in particular should he incur no further discipline for

rules or safety infractions, the onus will be upon the Company to justify any further continuation of his demotion beyond that point. With respect to that issue the Arbitrator retains jurisdiction.

For the foregoing reasons the Arbitrator finds that Mr. Bishop was deserving of a serious degree of discipline, and given the apparent failure of prior progressive discipline by the assessment of demerits, the sanction of demotion for a period of twenty-four months was justified. Subject to the qualification that the Arbitrator retains jurisdiction with respect to the aspect of the eventual review of the grievor's performance implicit within the sanction imposed, the grievance must be dismissed.

November 19, 2002

(signed) MICHEL G. PICHER
ARBITRATOR