CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3442

Heard in Edmonton, Wednesday, 14 July 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Discipline assessed to Mr. F.S. Badall.

BROTHERHOOD'S STATEMENT OF ISSUE:

In April 2003, the grievor, a Track Maintenance Foreman, was assigned to act as Foreman to a major Extra Gang while it worked on his section. On July 2, 2003, the grievor was assessed with a permanent demotion to Trackman, a thirty day suspension and an order to rewrite Rules as a result of the grievor's **(1.)** failure to put on safety glasses on April 15, 2003 **(2.)** not making a three point dismount from a work machine on April 15, 2003 and **(3.)** committing a minor error with respect to a Rule 42 protection. A grievance was filed.

The Union contends that: **(1.)** The assessment of both a demotion and a suspension was illegitimate; **(2.)** The assessment of a permanent demotion was illegitimate; **(3.)** The concept of progressive discipline was not implemented or respected; **(4.)** The discipline assessed was, in the circumstances, excessive and unwarranted.

The Union requests that the discipline assessed be removed from the grievor's record and that he be made whole for all losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. S. DAWSON
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Winnipeg
D. Brodie	– Manager, Labour Relations, Edmonton
G. Basra	– General Supervisor, Engineering

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. S. Dawson	– System Federation General Chairman, Winnipeg
D. Brown	– Sr. Counsel, Ottawa
F. S. Badall	– Grievor

AWARD OF THE ARBITRATOR

During the presentation of its brief the Company alleged several grounds of misconduct on the part of the grievor. Firstly it asserts that he violated CROR rule 815 which concerns track work procedures and the protection of track units in the circumstance of multiple work groups. It further maintains that he violated General Operating Instruction section 8, item 3 governing safe practices. Lastly, the Company asserts that the grievor violated CROR rule 42(b) by failing to secure a clear understanding, in writing, with the rail traffic controller as to the routes trains would be authorized to take through the work limits for which he was responsible.

As a preliminary position the Brotherhood asserts that the form 780 notice of discipline which was issued to the grievor on July 2, 2003 does not contain any allegation of a violation of CROR rule 815. Its counsel stresses that the notice to him simply reads:

Your record has been assessed with:

1. Permanent demotion to trackman

2. 30 Day Suspension for:
   a) PPE violation
   b) Rule 42 work practice
   c) Unsafe work practice (not applying 3 point contact) that resulted in your personal injury

3. Rewrite Rules first day back before working.

On the basis of the foregoing it is the position of the Brotherhood that the Company cannot, during the arbitration process, purport to maintain that the grievor was or could be properly disciplined for an alleged violation of CROR rule 815. The Company's representative stresses that there was discussion of rule 815 during the course of the grievor's investigation and that it should have been clear to him and to his Union that his failure to apply the rule formed part of the basis for discipline.

With respect, the Arbitrator cannot agree with the Company's submission in that regard. It is well established that grounds for discipline cannot be enlarged at the stage of arbitration, and that a grievor and his trade union are entitled to know, as of the time of the assessment of discipline, the precise nature of the case they have to meet should they choose to grieve the matter. (See **CROA 1855, 2103** and **3170**.) In the case at hand the grievor was not placed in a position whereby he could or needed to grieve an alleged violation of CROR rule 815, much less prepare to deal with such an allegation at the arbitration hearing. For these reasons the Arbitrator must sustain the position of the

Union that the submissions made by the Company with respect to the alleged violation of rule 815 of the CROR cannot be properly entertained or sustained.

Notwithstanding the non-applicability of the allegations concerning the violation of rule 815, the Brotherhood concedes that the grievor was, nevertheless, instructed by his supervisor to record certain information, including train movements, on the rule 42 confirmation form, referred to as the “train clearing record”. It is common ground that as the person holding track protection for the crew working under his direction, after confirming that the tracks are clear for a train to pass, the grievor would have authorized the train to pass and should then record the relevant data in the train clearing record. Upon a review of the evidence it is clear to the Arbitrator that the grievor did not properly fill out the form in accordance with the requirement to accurately record the particulars of trains which passed through his work limits at a particular time and on a particular track. Indeed, it would appear that three trains which moved through the grievor’s area of protection were not recorded in any way. While there is no suggestion that the grievor acted improperly with respect to giving clearance to those trains, it cannot be disputed that he did fail to properly record their passing, concerning the identification of the train, the time the trains entered the grievor’s work limits and on what track they were routed. The grievor’s explanation, that he wrote information on his hand and forgot to later transcribe it, is not compelling as evidence of the proper discharge of his obligation as a foreman responsible for a crew of some twenty-five employees.

The thrust of the evidence before the Arbitrator is that in fact the grievor found himself responsible for an assignment which was more than he could handle. The grievor has worked for many years as a track maintenance foreman. His duties, however, were generally restricted to overseeing much smaller groups of employees, generally in section gangs of three to five individuals. He also had little, if any, experience as an extra gang foreman and had never been responsible for a track maintenance force of the size to which he was assigned at Fort Langley, British Columbia in April of 2003. It does not appear disputed that the responsibilities given to the grievor were at the degree of responsibility of a Level III Foreman, whereas he had traditionally been assigned at a level of responsibility below Level I. On the whole, the Arbitrator is satisfied that it was plainly an error on the part of the grievor to attempt to undertake the responsibilities of the job at Fort Langley, although I am also satisfied that the Brotherhood is correct in its assertion that the permanent demotion of the grievor was excessive in the circumstances.

On the basis of the evidence I am satisfied that the grievor did render himself liable to discipline for his failure to observe safety practices, both when he was without safety glasses himself, and when he jumped from a piece of equipment, thereby causing himself an injury. I am also satisfied that the Company was justified in coming to the conclusion that he should be removed from the assignment at Fort Langley, although that could and should have been done by reassignment rather than by a permanent demotion.

A permanent demotion is tantamount to a conclusion that the grievor is unfit to work as a foreman in any foreman's assignment which his seniority might allow him to successfully bid. As the record indicates, the grievor has had no difficulty discharging the obligations of a foreman in the less onerous circumstances of an assignment which falls below the rank of a Level I foreman. It is difficult for the Arbitrator to see on what basis he should be deprived of the ability to function as a foreman at that level by reason of his inability to discharge the obligations of a Level III foreman particularly in light of the fact that he has over twenty-five years of service with the Company, twenty-three of which has been at the rank of track maintenance foreman.

In the circumstances the Arbitrator is satisfied that it is appropriate to make a substitution of penalty. Firstly, the grievor shall be subject to a suspension of two weeks for the three items listed within the form 780 issued against him on July 2, 2003. In that regard the Arbitrator is satisfied that the Company has established the elements described therein, and is not persuaded otherwise by the tabling of a handwritten document purporting to show compliance with rule 42, a document never provided to the Company until the arbitration hearing. As noted above, however, I am satisfied that the grievor should not have been subject to a permanent demotion from the rank of foreman. A more appropriate response would have been for the Company to determine that he was unqualified for the Level III responsibility and to reassign him at the level of responsibility which he occupied before he bid onto the vacancy at Fort Langley, with a restriction against his being able to bid onto work with the responsibility of a Level III foreman's position. It was not, however, necessary for the Company to deprive the

grievor of the earnings which he would have received at a lower level of foreman's responsibility.

The Arbitrator therefore directs that the grievor be compensated for the loss of earnings which he would have made at the lower level of foreman's responsibility which he occupied prior to his transfer to Fort Langley, for the period of time between his permanent demotion and the date of his being restored to that earlier rank. Should there be any disagreement between the parties concerning the interpretation or implementation of this award, the matter may be spoken to.

July 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR