CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3452

Heard in Montreal, Tuesday, 12 October 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

1. R. James – Time claim under the provisions of article 70 of agreement 4.16 for being held out of service pending investigation under the provisions of article 82 of collective agreement 4.16.

2. R. James – 21 days suspension for alleged violation of CROR 105, CROR 144, CROR General Rule A(x), CROR 104 (k) and GOI 8.12.2.

3. The discharge of R. James for the alleged violation of the Company's Drug and Alcohol Policy.

The above noted disputes concern the tour of duty dated February 7, 2004, and are submitted jointly and severally to be determined by the Arbitrator.

UNION'S STATEMENT OF ISSUE:

On February 7, 2004, Mr. James was working the West Control Yard Assignment. This assignment was, unfortunately, involved in a collision (sideswipe) with train M39371-07.

1. Mr. James was subsequently held out of service under the provisions of article 82 of agreement 4.16 pending investigation. This investigation commenced on February 10th, 2004 and concluded on February 19th, 2004. It is the Union's position that Mr. James is entitled to payment for being held out of service in accordance with the provisions of article 70 which states in part:

   70.1 Employees who are held off work by the Company to attend investigation with be paid as provided in article 70.2 and 70.3.

The Union requested that Mr. James be compensated in accordance with article 70.

2. Subsequent to the completion of the investigation, Mr. James was assessed a 21 day suspension for "violation of CROR 105, CROR 144, CROR General Rule A(x), CROR 104 (k) and GOI 8.12.2 leading to your 1400 West Control yard assignment colliding with train M39731-07 during your tour of duty Sat. Feb. 7th, 2004."

   The Union submits that Mr. James is a long service employee with an excellent work record with the Company. The Union submits that the conclusions reached by the Company do not warrant the discipline assessed considering the extenuating circumstances regarding the alleged incident.

   The Union submits that the discipline assessed Mr. James is unwarranted but, in any event, too severe. The Union requests that the discipline be removed from Mr. James' record and that he be compensated all lost wages and benefits.

3. On 2004/03/04 Mr. James was required to attend a Company investigation in connection with the "circumstances surrounding: alleged violation of the Company's Drug and Alcohol Policy during your tour of duty on Sat. Feb. 7th, 2004."

   Although not limited herein, the Union, *inter alia*, submits that the Company violated their Drug and Alcohol Policy, making the testing of Mr. James and the subsequent results, null and void.

   The Union further submits Mr. James was not required to undergo any drug and alcohol testing under these circumstances.

   In any event, the Union submits that the results of the Drug and Alcohol test do not warrant the imposition of any discipline or, in the alternative, should discipline be warranted, such discipline as issued by the Company was excessive and too severe.

The Union submits that the Company violated Mr. James' rights as guaranteed under the Canadian Charter, this, *inter alia*, given the fact that Mr. James was detained by a number of Company officers (over his repeated objections) for purposes of interrogation.

The Union submits that the Company violated Mr. James' right to obtain Union representation.

The Union submits that Mr. James was denied his right to a fair and impartial hearing. Mr. James, *inter alia*, was threatened with immediate dismissal from the service of the Company should he refuse to provide a urine sample for drug and alcohol screening, this even though the Yard Foreman, Mr. McKenzie (who was in control of the movement during the collision) was not required to provide such a test.

In brief summation, the Union submits that the Company violated Mr. James' rights under the Canadian Charter. The Company improperly relied upon evidence from "Medysis" in support of the dismissal of Mr. James. Mr. James was not required to undergo drug and alcohol testing under these circumstances. In any event, the results of such test do not support the discharge of Mr. James.

The Union requests that Mr. James be exonerated of any wrongdoing. That he be returned to active service, without loss of seniority and compensated for all loss wages and benefits.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

K. Tobin	– Counsel, Toronto
B. Hogan	– Manager, Labour Relations, Toronto
J. Orr	– MacMillan Yard Terminal Superintendent, Toronto
D. Goulet	– Risk Manager, Greater Toronto, Toronto
Dr. B. Krutzer	– Medical Review Officer
A. Ernesars	– Vice-President – Corporate (RRMBA Program)
D. Hunt	– Transportation Supervisor, Greater Toronto

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
G. Anderson	– Vice-General Chairman, UTU East
L. Reis	– Local Chairman, Windsor
E. Page	– Local Chairperson, Toronto South Yard
R. James	– Grievor

AWARD OF THE ARBITRATOR

The grievor, Mr. James, was involved in an incident on February 7th, 2004 in which there was a collision (sideswipe). Mr. James was held out of service pending investigation, given a 21 day suspension for the alleged violation of various rules and ultimately discharged for the alleged violation of the Company's Drug and Alcohol Policy. The effective date of the discharge was February 7th, 2004 the date of the incident. The specific reason given for the discharge was "violation of the company's Drug and Alcohol Policy during your tour of duty on Sat Feb 7th, 2004."

On February 7, 2004 the grievor was working as a Yard Helper with Yard Foreman Don MacKenzie, on the 1400 West Control yard assignment. The grievor was responsible for ensuring point protection. The yardmaster had given the crew of Train 397 authorization to depart on the lead track. The yardmaster clearly warned the yard crew consisting of the grievor and Mr. MacKenzie to be aware of that train and its movement on the lead track. Mr. MacKenzie heard the yardmaster's caution but he did not radio any instruction to the grievor. The yard crew also had received authorization to proceed on the West Control lead track but was to do so cognizant of the warning given to them with respect to train 397. Both trains ultimately entered the West Control front lead at approximately the same time and the yard assignment struck the eighth and ninth cars from the head end of train 397 causing the derailment of yard engine 7276 was well as the derailment of the eighth and ninth cars on train 397. Yard engine 7276 was derailed upright. Two other cars ended up listing with all wheels derailed.

Mr. John Orr, a superintended with seventeen years' service at CN and sworn as a railway expert immediately took command of the Incident. Shortly after the incident he spoke with both Mr. MacKenzie and the grievor. The grievor initially advised Mr. Orr that he was in the locomotive toilet area when the incident occurred. Mr. Orr investigated this statement and found sufficient evidence in his view to question its' veracity. He went back to the grievor indicating that he had a hard time believing what he had been told at which point the grievor admitted that he had fallen asleep or "dozed off" in the Conductor's chair at the time the incident occurred. According to the Employer, given the fact that the grievor initially tried to mislead Mr. Orr, the fact that he was sleeping (or

dozing off) at the time of the incident, the grievor's dereliction of duty, the incident itself and the magnitude of the derailment, Mr. Orr determined that reasonable cause existed to suspect the grievor's drug use in violation of the Drug and Alcohol Policy.

A Reasonable Cause Report Form was apparently completed at the time. This is a form which on its face states that it must be completed by a supervisor and signed by the supervisor and, if available, another Company officer or CN Police Officer prior to directing an employee to undergo reasonable cause drug testing. The form is a multi-part form. In Part A the individual completing the form must indicate what prompted him or her to complete the form. Part B provides the employee's name, occupation, department and specific location of occurrence. Part C requires the individual completing the form to check all items which describe the behaviour observed. Part D requires the individual filling out the form to provide a complete narrative description of the circumstances, including any facts, inferences drawn from those facts, and witnesses relied on, which constitutes the reasonable cause held that the employee has engaged in prohibited drug or alcohol use. And finally, Part E requires the individual filling out the form to print their name, sign the document, indicate their title, the date and the time.

The Reasonable Cause Report Form in the instant case in Part A has boxes checked off which indicate that: "Has been involved in a significant incident involving a violation of company rules, which does or did pose a threat to the employee, co-workers, or others." as well as: "Has been involved in an incident causing significant or

unusual property damage." What is not checked off is a box which indicates: "Direct observation of the physical symptoms or manifestations of being under the influence of drugs or alcohol while on duty".

Part C contains various categories and the individual completing the form is asked to check off the appropriate boxes. There is nothing checked off under Speech, Balance/Walking, Skin, Awareness or Mood/Behaviour. Under Eyes the only two boxes checked off are reddened and bloodshot. There is no box checked off under Other. There are no comments made in the narrative under Part D. Part E is not completed; that is, there is no name of the individual who is said to have completed the documented nor is it signed, dated or time indicated.

The grievor ultimately, claiming duress, took the urine test as requested by the Employer. Present at the time were various Union officers, including Ms. O'Brien the Union's Health and Safety representative, and Mr. Robin Stroud, Vice-Local Chair in Toronto. Additionally, the grievor spoke with Mr. Ken Reiss, his Union representative, by phone.

On February the 12th, Dr. Barry Kurtzer acting as the Medical Review Officer for the Employer was informed by the testing laboratory that the urine test indicated that the grievor had tested positive for cocaine. He spoke with the grievor later that afternoon, informed the grievor of the results of the tests and sought an explanation that could

provide a reason to excuse a positive finding of cocaine. None was supplied by the grievor. The grievor was informed by Dr. Kurtzer of his right to have a further test, what is known as a “split test”, done to confirm the results of the primary test. The grievor declined this right.

Dr. Kurtzer informed the Employer of the results of the test the next day, February 13th, as well as his conclusion that the grievor had tested positive for cocaine without any reasonable explanation. On that same day the Employer’s Occupational Health Services determined that the grievor was unfit to occupy the position held by him stating: “Occupational Health Services cannot support this employee’s fitness to occupy a safety critical position.

Interviews were subsequently held with the grievor with Union representation present. During the course of those various interviews the grievor continued to question the positive result of the drug test but did acknowledge various breaches of the Company’s policy.

The Union has grieved alleging that the grievor ought to be paid in accordance with the collective agreement for all time held out of service, that the 21 day suspension was excessive and unwarranted and that the discharge cannot be sustained. With respect particularly to the discharge grievance the Union takes the position that the Company was in violation of article 82 of agreement 4.16.

> 82.2 Employees may have an accredited representative to appear with them at investigations, will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation.

It claims that there were three significant violations of article 82.2 and the requirement to have a fair and impartial investigation by the Company. It claims first that the grievor was detained for approximately five hours following the incident and subjected to a vigorous interrogation without the benefit of a union representative even though such a representative had been sought by the grievor. Second, it alleges that various documents germane to the Employer's case have never been disclosed to the Union. In particular, it makes reference to notes that were taken by Company officials who questioned the crew during the course of the initial five hours, the Reasonable Cause Report Form, the Medical Review Officer Report signed by Dr. Kurtzer and, finally, the Fitness to Work Report emanating from Occupational Health Services. Third, it argues that Mr. Orr was either conducting the statement or significantly assisting Mr. Karn who was in fact taking the statement from the grievor and this, it suggests, is a violation of the principle that no Company officer who was or may be a witness to the incident being investigated can be reasonable for the statement without violating the requirements of a fair and impartial investigation.

The Union further submits that the Company violated its own Drug and Alcohol Policy and as a result any findings made with respect to that test should be ruled inadmissible. In the alternative, it argues that the Company should not be permitted to

rely upon any evidence, regardless of its admissibility, when such evidence was obtained in an "abusive and violative" manner.

Finally, it submits that as the Employer is not arguing that there is a Rule G violation, there is no evidence that the grievor was impaired or under the influence of any drugs at the time of the incident. The presence of alcohol or residual amounts of narcotics in an employee's urine is not evidence of itself of impairment. Consequently, the penalty of discharge is too severe under the circumstances.

In reviewing previous decisions of this Office it is evident that the rights and obligations inherent in article 82.2 have been dealt with on many occasions. In **CROA 2280**, commenting on the fact that the Canadian Railway Office of Arbitration has long followed a procedure whereby hearings are substantially expedited in cases involving discipline, the Office stated:

> "The disciplinary investigation conducted under the terms of a collective agreement can be intrinsic to the grievance and arbitration system fashioned by the parties for the disposition of their disputes."

In **CROA 3322**, at p.4 this Office wrote:

> "It is not disputed that the foregoing provision establishes the basis for what has generally been characterized as a "fair and impartial" investigation, a precondition to the assessment of discipline against any employee. Central to the issue in the case at hand is the right of the employee "… to hear all of the evidence submitted and … be given an opportunity through the presiding officer to asks questions of witnesses whose evidence may have a bearing on the employee's responsibility.""

It then further states:

> This Office has had a number of prior occasions to consider the principles which govern the application of provisions such as article 82.2 of the instant collective agreement. It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void *ab initio*, regardless of the merits of the case. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration. …
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> > In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.

The Union has, without contradiction, stated that it saw various documents for the first time at the hearing. Key to these documents, from this Arbitrator's perspective, is the Reasonable Cause Report Form. This form is the keystone document, the initial building block on which the Employer based its decision to discharge the grievor. The grievor was discharged for an alleged violation of the Employer's Drug and Alcohol Policy. The Employer's own policy requires it to have reasonable cause to order an employee to take a drug test. That reasonable cause must be recorded on the report

form. The document serves as the check mark to determine if reasonable grounds exist or not. The Union is entitled to know first, whether the Employer follows its own policy and unquestionably the document in question is fundamental to that issue and second, whether the Employer had reasonable grounds to cause the employee to take the urine test. Again the document in question is fundamental to that issue. It cannot be said that the Reasonable Cause Report Form was not a material document in the instant case.

In the employment relationship discharge is the ultimate penalty. It is often referred to as the “death penalty”. Where this ultimate penalty is imposed it is essential that the Employer abide by all the rules, its own and those of fundamental fairness. It is essential with respect to the latter, and in the context of the manner in which these arbitrations are conducted, that full disclosure of documents fundamental to its decision should be shared in order to permit a complete dialogue between the parties both in the stages leading up to arbitration as well as a full defence at arbitration.

Given that there is no issue that the Reasonable Cause Report Form was not disclosed to the Union prior to the arbitration, and given that the form was a document material both to the decision taken by the Employer and the rights of the grievor, and given that this Office has found consistently that as basic element of a fair and impartial investigation the grievor be provided with all material documents, the discharge must be held to be null and void *ab initio*.

Although the discharge is void, the Arbitrator sees no reason to alter the 21 day suspension given the admission that a number of rules were violated as alleged. This grievance is dismissed. There is no need to deal with the held out of service grievance given the above finding.

It should be noted, finally, that even if the above finding with respect to the discharge had not been made, this Arbitrator would not have upheld the discharge. As Arbitrator M.G. Picher wrote in an award dated July 18, 2000 between CNR and CAW, 2000 C.L.A.D. no. 465 at page 84:

> 2. A positive drug test is not conclusive of impairment when on duty, subject to duty or on call. It does not, therefore, of itself constitute just cause for discipline or discharge. It may, however, become material evidence which, in light of other evidence, supports inferences of impairment that do justify discipline or discharge.

In the instant case there is no evidence that the grievor's condition at the time of the incident related to the use of cocaine as it metabolizes and remains in the body for a number of days. Thus, whereas some degree of discipline would have been warranted, it would not have been discharge.

The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost save for the period of suspension.

October 18, 2004

(signed) M. BRIAN KELLER
ARBITRATOR