CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3466

Heard in Montreal, Tuesday, 11 January 2005 and Tuesday, 8 February 20

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Discharge of Conductor Jerry Coffey.

UNION'S STATEMENT OF ISSUE:

On June 3, 2003 Conductor Coffey was required to attend a formal investigation in connection with the circumstances surrounding his alleged conduct unbecoming an employee, during a conversation he had with CN Supervisor Kelly Stewart at approximately 1020 on May 28, while working as a yard foreman on the 09:00 Oakville Yard.

As a result of this hearing, Mr. Coffey was discharged.

It is the Union's position, *inter alia*, that the Company violated the provisions of article 82 thereby effectively denying Mr. Coffey a fair and impartial hearing. The Union further argues *inter alia*, the discipline assessed was unwarranted and in any event too severe. The Union requested that the grievor be reinstated, made whole without loss of seniority and benefits, and compensated for all lost earnings.

On December 6, 2004, the Company wrote the Union advising that the Company will be raising a preliminary objection regarding the arbitrability of the Union's grievance.

On December 6, 2004, the Company wrote CROA&DR (copied to the Union) advising that should the Union progress an *ex parte* statement of issue with respect to the Union's grievance it would have a preliminary objection regarding arbitrability. The reasons for the preliminary objection provided stated "Grievance not timely – article 84.5".

On December 7, 2004, the Union wrote the Company advising that it would be proceeding to file to arbitration by way of an *ex parte* statement of issue. The Union referenced the Company's intent to raise its preliminary objection. The Union advised the Company, *inter alia*, that it would request that the Arbitrator address all matters in dispute, including the substantive issue raised by the Union with respect to the grievance submitted.

The Union submits that all matters with respect to the Union's "Policy Grievance" are now properly before the Arbitrator for resolution.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

On Tuesday, 11 January 2005, there appeared on behalf of the Company [among others]:

J. Coleman – Counsel, Montreal
M. Becker – Director, Labour Relations, CN North America, Chicago

And on behalf of the Union [among others]:

M. Church – Counsel, Toronto
R. A. Beatty – General Chairperson, Sault Ste. Marie

At the hearing the parties advised the Arbitrator that the Company was withdrawing its preliminary objection. As a result the Arbitrator directed that the grievance be rescheduled to be heard on its merits.

On Tuesday, 8 February 2005, there appeared on behalf of the Company:

J. P. Krawec – Manager, Labour Relations, Toronto
J. Torchia – Director, Labour Relations, Edmonton
K. Stewart – Operations Manager, Oakville
T. Marquis – General Manager, Southern Ontario Zone
K. Creel – Sr. Vice-President – Eastern Canada
D. Fournier – Regional Manager, Crew Management Centre

And on behalf of the Union:

M. Church – Counsel, Toronto
R. A. Beatty – General Chairperson, Sault Ste. Marie
J. Robbins – Vice-General Chairperson, Sarnia
R. LeBel – General Chairperson, Quebec City
B. R. Boechler – General Chairperson, Edmonton
R. A. Hackl – Vice-General Chairperson, Edmonton
J. W. Armstrong – Vice-President, UTU-Canada, Edmonton
E. Chapados – Witness
N. Beveridge – Local Chairperson, Montreal
J. Coffey – Grievor

AWARD OF THE ARBITRATOR

The grievor began working with the Company as a brakeman and yard helper in Hamilton Ontario on June 7, 1978. He was then led to an assignment as a conductor with the Company's passenger service from 1978 to 1982. He advanced to the position of Yard Foreman in 1990. From 1995 to 1998, the grievor worked as a locomotive control

systems instructor. Over this three-year period, the grievor trained several instructors at terminals in Oshawa, Hamilton, Oakville and Niagara Falls. The grievor served as the local chairperson of Union Local 343 beginning in 1984 and held that position until his termination.

On May 28, 2004, the grievor engaged in a heated conversation with a Company officer, Supervisor Kelly Stewart. The grievor was working at the Oakville yard at 09:00. Shortly after beginning the assignment, Supervisor Kelly Stewart became concerned with the lack of progress that the 09:00 yard was making with respect to positioning of traffic required to spot Ford. Supervisor Stewart was in the yard office at Oakville, located in the traffic coordinator's office. Supervisor Stewart overheard a conversation between the traffic coordinator and the grievor's crew. Ms. Stewart was left with the impression that the set-up of empty railcars for Ford to load was being delayed in its makeup. She then left the yard office to investigate the delay in person. She drove to the lead track in the yard in order to get a first hand view of the situation.

Ms. Stewart approached the grievor on the working lead in an effort to discuss certain observations that she had made regarding the grievor's crew's lack of production. Ms. Stewart began to press the grievor for answers. Her testimony was that he was yelling back at her, had his gloves in a clenched fist, and was shaking them within inches of Ms. Stewart's face in a manner that she considered very threatening and intimidating. According to the evidence of Ms. Stewart, the conversation ended when they grievor told Ms. Stewart to "fuck off." He then turned and walked away. Ms. Stewart immediately removed the grievor from service. As the grievor walked away, Ms. Stewart claims that he yelled back to her: "You'll never be able to prove this. No one else heard anything. You can't prove this happened."

The grievor provided a more detailed version of the events both through the Union brief and through testimony at the arbitration hearing.

On May 27, 2004, the grievor stated he had been warned by General Manager Tony Marquis, “to not play games” and that he “wouldn’t like the outcome” if he continued to do so. The grievor, in that regard, provided a detailed account of an incident involving Mr. Tony Marquis and Ms. Stewart on May 27, 2004. On that day, the grievor stated that he witnessed his co-worker, Mr. Chapados, being unjustifiably chastised by Mr. Marquis. According to the testimony of both Mr. Chapados and the grievor at the arbitration hearing, the grievor screamed at Mr. Chapados and asked him whether he “knew how to put air in the cars”. The grievor took the remark, as did Mr. Chapados, as being completely unjustified under the circumstances. Mr. Chapados is an experienced employee and testified that he felt insulted and harassed by the behaviour of Mr. Marquis. The grievor and Mr. Chapados later met with Mr. Marquis where they were once again warned not to play games. The incident with Mr. Chapados, in the opinion of the grievor, led to an atmosphere of fear and intimidation which was maintained through to the following day when he was confronted by Ms. Stewart about the alleged delays.

The grievor then went on to detail the incident of May 28, 2004 which led to his dismissal. He stated that he was instructed by the yard coordinator that he and his crew were assigned to track OG31. Their first job was to take engine 7072 and its one car and to shove to the west end of track OG 31 to retrieve another car and then transfer engine 7072 and two cars from track OG31 to track OG30. With the assistance of his helper, the two cars were joined to engine 7072 as directed by the yard coordinator. The engine and two cars were at the east end of track OG31 and the grievor could see there was room for

two cars including a car length of room at the other end to make the move. The grievor's crew had coupled up and pulled west on OG31. From that position, they could advance onto the parts lead. However, the grievor and his crew discovered that they were blocked by the 08:30 assignment. The 08:30 assignment apparently had a long train that spanned from the OG32 track next to the grievor's crew well into the parts lead where the grievor's crew needed to move from OG31 to OG30. At that point, the grievor's crew was unable to move because of the blockage on OG31. The grievor's statement was that he was radioed twice by the yard coordinator who requested to know his whereabouts. The grievor replied on each occasion that he was still on track OG31 being blocked by the 08:30 assignment.

The grievor stated that he and his crew were blocked from 09:00 until approximate 09:45 that morning. The 08:30 assignment then had to proceed from the north yard to the south yard which started sometime after 09:30. The grievor, states that despite repeated requests, he was unable to obtain the Signal Activity Report (SAR) report which would document when the 08:30 assignment finally moved from the north yard to the south yard and thus freeing the parts lead and enable the grievor and his crew to make their move. In his view, the SAR would confirm that the grievor's assignment was delayed from moving for most of the 09:00 – 10:00 time period due to the 08:30 assignment's blockage of their tracks.

During the time that the 08:30 assignment blocked their movement, the grievor and his crew were completely unable to see that, in the time since they had checked the OG30 from the other end of track OG31, extra cars were now blocking them from the opposite end of track OG30. The grievor testified that he called the yard coordinator to determine who was blocking him at OG30. The yard coordinator responded that it was

the 06:30. The grievor called and asked if they could make room for the OG30 but there was a joint there. The yard coordinator then called the grievor to tell them to forget about putting cars in the OG30 and to put the two cars in the OG23 where there was ample room. The grievor testified that he complied with the yard coordinator's instructions and proceeded down the parts lead to track OG23. The grievor was further delayed at OG23; the grievor discovered that the cars already in OG23 were in bad order. The grievor was then required to take the hand brake off and bleed the air from the cars already in track OG23 in order to be able to move his engine and deposit his two cars onto track OG23 as directed. The grievor and his crew were finally able to successfully move the two cars on OG23 and then proceeded to the second job on track OG20.

The grievor stated that he was working on assignment on track OG20 when he saw Ms. Stewart approaching in a company truck. The grievor stated that Ms. Stewart stormed out of the truck and came straight up to him. She asked the grievor where his helper was and he told her that his helper was on the engine. According to the grievor, Ms. Stewart asked him why it not been on track OG30 making joints when the 08:30 assignment had finally cleared the way for the transfer of the two cars assigned to the grievor and his crew. The grievor stated that he tried to explain to Ms. Stewart what had occurred with OG30. In particular, he tried to explain that another assignment without his knowledge had put extra cars on OG30. The grievor testified that he was in an apprehensive state due to the events that occurred on May 27, 2004.

The grievor testified that he believed Ms. Stewart's aggressive interrogations about OG30 were disingenuous and meant to provoke him. He stated that he did not want to continue the discussion because he felt Ms. Stewart was, in his words, "trying to light his fuse". In his interview, and during his testimony at the arbitration, the grievor stated that

he tried to walk away but Ms. Stewart kept up persistent questioning about the OG30. During the discussion, he tried several times to explain what occurred. At one point, the grievor told Ms. Stewart to “get her fucking facts right.” The grievor then stated that he had had enough and again tried to walk away. Ms. Stewart at that point pointed to the yard office and told him that he was out of service. The grievor then advised Mr. Chapados that he was out of service. The grievor states that he was once again interrupted by Ms. Stewart who was shouting at him while he was talking to Mr. Chapados. The grievor then returned to the yard office where he changed his clothes. According to the grievor, Ms. Stewart came out of the building to tell him again that he was out of service.

The Union submits as a preliminary matter that the grievor did not receive a fair and impartial investigation. In that regard, the Union claims that the record from the investigation demonstrates that the investigating officer was biased. It also shows that the Company relied on inaccurate information because the grievor’s discipline record was inaccurate. Other allegations include: refusal by the investigating officer to allow the grievor to see the SAR report, refusal to allow the grievor to explain the May 27, 2004 incident, rejecting objections by the Union, stating opinions and conclusions and calling Ms. Stewart of his own initiative and only after the grievor testified.

I note the comments found in **CROA 3322**, where the arbitrator referred to **CP Rail and CAW-TCA Canada Rail Division, Local 101 (SHP 371)**. Speaking of rule 82, he states:

> … The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the

> employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the Union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigation officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.
>
> The process so contemplated is not a trial nor a hearing which must conform in all respects with judicial or quasi-judicial standards. It is, rather, an information gathering process fashioned, in accordance with the requirements of the collective agreement, to give the employee the opportunity to know the information gathered, and to add to that information before any decision is taken with respect to the assessment of discipline.

The allegations against the grievor are clear and straightforward. He is accused of using strong and inappropriate language against his supervisor. The grievor went on in detail about the events leading up to the exchange with Ms. Stewart on May 28, 2004. The investigating officer allowed the grievor to give his account without interruption of those events before adjourning and requesting the presence of Ms Stewart. The investigating officer in my view was properly focussed on the exchange which took place during the time immediately before and up to the heated discussion between the grievor and Ms. Stewart on May 28, 2004. He interrupted the grievor several times during the interview in order to focus on those events. I do not find his interventions in that regard to be inappropriate. Further, the fact that the investigating officer elected to call Ms. Stewart after he heard from the grievor was not in my view a procedural flaw which undermined the overall fairness of the interview. In that regard, I note the accredited representative did not object to the questioning of Ms. Stewart. The investigating officer also properly asked the accredited representative if he wished to ask questions of Ms. Stewart after the investigating officer had concluded his own questioning. Although the interview was perhaps not an example of a model trial court proceeding, it nevertheless in my view allowed the grievor the degree of due process contemplated by article 82.

Turning to the merits, the Union submits that the events of May 28, 2004 fall well short of justifying the penalty of the grievor's discharge. The Union does not minimize the significance of the grievor's action. It is clear that he directed obscene language at his supervisor. However, this type of language is not uncommon in the workplace. The Union cited numerous authorities in support of the view that the overall gravity of the May 28, 2004 incident does not justify the penalty. In particular, the Union submits that provocation is an important consideration in this case. The fact that Ms. Stewart rushed up to the grievor and shouted at him in close quarters is a mitigating factor in the assessment of the significance of his having told her to "get your fucking facts straight". Further, the Union submits that the incident was short-lived and did not represent a serious threat to Ms. Stewart nor was his remark incompatible with the continuance of a viable employment relationship. Overall, the Union submits that the grievor's account of the incident should be accepted over Ms. Stewart's.

The Employer submits that telling a Supervisor to "get her fucking facts straight" is completely unacceptable. In addition, the comments "You'll never be able to prove this. No one else heard anything. You'll see. You can't prove this happened" are a revelation of the grievor's character and inability to hold the Company's trust in the future. Indeed, the Employer asserts that these words were threatening and an attempt to intimidate Ms. Stewart into thinking twice about reporting the incident. Viewed in its totality, the Employer submits that the words of the grievor showed a propensity to manipulate the truth and to impugn his supervisor's authority. The Company also asserts that there are no mitigating factors which justify a reduction of penalty. The company alleges the following record:

DATE	DISCIPLINE	REASON
2004/06/25	Discharge	Conduct unbecoming an employee while employed as yard Foreman on 0900 Oakville Yard on 28 May 2004
2004/05/29	7 days of suspension	Failure to comply with Eastern Division Notice #11 dated May 11 2004 resulting in improper submission of time claim on 20 May 2004
2003/06/16	5 days deferred suspension	Violation of GOI section 8 item 4.3.1: Failure to wear required protective equipment while working, specifically not properly wearing your protective safety glasses while employed as the Foreman on the 0900hrs. Oakville Yard assignment.
1995/01/17	30 Demerits	Failure to complete duties as assigned resulting in the shutting down of Proctor and Gamble while employed as Yard Foreman on the 1700 Shed Ass. On Jan 17th 1995.
1994/11/22	15 Demerits	Failure to properly perform duties of Yard Foreperson.
1993/06/02	25 Demerits	Failure to follow instructions given by the Hamilton Yard Coordinator and subsequently abandoning your assignment while employed as Yard Foreman, 1400 Industrial Assignment.
1992/04/09	10 Demerits	Violation of GOI Form 696 Item 13.1(2) and Form CN 7355E Safety Rules – General Rules 19(a) and (b) failing to report until 9 April 1992 personal injury you sustained 8 April while employed as Yard Helper 1700 Hamilton Industrial Assignment.
1989/05/31	15 Demerits	Violation of CROR 104-B.

1986/09/24	15 Demerits	Refusing to accept a call for duty as Yard Helper on the 0700 Middle Yard Assignment at Hamilton on 24 September 1986 while assigned to the Hamilton Yard Joint Spareboard.

I note that a review of Ms. Stewart's memo to file indicates that a heated discussion took place between herself and grievor over the delay involving the OG30 cars. Ms. Stewart records in her statement that it was grievor who raised his voice first. The grievor, on the other hand, said that he tried to walk away from Ms. Stewart but that she kept harping on him about the delays. I accept the grievor's explanation that he ran into problems on the morning of May 28, 2004. I do not accept, on the other hand, that Ms. Stewart was the one who raised her voice first nor do I believe she deliberately tried to bait the grievor as the Union alleges. I also find that the events of May 27, 2004, as detailed by the grievor, did not contribute in any material way to the incident of May 28, 2004. I have a difficult time believing that a senior employee like the grievor was apprehensive on May 28, 2004 because of a discussion he had with Mr. Marquis about not playing games or because of the way Mr. Chapados was allegedly treated by G.M. Marquis.

Ms. Stewart was trying to ascertain the reasons for the delay on May 28, 2004 when she met up with the grievor. Rather than provide her with a calm and reasoned explanation, the grievor elected to raise his voice and, during the course of the discussion, uttered the words "Fuck off". I accept that those words ended the conversation. It is consistent in my view that those words would have precipitated Ms. Stewart's direction to the grievor to go home.

The grievor is then alleged to have uttered the words to Ms. Stewart that she would be unable to sustain her version of events because there were no witnesses. According to Ms. Stewart, the grievor made that statement as he walked back towards the office. Given that the grievor made those comments as he walked away and after he was told to go home, I accept that they were made more out of frustration rather than to inhibit Ms. Stewart from reporting the incident.

Although often heard on the shop floor, words like “fuck off” when directed at a supervisor demonstrate a serious affront to authority and warrant a serious disciplinary response. The comments were totally inappropriate and the onus falls on the grievor to demonstrate that the employment relationship is salvageable after such a serious affront to the authority of his supervisor. The issue then is whether there are sufficient mitigating factors which warrant an alteration to the dismissal penalty.

The grievor’s disciplinary record was challenged by the Union. There is an outstanding disciplinary incident which took place just prior to this incident: the grievor was given a 7 day suspension on May 29, 2004 for submitting improper time claims for keeping his crew on duty at overtime rates. A grievance has been filed and the matter is to proceed to arbitration. The grievor received a 5 day deferred suspension in 2003 for a safety equipment violation. The Union contests that discipline on the basis that it was to be removed after 12 months. The Arbitrator does not find it necessary to deal with these issues as, even if I fully accepted the Company’s position on the disciplinary record, it does not militate against his reinstatement.

Under the circumstances, and particularly bearing in mind the grievor’s lengthy service with the Company, I order that the grievor be reinstated without compensation for

wages and benefits lost and without loss of seniority. The length of the suspension is to drive home to the grievor that profane and antagonistic language directed at person in a supervisory position like Ms. Stewart will not be tolerated in the workplace. The grievor is a senior employee and must set the example of good behaviour for the sake of his reputation and that of the Company's.

February 14, 2005

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR