CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3510

Heard in Montreal, Wednesday 14 September 2005

Concerning

CANADIAN NATIONAL TRANSPORTATION LIMITED

and

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

EX PARTE

DISPUTE:

Concerning the treatment of Owner Operator, Mr. Bill Mushumanski, at the hands of the Company. The Union alleges a violation of Section 94 of the **Canada Labour Code**, as well as a violation of articles 3.1, 3.2, 5.14(b), 8.1, 9.1 and 12.5 of the collective agreement.

UNION'S STATEMENT OF ISSUE:

In December 2002, Mr. Mushumanski was assigned to transport a recovery move from the Winnipeg Intermodal Terminal to the Vancouver Intermodal Terminal. After delivering the trailer to Vancouver, he was provided a recovery move to his home terminal – Winnipeg. Approximately one hour outside of Vancouver, Mr. Mushumanski was asked to return to Vancouver to take a load to Edmonton. The move from Vancouver to Edmonton would require him to wait in Vancouver for up to 18 hours for the trailer which was not yet ready for transport.

Mr. Mushumanski advised the dispatcher that he already had an assigned load and the return, wait and trip, detouring through Edmonton rather than directly to Winnipeg, would make him late for a scheduled vacation and in violation of his agreement for a replacement driver during his absence. Given this untenable situation he advised dispatch he would continue to Winnipeg with the load he already had been assigned.

Upon his arrival in Winnipeg he was removed from subsequent recovery loads. This "suspension" from recovery loads lasted for over six months. No written notification was ever provided to him of discipline. Grievances were filed as lost time claims for the trips. A number of meetings were held pursuant to the provisions of article 5.3 of the collective agreement following grievances for lost trips. The Company agreed to answer the trip claims but no answer was ever forthcoming. Ultimately the Union progressed the grievance for lost trips to Step 2 in February of 2005. The Company then moved to discipline the grievor for his refusal to take the move to Edmonton some three years earlier. They issued his with a 5 day suspension and ruled that the loss of the aforementioned recovery trips were in lieu of the 5 day suspension.

The Union grieved the issue of discipline some three years after the fact and advised the employer that the issuance of discipline following a monetary claim by the Union was, in effect, anti-union animus. The Union alleged a violation of section 94 of Part I of the **Canada Labour Code**.

The Union is requesting financial restitution for the four lost trips for Mr. Mushumanski and a removal of the disciplinary letter of March 31, 2005. The Company denies the Union's contentions.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

A. De Montigny	– Sr. Manager, Labour Relations, Montreal
M. Peterson	– Manager, Road Operations

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
N. Glover	– Local Chairperson

AWARD OF THE ARBITRATOR

The record before the Arbitrator discloses that the grievor, an owner-operator in highway transport service, declined an assignment when instructed to return to Vancouver to take a load to Edmonton on or about November 5, 2002. Mr. Mushumanski was then in the process of handling a recovery load from Winnipeg to Vancouver and was returning to Winnipeg with a load. It is common ground that that is a lucrative form of assignment which is given to drivers on a rotation list basis.

It appears that the grievor informed the dispatcher that as he was one hour out of Vancouver with his Winnipeg load he did not intend to turn around and return to Vancouver for a separate Canada Post load destined for Edmonton. It appears that that move would have involved a considerable wait period before the grievor could receive the load destined to

Edmonton and that in the result he would lose the first two days of what he had planned as vacation time. It is agreed that as a contractor the grievor is free to take vacation when he wishes.

The Company takes the view that the grievor violated his contractual obligation as an owner-operator, and was therefore deserving of an appropriate response by the Company. In that regard its representative cites article 7.01 of the collective agreement which provides as follows:

> 7.01 It is understood and agreed that in the event the Contractor, at any time during the continuance of this agreement, fails to promptly pick up, transport and deliver the freight of the Company to any of its customers or otherwise fails to perform any covenants on his part herein contained or otherwise commit or omits any act or deed, the commission or omission of which is prejudicial or detrimental to the business of the Company and in conflict with this agreement, then it shall be lawful for the Company to deem this a breach of this agreement and the Company may, at its option, terminate this agreement forthwith. In lieu of termination, the Company may, at its option, suspend this agreement for a period not to exceed five business days.

The Company further refers to the rules and regulations, incorporated as Schedule C to the collective agreement which provide as follows:

> **DISPATCH**
> Owner Operators must arrive at the terminal at their pre assigned start times ready to work. They must be prepared to work additional times as required (within the Hours of Service Regulations) in order to meet all of the daily customer requests.

The Company notes that the grievor's refusal of the assignment required the calling of another driver resulting in an expense of some $750. Immediately after the incident, in November of 2002, the Company removed Mr. Mushumanski from the recovery assignment rotation list, as a result of which he missed four trips which he would otherwise have had. It is common ground, however, that he was nevertheless continued in his regular terminal

assignments. In the result, while he was not suspended or left without work, he was deprived of four more lucrative earnings opportunities.

The initial grievances were filed objecting to the denial of recovery assignments to the grievor. The Union points to four separate grievance letters which were filed with the Company, although the Company maintains that it received only three of them. In the circumstances I do not consider that discrepancy to be significant for the purposes of the outcome of this award. It seems that the parties discussed the grievances for an extensive period of time, without resolution. There followed a bizarre turn of events. On February 28, 2005, the Union's Regional Bargaining Representative sent to the Company a further Step 2 grievance which essentially grieved the same four missed trips dating from December of 2002 until mid-2003. In a letter dated March 8, 2005 the Company declined the grievance over the signature of National Manager of Field Operations Martyn Peterson. The letter indicates that the Company was then planning to schedule a disciplinary meeting with the grievor.

It appears that an investigation conference call was held on March 30, 2005 and that on March 31, 2005 the Company issued a disciplinary letter assessing a five day suspension for the grievor's failure to handle the Edmonton load in November of 2002. The disciplinary letter concludes with the following:

> The Company has determined that at this time the appropriate disciplinary measures to be 5 day suspension of the Standard Contrct [sic] between William Mushumanski and Canadian National Transportation Limited. In lieu of the latter discipline, removal of Mr. Mushumanski from the road recovery list in December 2002 to mid 2003 will be deemed discipline served.
>
> (sgd.) Jacques Deschamps
> Driver Manager – Winnipeg

Understandably the Union questions the regularity of a disciplinary investigation and the five day suspension being assessed some 2-1/2 years after the event. At the hearing the Company, which objects to the Union challenging the five day suspension as an expansion of the original grievances, undertook to the Arbitrator that the five day suspension and the related letter of March 31, 2005 would in fact not appear on the grievor's disciplinary record. The Union's representative suggests that the purported disciplining of the grievor in March of 2005 was generated by the Company as a means of frustrating or discouraging the outstanding grievances relating to the removal of the grievor from the recovery assignment list in 2002-03. To that extent it is suggested that there is anti-union animus and a possible violation of the **Canada Labour Code** in the motives of the Company.

With respect to the procedural issues the Arbitrator is not impressed by the position of either party. Putting the Union's position at its best, for reasons it best appreciates, it has not insisted on the expeditious resolution, whether by arbitration or otherwise, of the original four grievances for missed assignments. Its attempt to reconsolidate those grievances into yet another grievance in 2005 appears to have prompted the Company's questionable scheduling of a disciplinary investigation and the notional assessment of a five day suspension which was then erased as deemed already served by the denial to the grievor of recovery assignments in 2002-03.

I am satisfied that the entire matter in dispute is properly before me, including the assessment of the five day suspension. Clearly these events are all of a piece. Arbitrators have been well instructed by the Courts to deal with the real substance of a dispute, and to not frustrate the resolution of industrial relations disputes by recourse to undue technicality. (See **Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486** (1975), 8 O.R. (2d) 103 (Ont. C.A.)) The real substance of the matter is

whether the grievor was deserving of discipline in some form for his refusal to handle the recovery assignment from Vancouver to Edmonton on or about November 5, 2002. If so, was it appropriate for the Company to remove the grievor from recovery assignments between December of 2002 and May of 2003, when he was finally restored to the rotation list?

Upon a review of the record the Arbitrator is satisfied that the Company was justified in the actions which it took at that time, albeit it might have done so in a more orderly fashion and with the courtesy of a written note to the grievor with respect to his status. It may be noted that at the time there was no obligation in the collective agreement for the Company to hold an investigation or to give any particular form of notice, assuming that what it did was a disciplinary response. The Arbitrator is satisfied that what occurred was clearly disciplinary. I am also satisfied, however, that the discipline was for just cause, and that having regard to the grievor's prior disciplinary record, which included three letters of warning and, in addition, a suspension for an incident which occurred on September 24, 2002, the denial of the recovery assignment opportunities was an appropriate response. Given the undertaking of the Company that the five day suspension and the related letter do not form part of the grievor's disciplinary record, the Arbitrator need make no further comment or ruling with respect to that aspect of the dispute.

In the result, I am satisfied that the grievor was properly disciplined by being removed from the recovery rotation list for a period of time which resulted in his missing four enhanced work opportunities. For all of these reasons the grievance must be dismissed.

September 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR