CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3580

Heard in Montreal, Thursday, 14 September 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The Dismissal of Vern McDuffe of Dauphin, Manitoba for refusal to protect work in the terminal of Canora, Saskatchewan.

JOINT STATEMENT OF ISSUE:

On April 6, 2006, Conductor McDuffe was contacted by the CMC and advised that he was being forced to the terminal of Canora, SK pursuant to paragraph 148.11 of Agreement 4.3. Several discussions took place between Conductor McDuffe and various Company officials with respect to when he would be reporting in Canora.

On April 20, 2006 a notice to appear for an investigation was issued. An investigation took place on April 27 and, on May 8, 2006, a Form 780 was issued, dismissing Conductor McDuffe.

The Union contends that, at all times, Conductor McDuffe acted reasonably and was within his rights as contemplated and outlined in Agreement 4.3. He fully explained the delay and offered assurances that he would report to Canora as soon as he was able, which he did; but, was not permitted to book on to the board in Canora. The Union further contends that the Company has acted unreasonably, contrary to Article 152, in this matter. Accordingly, the Union requests that Conductor McDuffe be re-instated, without loss of seniority and be made whole.

The Company contends that Conductor McDuffe was required to report within seven days and disagrees with the Union's position.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. A. HACKL	**(SGD.) K. MORRIS**
FOR: GENERAL CHAIRMAN	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg
J. Newton	– Superintendent, Operations, Winnipeg

T. Bourgonje – General Manager – Prairie Sub Region, Winnipeg
R. B. Smith – Assistant Superintendent, Lakehead Zone, Winnipeg

And on behalf of the Union:
M. A. Church – Counsel, Toronto
R. A. Hackl – Vice-General Chairman, Edmonton
V. MacDuffe – Grievor

AWARD OF THE ARBITRATOR

The instant case involves the application of paragraph 148.11 if the collective agreement. It reads as follows:

> 148.11 When their services are required elsewhere on the seniority territory, employees on the furlough board will be required to respond in accordance with the following conditions:
>
> (a) Employees with a seniority date on or prior to March 17, 1982 will not be required to exercise their seniority rights outside of their home terminal or stations subsidiary thereto.
>
> (b) Employees wit a seniority date after March 17, 1982 will be required to protect service at those locations identified in article 107.39.
>
> (c) All employees with a seniority date subsequent to June 29, 1990 will be required:
>
> (i) to protect all work in accordance with this article over the seniority territory governed by this Agreement and in addition they will be required to protect work governed by other collective agreements on the Region;
>
> (ii) to accept and successfully complete training as a locomotive engineer or traffic coordinator and will not be permitted to relinquish traffic coordinator's seniority;
>
> (d) Employees with a seniority date subsequent to June 29, 1990 who fail to comply with the provisions of sub-paragraph (c)(i) above will, if failing to report at the expiration of 7 days following notification, forfeit any guarantee payments until such time as they report. Failure to comply with the provisions of sub-paragraph (c)(i) above within 30 days of notification or, failure to comply with the requirement of sub-paragraph (c)(ii) above the employee will forfeit their seniority and their services dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

(e) Employees on the furlough board will only be required to protect service elsewhere after all employees at the location have been recalled;

(f) When it is necessary to protect service on the seniority territory employees will be utilized in the following sequence:

(i) the junior qualified employee not working with a seniority date as an assistant conductor subsequent to June 29, 1990 on the seniority territory, there being none;

(ii) employees with a seniority date after March 17, 1982 will be required to protect service at those locations identified in article 107.39

(g) When the junior employee as provided in sub-paragraph 148.11(f) does not report within a reasonable period of time, the next junior employee at the terminal will be required to protect service. When the junior employee becomes available they shall be sent to relieve the employee who failed the original requirement.

(h) The junior employee as defined in sub-paragraph (f)(i) will be required to protect such service whether or not that employee is occupying a position on the furlough board. Employees failing to report at the expiration of 7 days will forfeit any guarantee payments until such time as they report. At the expiration of 30 days, such employees will forfeit all seniority rights and their services will be dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

(i) The junior employee as defined in sub-paragraph (f)(ii) above who fails to protect service at the expiration of 7 days will forfeit any guarantee payment until such time as they report or until such time their services are not required at that or another location as specified in article 107.39.

It is common ground that on or about April 6,2006 the grievor was properly notified of his being forced from the furlough board at Dauphin, Manitoba to protect work at Canora, Saskatchewan, where there was a shortage of employees. While the grievor acknowledged his obligation in a recorded telephone conversation with a dispatcher from the Crew Management Centre, including the fact that he was entitled to be paid for the first seven days if he should need that time before reporting, in fact he did not report within the seven days, or after the seven days. He first indicated his willingness to “book on” on or about May 5, 2006 when it appears he might then be eligible for an adjusted spareboard position at Dauphin.

When the grievor gave no indication of a firm time when he would report to Canora, being under the stress of using managers to perform bargaining unit work, the Company issued a notice to Mr. MacDuffe on April 20, 2006 for a disciplinary investigation to explain his absence. Basically, Mr. MacDuffe and his Union take the position that he was under no obligation to report at the time of the investigation. As part of their argument they point, by analogy, to the provisions of article 148.11 which govern even more junior employees than the grievor, namely those who are unprotected and have a seniority day subsequent to June 29, 1990. Counsel for the Union stresses that those employees cannot have their files closed and their employment terminated unless they do not appear available for work within thirty days of notification. He argues that the grievor, who is a protected employee, cannot have any lesser right.

The Arbitrator cannot agree with the Union's interpretation. Under the collective agreement the circumstances of unprotected junior employees are very different. Those individuals are generally on layoff, and not on a paid position on a furlough board, when they are directed to protect work at another location. Whatever the terms which the parties may have agreed are appropriate for the treatment of employees effectively being recalled from layoff, that does not speak to the very different issue of the rights and obligations of those who have the benefit of furlough board protection.

The grievor is an employee with a seniority date after March 17, 1982, generally referred to as a "C" employee. His obligation under article 107.39 is to protect work only

at terminals adjacent to his home terminal in the operation of article 148.11(b). Further, as noted in sub-paragraph (e) of that article, “C” protected employees are only called upon once all laid off employees have been recalled to cover a shortage. There is, to that extent, an urgency in the calling of “C” employees.

It is common ground that employees forced under article 148.11 have their wages protected for a period of up to seven days, to allow them to report to the shortage terminal. While that right is less than clear on the language of article 148.11, it does not appear disputed that it is the practice of the parties, intended to give employees who need some time to arrange their affairs as part of their temporary relocation. However, if the interpretation of the Union is accepted, an employee could benefit from the payment of the seven days and nevertheless remain indefinitely unavailable to cover the work shortage at an adjacent terminal if that individual is a “C” protected employee, like the grievor, and has valid personal reasons for not making the move. In the grievor’s case it is submitted that his obligations in running his own business in Dauphin, apparently the storage of goods in a former airport hanger, justified his delay in responding to the Company’s directive. The Arbitrator cannot agree. If that interpretation should hold, a person in the position of the grievor might remain absent from service virtually indefinitely. In the Arbitrator’s view that is manifestly not the intention of article 148.11 of the collective agreement.

The Company points to the provisions of article 148.11(g), and the accompanying question and answer incorporated into the conductor-only agreement whereby in answer to the question of what would be a reasonable period of time for the

purposes of article 148.11(e) the answer is “seven days”. In the Arbitrator’s view that is not only the period appropriate for the calling of another junior employee, but must be taken implicitly as the period deemed appropriate for a “C” employee to make himself or herself present in response to a move off the furlough board to an adjacent terminal. By the wording of sub-paragraph (g) the parties clearly contemplated that a “C” employee directed to protect work away from his or her home terminal pursuant to sub-paragraph 148.11(f) is expected to do so within seven days. It is at the expiry of that time that the Company has the right to force the next eligible employee.

On what basis can it be concluded that the Company and the Union would have agreed to allow an employee to take seven days’ pay for a direction to move to another location, and yet continue indefinitely to work in furtherance of their private affairs before, if ever, responding to the call? I can see none. In the result, I am satisfied that the Company was entitled to conduct a disciplinary investigation when the grievor failed to report before the conclusion of the seven day period. That does not mean that the grievor would have been subject to automatic discharge, particularly if he could provide a compelling explanation for any additional delay. Such a delay, however, could not be open-ended or indefinite.

In the result, I am satisfied that the grievor was subject to a serious degree of discipline for effectively abandoning his obligations to the Company. There are mitigating factors to consider, however, to the extent that the grievor did, as evidenced at the arbitration hearing, have obligations in respect of his personal storage business which he was not able to cover off easily by use of the services of another person. That

fact, coupled with the apparent unprecedented nature of the instant case, gives the Arbitrator some pause as to whether the ultimate termination of the grievor's employment is necessarily the appropriate result in the case at hand. As is evident from the material before the Arbitrator, Mr. MacDuffe does not have a history of work record or attendance problems over his nineteen years of service with the Company, and during that time he has had only minor discipline on some three occasions. This is, in my view, an appropriate case for a substitution of penalty, albeit a serious one.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost.

September 21, 2006

(signed) MICHEL G. PICHER
ARBITRATOR