CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3581

Heard in Montreal, Thursday, 14 September 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The Dismissal of Vaughn Alexander of Winnipeg, Manitoba for rule violations in connection with a derailment and collision in Fort Rouge Yard on December 30, 2005.

JOINT STATEMENT OF ISSUE:

On December 30, 2005, Vaughn Alexander was working as Assistant Conductor on Train M312 51 28 and was involved in a derailment and collision while setting out a portion of his train in Fort Rouge Yard. Several Company Officers, including General Manager Tom Bourgonje, General Superintendent Greg Wolinarski, Assistant Superintendent Ron Smith, Assistant Superintendent Paul Hackett, Assistant Superintendent Chris Yeroschack, and Trainmaster Miles Rutherford attended the site and interviewed Mr. Alexander immediately after the accident.

An employee investigation with respect "circumstances surrounding the derailment of Train M31251-28…and circumstances relevant thereto." Following the investigation, Assistant Conductor Alexander was dismissed for: Violation of GOI Item 4.1 (a) (vi) (misleading and withholding information); and Violation of CROR 106 (d) (failing to take action with respect to the positioning of the locomotive engineer); and, Violation of CROR 113 (d) (excessive speed coupling); and, Violation of CROR 115 (a) (failing to be in proper position to give signals); and, Violation of Prairie Region Notice 1049/03 (not being located in the lead locomotive) "during your tour of Duty from Rivers to Fort Rouge"

With respect to the foregoing, the Union contends that: At no time did Assistant Conductor Alexander mislead or withhold information from a Company Officer when interviewed after the incident. He answered all questions asked of him to the best of his ability and clarified his answers when clarification was sought during the employee investigation; and, Assistant Conductor Vaughn did not violate Rule 106 as it provides no direction with respect to a CLO operating a train, and, as a CLO operates under the direction of the Locomotive Engineer, was not in a position to override the Locomotive Engineer's decision, although he did voice concern to the Engineer; and, The Union admits that the coupling was made at excessive speed, but that

as Assistant Conductor Alexander gave proper signals to Conductor Mousseau, who was operating the Locomotive, the excessive speed coupling was due more to Conductor Mousseau's operating inexperience than to Assistant Conductor Alexander's actions (or lack of actions). Accordingly, while some degree of discipline may be warranted, dismissal is extreme and unwarranted, given the circumstances; and, Assistant Conductor Alexander was not in Violation of Rule 115 as he was in the proper position to give signals and instructions necessary to control the train movement. The lack of control was due to the operation of the Locomotive, not the actions of Assistant Conductor Alexander; and, Assistant Conductor Alexander's position on the second Locomotive in no way contributed to the derailment, and falls outside of the scope of the notice to appear. Additionally, the Company was aware of Assistant Conductor Alexander's positioning prior to the commencement of the investigation and chose not to amend the notice to appear or schedule a supplementary statement. Accordingly, the Union submits that any discipline assessed as a result is improper and should be expunged from the record.

Based on all the foregoing, the Union submits that while some discipline may be warranted, dismissal is extreme and not justified in all of the circumstances; that the discipline assessed should be substantially reduced and that Assistant Conductor Alexander should be re-instated, without loss of seniority and be made whole for his losses.

The Company disagrees.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. A. HACKL	**(SGD.) K. MORRIS**
FOR: GENERAL CHAIRPERSON	**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 grievor, Mr. Vaughn Alexander, was discharged from his position as an assistant conductor on two separate grounds, arising out of a derailment incident. The first ground, dealt with within this file, involves the allegation of extensive rules violations by

the grievor. The second head of discipline justifying termination, dealt with separately, involves the grievor's refusal to undergo an alcohol and drug test upon the direction of his supervisor. That issue, brought before this Office under file **CROA&DR 3582**, will be dealt within the body of this award, given the commonality of facts. This award shall therefore serve as the reasons for the award in **CROA&DR 3582**.

The record before the Arbitrator discloses that Mr. Alexander was working as Assistant Conductor on train M312-51-28 on December 30, 2005. Towards the end of the tour of duty Assistant Conductor Alexander and his crew were directed to set off a cut of cars into track WF34 in Fort Rouge Yard, coupling that cut onto a string of cars already in the storage track. They were then to take the balance of their train onward some 4.3 miles to Symington Yard.

The evidence reveals that the reverse movement of the grievor's train off the mainline and into WF34, in a westward movement, was done with serious irregularities. Mr. Alexander took up a station on the ground which would allow him, by means of radio contact, to instruct the locomotive engineer in the cab of the train, which was over 6,000 feet in length, with respect to the distances and appropriate speed as the movement proceeded into storage track WF34. In fact, however, for reasons which are less than clear, the locomotive engineer, Mr. D. Perich, accompanied Mr. Alexander on the ground. In the result, the movement, which involved proceeding westward on a relatively steep grade into the storage track, was done under the control of Conductor D. Mousseau, who remained in the cab of the locomotive. It is common ground that

although Conductor Mousseau is qualified as a Conductor Locomotive Operator (CLO), he could only operate a locomotive in the presence of and under the immediate supervision of a qualified locomotive engineer.

As established by the download of the locomotive computer data, it is clear that the westward movement of the train into track WF34 was executed at a negligent, if not reckless, rate of speed. The normal speed of a train moving in such a circumstance would be between 2 and 4 m.p.h. In fact the train under the control of Conductor Mousseau moved into and on the storage track, a distance of some twenty auto cars, at a speed as high as 13 m.p.h. It was travelling at 10 m.p.h. when the rear end of the train coupled with the cars already in the storage track. The evidence of Mr. Alexander, which the Arbitrator accepts, indicates that when a braking application was made, before the coupling occurred, the effect was to eliminate the slack in the train. As a result, when the coupling occurred a “hard joint” resulted, with the train striking the cars already in the storage track in a spear-like manner, causing a severe shock to the train.

Because of the errors committed by the crew, a massive derailment resulted, as 7,700 tons of rolling stock collided at 10 m.p.h. with 9,200 tons of stationary equipment already in the storage track. The impact was such that the cars on the grievor’s train jackknifed off the track, projecting into the main line where they struck the side of a passing CEMR consist, the train of an independent short line then travelling on the main line. The derailment cascaded to include cars from the CEMR train, as a result of which a substantial number of cars were derailed, a number of them onto their side, with

extensive damage resulting, but fortunately no injuries. In addition to CN management, mechanical and engineering staff being immediately dispatched, the City of Winnipeg emergency response authority sent police, fire and ambulance services to the site.

The Arbitrator was presented with extensive evidence as to what occurred immediately following the incident. The supervisors who then spoke with the crew members were given to understand that there had been nothing irregular in the reverse movement of the train into track WF34. It appears that the grievor, apparently seeing that there was some damage to a switch at the entrance of track WF32, offered the suggestion that the train might have run through that switch, causing the derailment, although the Arbitrator is satisfied that he did not offer that as a conclusive explanation. After the initial investigation management made the decision that it would allow Assistant Conductor Alexander and his crew to take the train onwards to Symington, an operation which might involve a total of 9 miles to the point of fully yarding and tying down their equipment.

Shortly after the train departed the wreck site, Assistant Superintendent R.B. Smith read the data download from the train's locomotive on his portable computer. He then ascertained that in fact the movement had entered the storage track at a clearly excessive speed, and struck the stationary cars in the track while travelling at some 10 m.p.h., clearly in violation of operating rules. The download indicated to him that in fact the throttle of the train had at one point been placed at level 7 out of a possible 8 speed levels and that the braking initiatives of the person controlling the train were clearly too

little and too late, as the train went into emergency brake upon impact. Armed with that information, General Manager Tom Bourgonje, who was on the site, issued the directive that the grievor, whom he then believed to be the only person who observed the movement of the train into the storage track, should be directed to undertake a drug and alcohol test upon his completion of duty at Symington Yard.

When he was approached to told to take the alcohol and drug test, apparently after the departure of his two workmates from the booking-in facility, Mr. Alexander questioned in his own mind why he alone was being subjected to an alcohol and drug test. It appears that by reason of certain conflicts which had arisen between himself and other managers at a point in the past when he ceased working as a manager himself, he felt that he was being singled out and harassed. On that basis, he maintains, and on the advice of his local union chairman who was then present, he refused to undergo the drug and alcohol test.

The evidence further reveals that shortly after that time the local union chairman disclosed to Mr. Bourgonje that in fact locomotive engineer Perich had not been in the cab of the locomotive at the time of the movement which caused the derailment. Faced with that disclosure Mr. Bourgonje immediately issued a directive that the other two members of the crew, Locomotive Engineer Perich and Conductor Mousseau, also be immediately directed to undergo an alcohol and drug test. In fact, however, the Company was unable to find them, after proceeding to their respective homes in an

attempt to do so. In the result none of the employees were in fact tested and only Mr. Alexander registered a refusal.

Following disciplinary investigations, all three employees were discharged for the very rules infractions which are the subject of this grievance. Subsequently, however, Locomotive Engineer Perich and Conductor Mousseau were reinstated into their employment, subject to a thirty day suspension. The grievor has remained discharged. The grievor was also charged with travelling in the trailing locomotive rather than the lead locomotive during the tour of duty from Rivers to Fort Rouge, prior to the events in question.

On the basis of the facts described above, I am satisfied that the grievor was culpable of being involved in misleading his supervisors and withholding vital information with respect to the derailment. I find it difficult to believe that he, as a experienced railroader, would not visibly have appreciated the difference between a train moving at 2 m.p.h. and his own movement, which was proceeding at 10 m.p.h. into the storage track. Moreover, there can be no doubt but that he did not volunteer any information with respect to the fact that the locomotive engineer was not in the cab at the time of the movement, and that the conductor was entirely alone at the controls without any supervision. I am satisfied that he also violated CROR 106(d) for failing to take any action with respect to the obviously incorrect positioning of the locomotive engineer at the time of the reverse movement of his train, and that he must be held responsible for the excessive speed coupling which occurred, in violation of CROR

113(d). I am also satisfied that the grievor was not in a proper position to give signals for the movement in question. A schematic tendered in evidence indicates that he stood close to track WF34, and was nearly one-half mile distant from the point of connection between his train and the cars already in the storage track. While the Arbitrator appreciates that in some circumstances long distance observation may well be appropriate, where sight lines are clear, given the distance and angle involved, this is a circumstance in which the better course clearly would have been for the grievor to ride on the point of his movement to obtain the necessary perspective on the spatial relationship as the tail end of his train progressed towards the stationary cars already in the track.

However, the Arbitrator cannot sustain the Company's assessment of discipline for the fact that the grievor did not ride the head end of the train earlier in the day during his course of duty. That conclusion is made purely on procedural grounds. The offence in question is clearly unrelated to the events surrounding the derailment. The disciplinary notice issued to the grievor indicated that he would be investigated for the events surrounding the derailment. In other words, notwithstanding the Company's prior knowledge of the separate infraction, he received no notice of the Company's intention to investigate the fact that he travelled in the trailing locomotive during his tour of duty preceding the incident at Fort Rouge Yard. The Arbitrator is therefore compelled to sustain the Union's objection that, because of the lack of notice, the Company did not afford the grievor a fair and impartial investigation with respect to that aspect of the dispute.

On the whole, there can be no doubt but that the grievor rendered himself liable to an extremely severe measure of discipline, as did his workmates. It is noteworthy that the grievor has some twenty-two years of service with the Company, part of which included service in relatively high positions of management in the transportation department before his eventual return to work as conductor in May in 2003. Like the other members of his crew, he is described as having better than twenty years of service, with a very good disciplinary record, a fact not substantially challenged by the Company.

In the Arbitrator's view all three members of the crew were equally responsible for the unfortunate sequence of events which unfolded at Fort Rouge Yard on December 30, 2005. There does not appear to be any dispute that the grievor called out to Conductor Mousseau on the radio when the movement was twelve cars, six cars and three cars distant from coupling, and that he issued an instruction to stop at the three car length distance, given the apparent speed of the movement. The fact remains, however, that like his crew mates, he concealed from the Company the fact that the train was under the control of an unqualified individual, namely Conductor Mousseau, at the time of the derailment. Like his workmates, he gave no indication of the excessive speed of the train, a fact which the Arbitrator believes should have been apparent to him and to Mr. Perich, and obviously to Mr. Mousseau.

In approaching the appropriate discipline for the rules infractions, however, one mitigating factor must be considered. As noted above, the Company effectively forgave the conduct of Locomotive Engineer Perich and Conductor Mousseau, who were arguably as responsible as the grievor for the mishandling of the train, and reinstated them into employment subject to a thirty day suspension. No such treatment was afforded Mr. Alexander. In explanation, at the hearing, the Company took the view that Mr. Alexander had not demonstrated remorse or apologized for his actions, while the other two crew members had done so, therefore meriting their reinstatement.

The Arbitrator has substantial difficulty with that assertion. Firstly, it cannot be disputed but that the grievor was open with Company from the time he was confronted with the issue of the placement of the crew members during the movement, apparently during the course of a telephone call shortly after the incident after the Company had become advised of the facts by the Union's local representative. He did not attempt to minimize or mask what had happened. The Arbitrator is also satisfied, as submitted by counsel for the Union, that during the course of the disciplinary investigation itself Mr. Alexander did express regret and remorse. Towards the end of his statement he said: "The CLO should never have been allowed to make the move unaccompanied. We all should have had more respect for the tonnage, grade and nature of the move." And shortly thereafter he concluded "I apologize for my role in the grief I brought the railway and everyone in this room." Moreover, while the evidence does indicate that the grievor was not forthcoming with the facts at the time supervisors attended at the wreck site, he

was in that regard no more culpable than Locomotive Engineer Perich or Conductor Mousseau.

How, then, can the treatment of the grievor be distinguished from that of his two crew mates, at least as regards the rules infractions? I am satisfied that it cannot fairly be characterized as more grave or meriting any greater disciplinary consequence. The jurisprudence is clear that like conduct should attract like discipline, and that it is not open to the Company to impose invidious or discriminatory levels of discipline for what is essentially the same conduct as among several employees.

There is, however, one important distinguishing factor on the facts. It is not disputed that the grievor refused to undergo an alcohol and drug test when directed to do so. I am satisfied that the request made to the grievor was entirely appropriate and in keeping with the Company's policy of administering alcohol and drug tests in appropriate situations where there has been an accident or incident. Counsel for the Union argues that it was for the Company to immediately direct an alcohol or drug test when the supervisors encountered the grievor initially at the wreck site, and that it could not do so at a later point in time, having effectively returned the grievor to his train to complete the 4.3 mile distance into Symington Yard. The Arbitrator is not impressed with that submission. The facts disclose that it was only after the departure of the grievor's train for Symington that Mr. Bourgonje learned that in fact the reverse movement of the grievor's train into track WF34 was done at highly excessive speed. Given that information, and his view that Mr. Alexander was the person responsible for

observing the movement and ensuring its safe completion, he then determined to have an alcohol and drug test administered to Mr. Alexander. The Arbitrator can readily appreciate the suggestion that the test should also then have been ordered for the two other employees. I have some difficulty understanding why that was not done, given the evidence of the speed of the movement and the related responsibility of both Mr. Perich and Mr. Mousseau. In my view, however, that fact only goes to mitigation, and not to the Company's ultimate right to demand a drug test of Mr. Alexander in the circumstances.

When confronted with the order to take a drug and alcohol test, whatever his own feelings, it was the grievor's obligation to "obey now – grieve later" if he felt that the directive was somehow unfair. By refusing to undergo a drug test, in the Arbitrator's view, Mr. Alexander radically changed the nature of his own infractions over the course of these events, and rendered himself liable to a more severe degree of discipline. Whatever his personal feelings, his refusal to take an alcohol and drug test in the circumstances does leave him open to the drawing of adverse inferences, and does little to bolster his credibility.

What, then, is the appropriate result? On the whole, the Arbitrator is persuaded that this is an appropriate case for a reduction of penalty. The inherent preferential treatment of Locomotive Engineer Perich and Conductor Mousseau, not sufficiently explained in my view, gives substantial concern as to the equitable nature of the continuing discharge of Mr. Alexander. By the same token, his circumstance is distinguished from that of his two co-workers, to the extent that he alone refused to

undergo an alcohol and drug test in circumstances which the Arbitrator judges to have been entirely appropriate for the taking of such a test.

In the result, the grievance is 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 and benefits lost.

September 21, 2006

(signed) MICHEL G. PICHER
ARBITRATOR