CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3622

Heard in Edmonton, Thursday, 14 June 2007

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS, LOCAL 2004

DISPUTE:

The assessment of 20 demerit marks, and time held out of service pending investigation, to employees of Gang 5P42 effective September 30, 2006, for their "failure to follow instructions of your supervisor and your refusal to continue to perform work beyond 8 hours during your work shift on Gang 5P42 on September 30, 2006."

JOINT STATEMENT OF ISSUE:

15 of 16 employees disciplined were each assessed 20 demerit marks plus time held out of service pending investigation, following an incident on September 30, 2006, near McBride, B.C., where employees working on Tie Gang 5P42 were, in the opinion of the Company, insubordinate by refusing to follow their supervisor's instructions to perform overtime work beyond their eight hour work day. The 16th employee's discipline, Mr. D. Wort, was 30 demerit marks as a result of his behaviour during the time that his supervisor was attempting to discuss the matter individually with the other employees.

The Union contends that the discipline assessed in all instances was unwarranted, inconsistent and unjust, and should be entirely expunged based on their position that the Company violated articles 18.2 (f) (I, II, III) when the grievors were removed from service prior to their employee statements. The Union also contends that the discipline should be removed by virtue of the fact that at Step II of the grievance procedure the Company expunged the discipline assessed to one of the employees involved in that incident. The Union further contends that the disciplined assessed two employees, Messrs. Fryer and Bains, should be entirely expunged based on their position that the Company violated articles 18.2(b) by denying their right to Union representation. The Union also contends that the Company violated article 18.3 by not paying the grievors for the time held out of service and has requested that they be made whole for all lost monies and benefits.

The Company disagrees with the Union's contentions and has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. KANE	(SGD.) D. BRODIE
STAFF REPRESENTATIVE	FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
A. DeMontigny	– Sr. Manager, Labour Relations, Montreal
P. Payne	– Manager, Labour Relations, Edmonton
D.Cariati	– Manager, Track Services
D. Sertic	– Track Standards Engineer

And on behalf of the Union:

A. Kane	– Staff Representative, Vancouver
J. Dinnery	– President, Local 2004, Rockglen
J.Chipman	– Witness

R. Goyer	– Witness
P. Jacques	– Witness
D. Martens	– Witness
I. Bains	– Grievor
G. Cail	– Grievor
F. Fryer	– Grievor
B. Garrou	– Grievor
K. Glubrecht	– Grievor
R. Gordey	– Grievor
G. Hues	– Grievor
P. Le Blanc	– Grievor
A. Morais	– Grievor
D. Proudfoot	– Grievor
G. Sutherland	– Grievor
B. Thibault	– Grievor
B. Tosh	– Grievor
D. Wort	– Grievor

AWARD OF THE ARBITRATOR

Several separate heads of dispute have been brought together under this single grievance, as they arise out of the same set of facts. The facts are not substantially disputed. On Saturday, September 30, 2006 the grievors were working as part of Track Services Gang 5P42, comprised of thirty-four employees and a foreman, Extra Gang Lincoln Baley. At or about the commencement of their tour of duty at 02:30 hours in McBride B.C. the gang was informed by Foreman Baley that the Company was going to require them to work on Tuesday October 10, 2006, rather than give them that day as an additional day off in lieu of the Thanksgiving general holiday which fell on the 9th, which was one of their scheduled rest days. The Arbitrator is satisfied that shortly thereafter employees expressed their displeasure, and specifically that a number of them indicated to Foreman Baley that they would work no more than eight hours on that day, September 30th, and thereafter each day for the remainder of their ten day work cycle. The evidence before the Arbitrator, which I consider to be properly tendered, indicates that Mr. Baley communicated that fact by telephone to his immediate supervisor, Track Services Program Supervisor David Sertic at approximately 05:30. Supervisor Sertic later contacted Foreman Baley, sometime after 06:30 hours to advise that he required the gang to continue working through the full available track time block on that day.

The material before the Arbitrator confirms that based on the position taken by approximately seventeen of the thirty-four employees on the gang, to the effect that they would not work beyond eight hours, the gang returned to Dome Creek crossing to remove their equipment from the track at or about 09:00, notwithstanding that their working block had been extended to 11:00. The Arbitrator is satisfied, having regard to all of the evidence, including the statement of employee Brian Tosh, that at the commencement of the tour of duty the seventeen employees in question made it very clear to Mr. Baley that they would not work beyond eight hours. I am also satisfied that based on the pattern of prior days they had every reasonable expectation that overtime would be required, as usual.

As the crew arrived at the Dome Creek crossing they were met by Supervisor Sertic who essentially directed them that they were compelled to work overtime. While extensive evidence was given with respect to what transpired during the conversations which then occurred, the preponderance of the evidence confirms that the seventeen employees in question essentially confirmed their position that they would not work beyond eight hours and Mr. Sertic advised them that they were suspended from service pending an investigation. The evidence further indicates that while Mr. Sertic was in the process of speaking to employees and attempting to do so on an individual basis, employee David Wort insisted on standing close by as individual employees responded to Mr. Sertic. A report written by Mr. Sertic indicates that he viewed Mr. Wort's attitude as confrontational and disobedient as he continued in his course of action for some forty-five minutes "… using frequent profanities, culminating in him telling me "I'd never work any fucking overtime for you." in front of the other employees." Mr. Sertic relates that at that point he further indicated to Mr. Wort that he would be investigated for conduct unbecoming and insubordination.

The Company and the Union were obviously confronted with a difficult situation, as the employees were at an away from home location. Holding them out of service pending the investigation would essentially mean the suspension of any productivity. It was therefore agreed between the parties to accelerate the investigation process. In the result, an agreement was reached whereby employees would continue to be paid their expense allowances while

held out of service and the Union would waive the minimum forty-eight hours' written notice of the formal investigation in accordance with article 18.2 of the collective agreement. All but two of the employee statements were scheduled to be conducted on Monday, October 2, commencing at 08:00. The representatives of the Union indicate, and the Arbitrator accepts, that the Union made the concession with respect to the waiver of the 48 hour period on the clear understanding that the investigations would be scheduled so as to ensure Union representation for all of the employees.

Because Mr. Wort and another employee, Mr. Brian Tosh, were also charged with insubordination, they were in fact held out of service somewhat longer, with Mr. Tosh and Mr. Wort being interviewed on October 6, 2006. It is common ground that the charge of insubordination was dropped as against Mr. Tosh and that he was compensated for the three extra days he was held out of service. Mr. Wort, on the other hand, was assessed thirty demerits, as opposed to the twenty demerits assessed against the remainder of the employees for his additional disrespectful conduct towards Mr. Sertic on the morning of September 30, 2006.

A number of issues arise to be resolved. Firstly, the Union notes that the Company did not in fact hold to its undertaking to commence the statements at 08:00 on Monday, October 2, 2006. In fact it commenced at 07:00. In the result, the Union representatives had not reached McBride and were not present for the investigative interviews of grievors F.C. Fryer and S. Bains. The record indicates that when those two employees were interviewed they were asked whether they were willing to waive Union representation and indicated that they agreed to do so. The Union nevertheless maintains that the Company essentially reneged on an important undertaking which prompted the waiver of the 48 hour notice, and in its view vitiated the concept of a fair and impartial investigation for the two employees in question.

The evidence further discloses that one of the employees who was disciplined, Van Do Truong, was released while held out of service by Foreman Baley to report for a new position in Fort Nelson, B.C. In the result, his investigative statement was taken at that location on October 4, 2006. Because there was no documentary evidence presented in the form of supervisory statements during the course of his investigation the Company subsequently decided to view the investigation as improperly conducted and vacated any discipline as against Mr. Truong. As part of its submission, the Union maintains that the fact that no discipline was ultimately assessed Mr. Truong results in a discriminatory and uneven application of discipline as compared with the treatment afforded to the grievors.

In light of the foregoing, I turn to consider the merits of the grievance. Firstly, as indicated above, I accept the submission of the Company that all of the grievors wilfully participated in the concerted withholding of their services, to the extent that as a group they indicated that they would not work overtime when advised of the Company's handling of the Thanksgiving holiday. They plainly acted on that intention, both by way of their strong expression of view to Mr. Baley and their refusal to relent when encountered by Supervisor Sertic at the Dome Creek crossing on the morning of September 30, 2006. Given the pattern of daily overtime to which they were accustomed they knew, or reasonably should have known, that overtime would be available. Indeed, it is the availability of overtime which, I am satisfied, prompted their very course of action as a retaliatory response.

Prior decisions of this Office have emphasized the severity of what amounts to an illegal strike or the withholding of services by employees in a concerted fashion. The grievance and arbitration process contemplated under the **Canada Labour Code** and collective agreements made under that statute are the appropriate means of redress for perceived workplace injustices, not unlawful self-help. In the circumstances I am satisfied that the assessment of twenty demerits was appropriate in all of the circumstances. Nor do I consider that it was inappropriate to hold the employees out of service for a period of two days pending the completion of the disciplinary investigations. Article 18.2 of the collective agreement specifically contemplates, under paragraph (f)(ii), that measure where the offence being investigated is sufficiently serious to warrant such a step. It is trite to say that the workplace is not a debating society and that employees should adhere to the work now – grieve later rule. The concerted withholding of overtime work by a substantial group of employees, such as to seriously impede productivity, is a serious matter to be dealt with accordingly. I am satisfied that it was not inappropriate to hold the employees in question out of service for a relatively short period, pending the expedited completion of their investigation.

The Arbitrator does consider, however, that the Company did overstep the bounds of fair and impartial treatment by essentially inviting employees Fryer and Bains to undergo their investigative statements when Union representatives could not be present. While the Arbitrator appreciates that the two employees indicated that they were willing to do so, it is only the Union's waiver of its right to insist on the 48 hour notice period that allowed the Company to proceed. The Union's clear understanding in granting that concession was that the investigations would

be conducted with Union representatives present. In the result, I must accept the submission of the Union's representative that the Company did violate the minimal standards of fair and impartial treatment in the manner in which it conducted the investigations of grievors Fryer and Bains. The penalty assessed against them must therefore be viewed as null and void *ab initio*.

As regards the insubordination of Mr. Wort, I am satisfied that the Company did have grounds to assess discipline against him for his disrespectful conduct towards Mr. Sertic at Dome Creek crossing on the morning of September 30, 2006. However, a full assessment of the circumstances suggests that the assessment of thirty demerits was excessive as applied to Mr. Wort. The record discloses that because of the separate charge made against him he was held out of service for a further three days, effectively being subjected to a five day suspension from employment. In the Arbitrator's view that is a significant penalty which, coupled with the assessment of twenty demerits and a written reprimand, would be sufficient to bring home to Mr. Wort the need to be respectful towards his supervisors in any similar circumstance in the future. Nor can the Arbitrator find that the fair treatment accorded to Mr. Truong demonstrates prejudice or injustice towards the grievors, whose collective agreement rights were not violated.

For all of the foregoing reasons the grievance is allowed, in part. The assessment of twenty demerits as against all of the employees shall be allowed to stand, without compensation for their time held out of service. The assessment of thirty demerits assessed against Mr. Wort shall be amended to twenty demerits plus a reprimand, in light of the more extended period of time he was held out of service. Finally, for the reasons expressed above, the discipline as assessed against Employees Fryer and Bains shall be removed from their records as being void *ab initio*.

June 18, 2007

(signed) MICHEL G. PICHER
ARBITRATOR