

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3673

Heard in Montreal, Tuesday, 13 May 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The discharge of Assistant Conductor Janice Storla of Saskatoon, SK for violation of CROR Rules 104(k), 105,114, 115 and GOI section 8.12.13.

UNION'S STATEMENT OF ISSUE:

The grievor was working as Assistant Conductor (Yard) on the 0755 East End assignment in Saskatoon Yard on October 19, 2007. During this tour of duty, the grievor parte was operating a belt pack locomotive and engaged in pulling a cut of cars eastward when the locomotive was involved in a side collision with inbound train 453,

An employee investigation took place, following which Superintendent Jim Newton advised the grievor that she had the option to either accept a thirty day suspension and waive her rights to grieve or she would be dismissed. The Union's Local Chairperson advised Mr. Newton that the grievor was not willing to waive any rights and the Company should assess whatever discipline they feel is appropriate. The grievor was dismissed.

The Union contends that the Company has acted improperly by attempting to coerce the grievor to waive her substantive rights. The Union submits that the Company's actions, contrary to the collective agreement and *Canada Labour Code*, taint this assessment of discipline to a point where it ought to be declared void *ab initio*.

The Union also contends that the grievor was denied the right to a fair and impartial investigation in that she was denied the right to attend the Company's investigation of other crew members contrary to Article 117 of Agreement 4.3. The Union submits that the discipline assessed ought to be declared void *ab initio* for this reason as well.

The Union further contends that the assessment of discharge is excessive in the extreme, given the circumstances, especially given the fact that the Yard Conductor in charge of the assignment was only assessed thirty demerits. The Union requests that the discharge be replaced with an assessment of discipline more appropriate in the circumstances.

Additionally, and without prejudice to any of the foregoing, the Union submits that the assessment of a discharge is excessive in the context of progressive discipline given that the Company relies on previous discipline on the grievor's record that is still in the grievance procedure. The Union requests that the discharge be replaced with an assessment of discipline mare appropriate in the circumstances,

The Company disagrees, having declined the grievance without meeting and has failed to address the Union's allegations of actions contrary to the collective agreement and *Canada Labour Code*.

FOR THE UNION:

(SGD.) R. S. THOMPSON
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

- K. Morris – Manager, Labour Relations, Edmonton
- J. Newton – Superintendent, Operations, Saskatoon
- B. Laidlaw – Manager, Labour Relations, Winnipeg
- D. Crossnan – Manager, Labour Relations, Prince George
- P. Payne – Manager, Labour Relations, Edmonton
- A. Daigle – Manager, Labour Relations, Montreal

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- R. S. Thompson – General Chairperson, Edmonton
- R. A. Hackl – Witness
- J. Storla – Grievor

AWARD OF THE ARBITRATOR

The grievor was the assistant yard conductor performing a belt pack assignment in the Saskatoon yard with a fellow crew member acting as yard conductor. They were accompanied by a student trainee.

The first assignment for the crew was to pull twenty-seven cars on track SC 24. A job briefing took place prior to the assignment. Following the briefing, the grievor took control of the belt pack locomotive and coupled the twenty-seven railcars on track SC 24. The grievor then initiated a reverse movement in an eastward direction. The grievor, for this manoeuvre, had positioned herself on the ground near track SC 24 next to the yard conductor. The grievor did not move from this location at the west end but rather remained positioned with the conductor who was to monitor the leading end of the movement. The locomotive moved eastward and reached the location of the west crossover switch. The grievor, however, did not stop her belt pack movement before the locomotive reached the east crossover switch. The belt pack locomotive collided with train 453. Five railcars were damaged and eight automobiles were destroyed for a total accident cost of \$580,000.

The Union maintains that the grievor was forthright in her statement and that the major responsibility for the accident lies with the conductor. The Company maintains that the grievor, by her own admission during her statement, breached several cardinal rules including: rule 104(k) dealing with the proper lining of switches; rule 115 (d) which requires a member of the crew to be on the lead locomotive while making a backup movement with a locomotive consist where visibility is restricted; rule 105 which requires that a train or engine using other than a main track must operate at a reduced speed; and, rule 114 which states that equipment must not be moved or fouled of another track unless the movement is properly protected. In addition, again by her own admission, the grievor acknowledged breaching several GOI rules-including not controlling the movement of rail equipment as well as not following proper procedure for pushing equipment.

The Union raised a point in argument that the grievor was not advised of her right to attend the statement of the conductor. As a result, the Union claims that the discipline should be declared void *ab initio*. Apart from the Union not raising this issue within the grievance procedure, Mr. Terry Hoult, who conducted the investigation, indicated in an email to the Company prior to these proceedings that he received a verbal assurance from the grievor, as well as from the conductor, that they did not wish to attend each other's statements. On the strength of that written assertion, and bearing in mind that it was Mr. Hoult himself who conducted the investigation, I find that the grievor's right to attend a statement of the conductor was not violated. It is also worth noting that the Union representative, Mr. Campbell, was present at both the grievor's statement and that of the conductor's.

There is also evidence before me that discussions took place between the Union and the Company regarding the grievor being offered a thirty day suspension on the understanding that she would waive her right to grieve the current discipline. Those discussions were mentioned in a confirming letter from the Union to the Company where the Union rejected the thirty day offer. I find that it would be inappropriate to rely on what, in my view, were otherwise intended to be "without prejudice" settlement discussions to be determinative of the Company's position on the penalty issue. The settlement discussions here should be viewed in the same way as any other discussions

which take place within the context of the grievance procedure. The well-known rule is that such discussions ordinarily attract the cloak of privilege. It would undermine the freedom the parties enjoy in these types of discussions to hold one side responsible for an offer that was clearly intended exclusively for negotiation purposes only. That is what I find occurred with respect to the thirty day offer in this case. I therefore place no weight on the thirty day offer made by the Company to the Union in exchange for the grievor abandoning her current grievance.

In this instance, the grievor, was clearly not performing her duties properly on October 19, 2007. Her inattentiveness, along with that of her crew members, led to significant damage to Company property. The clear breaches of several cardinal rules in this case underline the need to underscore that the responsibility for the operation of Company rail cars with remote equipment in a safe manner is very important. The grievor effectively stepped into the position of a locomotive engineer and carried a significant part of the burden of ensuring the safe passage of the movement.

The grievor's record of ten demerits (**CROA&DR 3671**) was followed by a three-day suspension (**CROA&DR 3672**), for rule breaches that occurred some two and a half years prior to this incident. Accordingly, the grievor had no demerits on her record at the time of the current incident on October 19, 2007. The grievor's length of service of 16 years (albeit eight of which she was absent due to a very serious work-related injury), her forthrightness during investigation and the fact that two and a half years have passed since her last rules violation are factors which mitigate in her favour. In addition, I place significant weight on the fact that the conductor, who also shares significant responsibility for these events, was only disciplined thirty demerits for the same incident. Absent any other aggravating factors, the grievor should be in no better or worse position than her fellow crew member.

The grievance is allowed. The grievor shall be reinstated with compensation for all lost wages benefits and her seniority restored from the date of her dismissal. Her record of discipline for the incident shall be recorded as thirty demerits.

May 20, 2008

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