CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

SUPPLEMENTARY AWARD TO CASE NO. 3673

Heard in Montreal, Tuesday, 10 February 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Dispute with respect to the application of certain benefits to the grievor.

UNION'S STATEMENT OF ISSUE:

On May 20, 2008, the Arbitrator issued the award in CROA&DR 3673, allowing the Union's grievance and reinstating Assistant Conductor Janice Storla into employment "with compensation for all lost wages [and] benefits and her seniority restored from the date of her dismissal.

Upon her reinstatement into employment the Company did not remove twenty demerits from the grievor's discipline record as is done for employees who have been discipline free for a period of 12 months. The Company takes the position that the grievor is not entitled to the benefit of having discipline removed every 12 months as her service during this time is not "active" service.

The Union disagrees and maintains that the Company's position is discriminatory, contrary to the Arbitrator's award as well as past practice and the collective agreement.

COMPANY'S STATEMENT OF ISSUE

On May 20, 2008 the Arbitrator issued the award in CROA&DR 3673, reinstating Ms. Storla to active service "with compensation for all lost wages benefits and her seniority restored from the date of her dismissal." The Arbitrator also determined "Her record of discipline for the incident shall be recorded as thirty demerits."

The Union contends the Company failed to remove twenty (20) demerits from the grievor's discipline record following a period of twelve months from date of culminating incident resulting in her discharge.

The Union claims the Company Discipline Policy that requires employees such as Ms. Storla to perform "twelve consecutive months of active service, free of discipline" as discriminatory, contrary to the Arbitrator's award as well as past practice and the collective agreement 4.3.

The Company submits the Company discipline policy in these circumstances is not arbitrable and the administration of the discipline records by the Company in this manner is not discriminatory nor is it contrary to the Arbitrator's award or collective agreement 4.3.

FOR THE UNION:

(SGD.) B. R. BOECHLER
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.)K. MORRIS
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
D. Gagné	– Manager, Labour Relations, Montreal
D. S. Fisher	– Director, Labour Relations, Montreal

And on behalf of the Union:

M. Church	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairman, Edmonton
B. R. Boechler	– General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The issue in this supplementary award is whether the grievor is entitled to have twenty demerits removed from her disciplinary record as a result of an order that she be reinstated to her employment and compensated for all wages and lost benefits. The basis for the grievor's claim is found in the Company disciplinary policy, the relevant portion of which reads as follows:

> Company Discipline policy
>
> 3. Demerit Marks
>
> A system of marks to be assessed against an employee's record according to the circumstances in each case. …
>
> For every twelve consecutive months of active service, free from discipline, an employee will have 20 demerits marks deducted from any that may stand against the employee's record.

The Union does not take issue with the Company's policy which allows for the removal of twenty demerits for every twelve consecutive months of active service if the employee is free of discipline. It simply asserts that the policy has been misapplied by the Company in refusing to remove twenty demerits points, despite the Arbitrator's direction to restore the grievor's benefits from the date of her dismissal. The Union's position is essentially that the grievor, as a result of the reinstatement of her "benefits", should be considered under the policy to have been actively at work from the date of her termination. The Union further claims that the Company took a chance when it terminated the grievor. The consequence of that choice is that the Company is now faced with having to treat the grievor in the same manner as it would have had the grievor remained actively employed. That includes the "benefit" of having her employment record reduced by up to twenty demerits in the same way as any other employee with a discipline-free record over twelve consecutive months.

The Company maintains that the policy has been consistently administered in the past to exclude numerous types of absences from the calculation of the twelve month discipline free period. They include absences for personal leaves, absences for illness and injury, absence for sickness and absences due to disciplinary suspensions. In these instances, the Company points out that an employee is not considered to be on "active" service and therefore would not accumulate time towards the reduction of demerits under the policy. The Company also maintains that the discipline policy is not a matter which is dealt with in the Collective Agreement and should therefore not be subject to a challenge in arbitration proceedings.

The term "benefits", in my view, commonly refers to those negotiated collective agreement items carrying a monetary value such as health care plans or pension credits. The term "benefits", again in my view, was not intended to cover any other non-negotiated subject matter, such as the right to have demerits expunged from a work record in the event of twelve months of discipline-free active service. Such a "benefit" would have to be clearly articulated in the collective agreement and there is no such provision before me or any other evidence which suggests the parties have ever agreed to such a term.

The Union does, however, point out two cases of dismissed employees who were terminated in 1996. These same employees were reinstated in 1997 and demerits were deducted according to the discipline policy. The employer claims that these were administrative errors. In the end, I do not find this evidence sufficient or persuasive enough to find that a practice exists to remove demerits in cases of dismissed employees who do not provide active service as required under the policy.

I also note that the grievor did not provide continuous active service over a period of twelve months, as other active service employees are required to do in order to receive the twenty demerit deduction. Those employees who

provide active service are, unlike the grievor, in a position where they are exposed to being disciplined for work-related infractions while on the job. If the Union's submission was upheld, the grievor would be in a position of receiving credit for a period of "active" service, which is ultimately to be used in the calculation of the required twelve months of continuous active service, without having to step her foot in the workplace during the period between her termination and reinstatement. That would, in my view, not only be an unreasonable application of the policy but also particularly unfair to those employees on continuous active service who, it should be said, risk being disciplined on an ongoing basis.

For all the above reasons, the grievor's request for a reduction of demerits is denied.

February 17, 2009

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