CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3731

Heard in Calgary, Wednesday, 11 March 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Closure of D. Cabylis' employment file while on probationary status with the Company.

COMPANY'S STATEMENT OF ISSUE:

On February 21, 2008, the Company deemed Mr. D. Cabylis to be unsuitable for employment with the Company as a conductor and formally notified him that his file was being closed in accordance with the Company's rights pursuant to article 108A.10, paragraph (d) of agreement 4.3.

The Union contends that although the grievor was still under probationary status, he was an excellent student and does possess the skills to be a good employee.

The Union requests that the Company reconsider the arbitrary dismissal and reinstate the grievor to active service.

The Company maintains that it properly exercised its rights and has denied the Union's request.

FOR THE COMPANY:

(SGD.) K. MORRIS

FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. VanCauwenbergh	– Director, Labour Relations, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton
J. Thompson	– Assistant Superintendent Operations, Winnipeg
B. Cox	– Trainmaster, Melville

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
M. Rutzki	– Secretary, GCA, Melville

AWARD OF THE ARBITRATOR

The record discloses that the grievor was terminated, as a probationary employee, following a serious derailment which, it is not disputed, was occasioned by his error of judgement while working as yard conductor. The position of the Company is that as the grievor was on probationary status it was within its discretion to conclude that he was not suitable for continued employment and to close his employment file. The Union maintains that in fact there was an element of arbitrariness on the part of the Company.

It is well settled that boards of arbitration do not lightly interfere with the decisions of employers with respect to the termination of newly hired employees during the course of a probationary period. The governing principles were summarized as follows in **CROA 1568**:

> It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status. … I t is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.

See also **CROA 821** and **2725**.

The Arbitrator is satisfied that there was no discrimination or bad faith exhibited by the Company in its decision to close the employment file of Conductor Cabylis. There are, however, certain factors which arise in the evidence which, as the Union argues, do raise the issue of whether there was a degree of arbitrariness in the manner in which the grievor was treated, overall. Firstly, it is common ground that the collective agreement contemplates that the grievor, as an employee subject to the terms of the collective agreement, was entitled to an eight-week program of classroom training before he was to undertake his on-the-job training. That is reflected in article 108A.7 of the collective agreement.

> 108A.7 (a) Each Trainee will be required to attend eight (8) weeks in the classroom training program. If successful the Trainee will be certified as a Conductor Trainee, herein after referred to as a Trainee.

It is not disputed that the grievor was not provided with the eight weeks of classroom training contemplated within the above provision. In fact, he received only five weeks of classroom training before being progressed to performing trial tours of duty, beltpack and CLO training.

The Company's representative objects that the issue of truncated training was not raised during the discussions between the parties during the course of the grievance procedure. The Union, however, notes that a separate grievance had been filed in

respect of that question, and that the Company was aware of its concerns in that regard. On the whole, the Arbitrator is not persuaded that there is unfairness to the Company in the Union's advancing of that issue. While the Union would be required to identify that article of the collective agreement if the grievance were specifically in relation to an alleged violation of that article, it has chosen to rest the instant grievance on an assertion of arbitrariness. The facts or elements which make up that arbitrariness are not, under the provisions of the collective agreement or the memorandum which governs this Office, elements which the Union must necessarily disclose to the Company in advance of the arbitration, albeit in some circumstances surprise in that regard might be a proper basis for granting an adjournment. No adjournment was requested in the case at hand. I am therefore satisfied that the failure of the Company to give to the grievor that degree of training which the parties themselves contemplated as being appropriate to a newly hired employee, at least in respect of classroom training, is a relevant consideration in assessing whether there was a degree of arbitrariness in the treatment of Mr. Cabylis.

The foregoing comment also tends to undermine the alternative argument made by the Company's representative, namely that the grievor scored extremely well in the classroom segment of his training, effectively standing first in his class. As true as that may be, it does not speak to the overall standard of training or completeness which all of the candidates received. In the result, the Company's failure to provide the requisite classroom training to the grievor must be viewed as an element going to the issue of arbitrariness in his termination.

There is a second factor which, in my view, also goes to the issue of arbitrariness. It is clear that the Company's decision was substantially motivated by an incident which occurred on February 14, 2008. On that day the grievor was instructed to switch cars into track MA04 in Melville yard. There was then a "job-aid" document apparently posted on the property which gave data as to the number of cars that could be contained in the various tracks of the yard. It seems it was prepared by the Company for use by persons doing yard switching during a previous strike. The job aid stated that track MA04 could hold 91 cars. As the grievor's additional cars would bring the total in the track to 88 cars, he believed the track had sufficient space to handle the cars he was adding. It is also not disputed that the track in question was under a "known to be clear" exception to CROR Rule115, which allowed cars to be switched into it without a person riding on the point of the movement.

In fact the track could not handle 91 cars in all cases, as that number appears, without explanation, to have been based on cars of relatively short length. When longer cars are introduced into the mix, the track is bound to overflow. That is what happened when the grievor switched additional cars into track MA04, which resulted in the derailment of some cars, including cars carrying dangerous goods, even though the track contained fewer than 91 cars. As noted above, that derailment was the principal reason for the employer's decision to terminate the grievor.

In the Arbitrator's view, the facts so described demonstrate an element of contributory negligence on the part of the Company with respect to the events of February 14, 2008. There is, in my view, an element of arbitrariness for the Company to have summarily terminated Mr. Cabylis in these circumstances. When these facts are coupled with the failure to provide him the requisite training, I am satisfied that in the unusual circumstances of this case that the Union has discharged the burden of establishing that the grievor's termination was arbitrary, albeit there was some element of fault on the part of the grievor.

For the foregoing reasons, the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost, and without loss of seniority. The grievor's reinstatement is conditioned on the discretion of the Company to restrict him to yard service for the period of one year from the date of his reinstatement, should it choose to do so.

March 17, 2009

(signed) MICHEL G. PICHER
ARBITRATOR