CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION

CASE NO. 3741

Heard in Montreal, Wednesday, 15 April 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

The assessment of 30 demerits to Heavy Equipment Operator, P. Myhaluk, for his alleged "failure to comply with CN productivity expectations while operating crane CN 10517 on September 10, 2008.

JOINT STATEMENT OF ISSUE:

On October 6, 2008, a formal investigation was conducted with Heavy Equipment Operator P. Myhaluk concerning an allegation that he failed to comply with CN productivity expectations while operating crane CN 10517 on September 10, 2008.

Following the investigation the Company assessed Mr. Myhaluk with 30 demerits. The Union appealed the discipline assessed contending that the Company has failed to determine the grievor's responsibility and that the discipline assessed was unwarranted and should be removed in its entirety.

On January 15, 2009, the Union amended their grievance also alleging that the Company targeted Mr. Myhaluk as a result of his activities as a Union Representative and Health and Safety Representative. The January 15, 2009, letter further contends that the discipline was issued in bad faith, was discriminatory in nature and a form of harassment by the Company. The Union requests that Mr. Muhaluk be transferred from the Brampton Intermodal Terminal to another position within the 5.1 Agreement.

The Company maintains that the grievor's responsibility and that the assessment of 30 demerits was warranted. The Company additionally maintains that the allegations raised in the Union January 15, 2009, amendment are without merit and have no bearing on the instant dispute.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

R. Bateman	– Sr. Manager, Labour Relations, Toronto
D. S. Fisher	– Director, Labour Relations, Montreal
D. Cater	– Terminal Manager, Brampton Intermodal Terminal, Brampton

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
P. Myhaluk	– Grievor

AWARD OF THE ARBITRATOR

The Company's productivity expectations policy concerning the combined Lunch/Break from April 2005 states five minutes is allowed for the employee to proceed to the building to wash up, followed by a 45 minute combined break. The policy states that the "… total 50 minutes will be monitored from the time employees log back into OASIS and/or depart from the parking area to their lunch, until employees log back into OASIS prior to their lunch break and/or depart from the parking area after lunch. Similar to the shift start an employee will be expected to make their first productive move after lunch within 5 minutes of their OASIS log in." I am satisfied on the evidence before me that the grievor logged off his machine just before 1:00 p.m. and logged back on at or near 2:00 p.m., exceeding the 50 minute lunch break allotment by some 10 minutes. The policy is clear and well-known and there is no basis for the estoppel argument advanced by the Union that the lunch period was still one hour as it had been prior to the introduction of the productivity expectations policy in 2005.

The grievor was observed that same day by a Supervisor at the end of his shift at approximately 2:30 p.m. leaving the north end of his yard heading south at the same time that the Supervisor was travelling north to conduct efficiency testing. There is sufficient evidence before me to find on the balance of probabilities that the grievor was manipulating the reporting of previous work completed as he was no longer in his assigned work area. The GPS data report for his crane indicates that he completed his last move at 14:34 and that the same crane arrived at the BIT parking area at 14:38. The grievor entered 14:39 in the OASIS as the time of his last move. I do not accept his explanation that the 14:39 time was due to a computer glitch. The more likely explanation is that the grievor purposely failed to press the "enter" button and properly log out at the end of his shift to make it appear that he was still working, as subsequently confirmed by the GPS data. The evidence further supports the submission of the Company that the grievor entered container movements in the OASIS system at a time when his equipment was not in the productive work area.

The grievor did attempt to disguise his activities while working as a crane operator on September 10, 2008. The most serious transgression in my view was the manner in which the grievor made it appear that he was working when he had in fact was found in the parking area well before the end of his shift. The grievor never admitted to any transgression about leaving his shift early and in fact tried to cover up his actions by suggesting that the computer in his crane was the root cause of the time recording problem. The grievor also purposely did not adhere to the lunch/break schedule and readily admitted to taking an hour rather than the allotted 50 minutes for lunch. Not only is there ample cause for discipline here but there are no significant mitigating factors which persuade me to alter the penalty of 35 demerits. Although 35

demerits stands as a significant penalty assessment under the Brown system, it is not out of line here given the dishonest actions and failure of the grievor to be forthright about his behaviour during his shift.

The Union did not provide any cogent evidence that the grievor was targeted because of his activities as a Union representative or as a Health and Safety Representative as set out in the joint statement. Accordingly, there is no basis for the submission that the grievor was the subject of harassment or discrimination.

The grievance is dismissed.

May 4, 2009

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