CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3749

Heard in Montreal, Thursday, 16 April 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Discharge of Conductor Charles Anderson.

UNION'S STATEMENT OF ISSUE:

On October 04, 2007, the grievor, Charles Anderson, was required to attend a Company investigation in connection with: "circumstances surrounding but not limited to your failure to provide our Customers with planned service, lack of productivity and negative operational impact resulting in additional operating cost between September 14 and September 28".

Subsequent to the investigation Mr. Anderson was discharged. The Union submits that the Company blatantly violated: **(1.)** Article 82 of the Collective Agreement 4.16. **(2.)** The Workplace Environment provision of the 4.16 Collective Agreement (including the discharge and the Company's managing of this grievor).

Given the blatant violations of the Collective Agreement, in addition to other relief requested, the Union submits that a remedy, in the application of Addendum 123 of Agreement 4.16, is appropriate in the circumstances. The Union requests that the Arbitrator issue an appropriate remedy.

In the alternative, remit such matters back to the parties for purposes of reaching an agreement on an appropriate remedy with a 30 day time period or as otherwise determined by the Arbitrator. That the Arbitrator retain jurisdiction to resolve such matters with respect to the appropriate remedy to apply should the parties fail to reach agreement.

Further, the Union requests that; **(1.)** The grievor be exonerated of any wrongdoing and the discipline assessed to be removed from his work record. **(2.)** The grievor be returned to service without loss of seniority and compensated all lost wages and benefits. **(3.)** The Company to be found in violation of Article 82. **(4.)** The Company to be found in violation of the Workplace Environment Provision of Agreement 4.16. **(5.)** The grievor to be made whole as a result of such discharge. **(6.)** The Arbitrator to issue cease and desist directives to the Company with respect to the violations of the Collective Agreement. **(7.)** Any other relief or alternative relief, in favour of the Union, as deemed appropriate in the circumstances.

The Company disagrees with the Union.

FOR THE UNION:

(SGD.) J. R. ROBBINS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

F. O'Neill	– Manager, Labour Relations, MacMillan Yard
R. A. Bowden	– Manager, Labour Relations, MacMillan Yard
J. Kelly	– Manager, GO Operations, Toronto

And on behalf of the Union:

G. Gower	– Sr. Vice-General Chairman, Belleville
J. R. Robbins	– General Chairman, Sarnia
R. A. Beatty	– Transition Director, Sault Ste. Marie
C. Little	– General Secretary/Treasurer, Local Chairwoman, Belleville
C. Anderson	– Grievor

AWARD OF THE ARBITRATOR

There are three incidents which led to the grievor's termination. The first incident occurred on September 14, 2007 when eastboud train M30511-13 had gone into emergency and was tying up the mainline outside of Belleville. The grievor, who had a regular road switcher assignment as a Conductor on train L590/591, failed to do any work during a four hour period between 09:00 and 13:00 which, in the Company's view, resulted in a delay in forwarding customer product. The facts in that regard are that the crew had tied onto a string of cars on BY 13, as instructed to do after their morning meeting. The crew then waited at the head of the track BY 13 for four hours without performing any work. Rather than remaining idle on BY 13, the Arbitrator agrees with the Company that the grievor should have taken the operational steps expected of someone in his position such as requesting a joint authority from M30511-13 to get the head room required to switch out of track BY 13; or, take small blocks of cars from track BY 13. The switching out of small cuts of cars would not have required a joint authority request. The grievor did not display the initiative required of someone in his position on September 14, 2007.

The second incident occurred on September 26, 2007 when the grievor was the conductor on the same assignment. The grievor received information that cars in his assignment could not be hooked up as scheduled. The grievor failed to inform his supervisor of the delay. As a result, a train went up to the Bath Spur looking for cars but there were no cars in position. The grievor, in my view, failed in his responsibiliy to ensure that his work schedule was completed on that day.

The third incident occcurred two days later on September 28, 2007 when the grievor failed to switch a customer's cars and also failed to report to his Supervisor and TRS group that he did not complete his assignment. The grievor admitted during his statement that he took full responsibility for the cars not being pulled and should have paid closer attention to his work. He again failed to live up to his assigned responsibilities for the third time that month.

The Union raised a number of procedural objections. The Union first alleges that the Company failed to conduct a fair and impartial investigation because the Company did not question the other crew members with respect to all three incidents. As noted in **CROA 3461**, in

the absence of a provision in the collective agreement stating otherwise, there is no onus on the Company to interview each and every person involved in an incident. The only risk to the Company, as noted below, is that of adverse inferences being drawn against the Company when dealing with the merits of any subsequent discipline, as noted below in **CROA 3461:**

> As a preliminary issue the Union alleges a violation of the standard of a fair and impartial hearing according to article 82 of the collective agreement. It does so on three grounds. First is the passage of time between the incident of October 28, 2003 and the investigation, held on March 6, 2004. Second is the fact that the Company handed the grievor a letter of removal from passenger service at the conclusion of the investigative meeting. Third is the Company's refusal to call as witnesses persons suggested by the Union.
>
> The Arbitrator cannot sustain the last two grounds of objection. There is no obligation on the employer to call witnesses requested by the Union, and the failure to do so has been found not to violate the basic standard of a fair and impartial investigation (see, **CROA 2920** and **2934**), although a failure to do so can put the Company at peril of adverse inferences being drawn against it on the merits of any eventual discipline.

See also **CROA 3436**.

The Union next claims that the notice to attend the investigative hearing was improper. A review of the notice does not support the Union's submission. The notice identifies the period under review as well as the nature of the workplace offences. Neither the grievor nor the Union ever raised an objecition to the notice at the ouset or during the investigation. The grievor in that regard acknowledged at Q and A #4 that he was properly notified of the investigation and was prepared to proceed. The grievor, it is also worth noting, was then provided with a host of documents and further acknowledged, as noted at Q and A #6, that the employee statement was his opportunity to present any evidence, documents, facts or explanations on the matters under investigation.

The Union further alleges that the investigating officer failed to provide the grievor with the opportunity to question him or any of the other witnesses. There is not a shred of evidence which supports this allegation. Apart from one objection concerning a re-crew on September 14, 2007, the Union representative did not raise any objections during the course of the statement including any concerns about her inability to put questions to any witnesses. The Union representative in fact was specifically asked at Q & A # 61 if she had questions to put through the presiding officer and she replied "not at this time". At Q & A 62, she was again specifically asked if she had anything further she wished to add to the employee statement and provided the same answer. The Union cannot wait in the wings and claim unfairness at arbitration when there are no objections raised at the time of the employee statement.

The Union's next allegation that the grievor was somehow prejudged or that the investigating officer provided evidence against the grievor are also objections which are unsupported by the evidence. There is nothing prejudicial, in my view, in the notice to attend the investigation. Nor does a review of the questions put to the grievor during his statement suggest that the investigating officer's questions amount to "providing evidence" against the grievor as the Union alleges. See: **CROA 1852, 1733, 1781** and **AH 548**

Finally, the Union alleges that the Company violated the Workplace Environment provision of the collective agreement. The provision states that a grievance may be filed on the basis of alleged harassment or intimidation by management. The "Remedy Provision'' at Addemdum

123 is applicable in the event of a violation of the collective agreement is found. In this case the Union alleges that the Company "… had a right to investigate the Grievor but exercised those rights unreasonably by knowingly blatantly violating the rights of the Grievor". As noted above, there is no evidence here of procedural unfairness. All of the procedural allegations of the Union with respect to the violation of the grievor's rights have been dealt with individually and rejected. Further, this case, in my view, is unlike **CROA 3310** where the arbitrator found that the Company representatives "…knew they were acting contrary to their contractual obligations and without the Union's agreement" before ordering a remedy. There is no evidentiary support for the Union's allegation of harassment and intimidation in the investigative process, or otherwise, that would support a finding of a breach of the Workplace Environment provision. Specifically, there is no evidence that the Company deliberately set out to target the grievor as the Union alleges.

Accordingly, all the Union's objections concerning the fairness and impartiality of the hearing are dismissed, as well as the Union's submission with respect to a violation of the grievor's righs pursuant to the Workplace Environment provision.

Turning to the merits, the three incidents taken individually or collectively support a disciplinary response. The grievor had only 3 years of service and yet had amassed a record of 59 demerits before the September 14, 2007 incident. He was clearly on the precipice of dismissal and yet has unfortunately been unable to turn things around as he was required to do under the circumstances. The grievor is in a real sense the author of his own misfortune. He can no longer be counted on, in my view, to carry out his duties on an ongoing basis in a manner expected from someone in his safety-sensitive position.

The grievance is dismissed.

May 7, 2009

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