CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3752

Heard in Montreal, Thursday, 16 April 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of 20 demerits to Shayne Gormley with respect to his tour of duty as a Traffic Coordinator on December 24, 2006.

UNION'S STATEMENT OF ISSUE:

Shayne Gormley was working as a Traffic Coordinator in Vancouver's Thornton Yard on December 24, 2006. He was contacted by a BN Crew seeking yarding instructions and assistance. The grievor provided instructions to the BN Crew and committed to monitor their movement and assist via camera.

The BN movement became involved in a side swipe of yard movement on the west end of the yard. The grievor was required to provide an employee statement with respect to this matter, following which, he was assessed 20 demerits.

The Union contends that, while the grievor certainly contributed to this incident, the BN crew's failure to comply with radio regulations was the single greatest causal factor with respect to the sideswipe. In fact, compliance on their part would have totally prevented this incident. Accordingly, the Union submits that this fact, coupled with other mitigating factors, the assessment of 20 demerits is excessive and ought to be reduced.

The Company contends that the assessment of 20 demerits is appropriate in all the circumstances and has declined the grievance.

FOR THE UNION:

(SGD.) R. A. HACKL
FOR: 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

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto

B. R. Boechler – General Chairman, Edmonton
R. A. Hackl – Sr. Vice-General Chairman, Edmonton
S. Gormley – Grievor

AWARD OF THE ARBITRATOR

The following is the award of the arbitrator in **CROA&DR 3752** and **3753**.

The facts are not in dispute. The grievor first instructed the BN crew to yard their train into track PF06. He then further instructed the BN crew to double over the head end 23 cars into track PF01. There were 63 cars already sitting in track PF01 at the time. The grievor further advised the crew that he would monitor their movement. The BN crew understood that the grievor was observing the track and began shoving their cars into PFO1 as instructed. While doing so, the BN cars coupled onto the stationary cars already in the track causing them to move westward out of track PF01 and into the side of the west lead yard assignment resulting in a derailment. The grievor indicated at his investigation that he had control of the movement in accordance with CROR 115.

The Union concedes that discipline is appropriate but that 20 demerits is an excessive disciplinary response. The Company maintains that the grievor is deserving of the 20 demerits given the violation of CROR 115.

The grievor admitted at the investigation that he had assumed responsibility of the BN movement while shoving the 23 cars. The grievor clearly did not try to deflect responsibility for his actions during his statement. He appears to have learned from the incident and has also expressed a genuine resolve to do his best in the future. There are also other mitigating factors to consider including the grievor's 15 years of service and the fact that he has had no current demerits on his record. After reviewing the circumstances of this case, and also having reviewed similar decisions of this office, including **CROA 2990** and **3237**, I am of the view that this is an appropriate case to reduce the penalty of 20 demerits imposed by the Company.

The grievance is upheld with the direction that the record of the grievor for this incident in **CROA&DR 3752** show a reduction to a disciplinary penalty of 15 demerits.

As part of the Company's investigation into the incident, the grievor was required to undergo post-accident alcohol and drug testing some four hours after the incident. His breath sample was negative for the presence of alcohol. The urine sample he provided confirmed the presence of marijuana metabolites. The grievor was removed from service. The grievor attended a formal investigation regarding his failure to comply with the Company Drug and Alcohol policy during his tour of duty on December 24, 2006. The grievor denied at the investigation that he was impaired by drugs while on duty and also denied having a drug or alcohol problem. The grievor was given his termination notice on January 31, 2007.

The Company policy states, at p.7, that drug testing with be performed:

> … where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy, including after an accident or incident. Post accident testing is done after any significant accident or incident where an experienced operating officer, upon consideration of the circumstances determines that the cause may involve or is likely to involve a rule violation and/or employee judgment.

Arbitrator Picher endorsed the acceptability of post-accident drug testing in **SHP 530:**

> I am also satisfied that a fair extension of reasonable cause testing is that it applies quite properly in a post accident or post incident situation.

Arbitrator Jolliffe also endorsed this approach in a recent decision submitted by the Union: United Assn. Of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 663 v. Mechanical Contractors Association of Sarnia [2008] OLAA No. 621. He notes at paragraph 149:

> Frankly, I prefer the approach taken by Arbitrator Picher as recently discussed in his 2007 decided *Imperial Oil* case as upheld on judicial review which I interpret as varying little from the analyses undertaken by several other arbitrators in various provincial jurisdictions, as noted by the parties set out earlier in this award … As the case law has developed, I do not see that for non-random testing one's concern has ultimately moved far from the longstanding principle that any demand for testing, being a physical intrusion on the person "… must be used judicially and only with demonstrable justification, based on reasonable and probable grounds", as earlier stated by Arbitrator Picher in the CNR case, and in my view not much altered by human rights analysis.

and further at paragraph 151:

> Firstly, with respect to the MCAS members' policies respecting the testing itself, although they vary to a degree as presented, in my view, they are acceptable where indicating that the company may require at its discretion that testing take place in order to confirm or eliminate alcohol or drug consumption as a contributing factor where the employer has reasonable cause to suspect impairment by reason of immediate observations concerning employee performance or demeanour. Likewise they are acceptable where an incident/accident has occurred where there is cause to suspect alcohol or drug use by reason of the occurrence itself, observations and surrounding circumstances, and in such case such testing should be done as soon as possible, with four hours having been mentioned as the outside limit in most of the written policies.

The grievor in this case failed to properly monitor the movement as he had undertaken to do in violation of CROR 115(c). The grievor himself admitted in that regard that he assumed responsibility to observe the track as the crew began shoving the cars into track PF01. The ensuing collision produced a derailment which fortunately only resulted in equipment damage and no personal injuries on this particular tour of duty. I do not have any difficulty accepting the position of the Company that there were grounds for alcohol and drug testing, pursuant to the terms of the policy, as a result of the accident and the direct involvement of the grievor, who had assumed the prime responsibility for monitoring the movement on track PF01.

The reliability of drug testing as an indication of impairment while on duty was addressed by Arbitrator Picher in **SHP 530**. The *Conclusion* portion of his award states in part:

> 2. A positive drug test is not conclusive of impairment when on duty, subject to duty or on call. It does not, therefore, of itself constitute just cause for discipline or discharge. It may, however, become material evidence, support inferences of impairment that do justify discipline or discharge.

And similarly in **CROA 3632** :

> What does the evidence in the case at hand confirm? Firstly, the positive drug test result cannot, of itself, confirm that the grievor was under the influence of

> marijuana during the course of his duty. As noted in prior awards (**SHP 530**), the positive result for cannabinoids can only indicate the consumption of marijuana over a relatively broad band of time, most commonly in the area of approximately one week in advance of the taking of the sample.

Similar to **CROA 3632**, the question then becomes the appropriate measure of discipline. The positive test result does reflect the fact that the grievor, an employee with 15 years of service, elected to take the risk of imbibing an illegal substance. It is simply not credible for the grievor to maintain, as he did at his investigation, that he was unaware that his off-duty conduct might result in a violation of the policy. His deliberate lifestyle choice yielded the result of a positive drug test, a decision for which the grievor must accept full responsibility. In a very real sense, therefore, the grievor was the author of his own misfortune. There is, on the other hand, no direct evidence here that supports a finding that the grievor was impaired while at work and I am satisfied that this is a case where the termination penalty should be set aside.

The grievance is allowed in part. The grievor is to be reinstated to his employment without compensation or loss of seniority. The grievor's reinstatement shall be conditional upon his written agreement to be subject to random, unannounced drug and alcohol testing, to be administered for a period of not less than two years from the date of his reinstatement. Any failure on his part to comply with the conditions of such testing, or a positive test result, shall be grounds for immediate termination of the grievor's employment. His discipline record will stand at 15 demerits based on the findings noted above from case number **CROA 3752**.

May 22, 2009

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