CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3782

Heard in Edmonton, Thursday, 11 June 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Concerning the assessment of 20 demerits to the record of Heavy Equipment Operator, K. Bonnett, for "intentionally double-stacking containers in rail cars without IBC's [sic] in place, in contravention of proper procedure and safe work practices on August 19, 2008".

JOINT STATEMENT OF ISSUE:

The griever was called for an investigative statement on September 9, 2008 in connection with "events of August I9 during shift". He was subsequently assessed 20 demerits and terminated for accumulation of demerits.

It is the Union's position that the griever was not afforded a fair and impartial hearing in accordance with the provisions of Article 23.1 of the collective agreement. The Union argues that the notice to appear was excessively vague and that the transcript of the investigation did not reflect objections made by the Union. Although the griever admitted during the investigation that he should not have double-stacked the containers he also felt that there was insufficient room to place them on the ground while waiting for his groundsperson to show up to pin the containers. He was further frustrated by the groundsperson ignoring his calls on the radio and taunting him. The Union also alleges that the griever's long service, and his forthrightness during the investigation must mitigate against the severity of the discipline imposed.

The Union requests the griever be reinstated forthwith with full compensation for all lost wages and benefits.

The Company denies the grievance and the Union's allegations.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. OLSHEWSKI	(SGD.) B. LAIDLAW
NATIONAL REPRESENTATIVE	MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

B. Laidlaw – Manager, Labour Relations, Winnipeg
R. Hargreaves – Supervisor, Vancouver

And on behalf of the Union:

B. Kennedy	– Staff Represantative, Edmonton
R. Shore	– Represantative, Vancouver
K. Bonnett	– Grievor

AWARD OF THE ARBITRATOR

The Union raised two procedural objections. The first objection relates to the absence of particulars in the Notice to Appear for the investigation. The relevant portion of the Notice reads as follows:

> You are required to attend an investigation to provide a formal employee statement in connection with events of August 19th during your shift.

The Union argues that, although it was provided with information regarding evidence that would be used during the hearing, it had no idea what the charges would be. That allegation is not substantiated by the evidence. To begin with, the Notice is very clear concerning the date the incident occurred, August 19, 2008. The facts here are therefore distinguishable, on the basis of the contents of the Notice alone, from **AH 521** where the Notice in that case indicated that the grievor had "failed to meet his work obligations … between January 4 and February 3, 2003". As the arbitrator indicated in **AH 521**, the allegations during that time frame "… could encompass a host of possible infractions ranging from absenteeism to insubordination to the use of alcohol and drugs in the workplace". The grievor in this case, by contrast, was notified that his investigation related to the events arising during his shift on August 19, 2008.

As noted by the Company, neither the grievor nor the Union raised any objections over the contents of the Notice prior to or during the investigative meeting. In fact, after being presented with the various statements at the outset of the hearing, including that of Mr. Nagy, the grievor acknowledged that he was ready to proceed and that he had an opportunity to review the evidence. Significantly, the grievor immediately embarked on a detailed account of the container incident when asked by the investigator: “Please tell us what happened between you and Mr. Nagy that day”. There was no objection raised by the Union representative to the lack of detail in the Notice or any other procedural deficiencies before the grievor provided details of the container incident. As noted in **SHP 304** cited by the Company:

> The operative principle, however, is not unlike the obligation to “work now-grieve later”. If an employee, or a union representative, is of the view that he or she has not received adequate notice of the subject matter of the disciplinary proceeding or investigation being conducted under Rule 28 it is incumbent on the employee or representative to register that concern with the Company, <u>either in advance of the investigation or at its outset</u>.

See also: **CROA&DR 3610**.

Accordingly, the lack of timely objection to the Notice, either prior to or at the outset of the investigation, leads to the inference that the both the grievor and the union representative were sufficiently informed of the nature of the allegations in order to provide answers to those allegations. There is no indication that there was any ambiguity in their minds concerning the nature of the incident under investigation; that is the placement and pinning of containers during his shift on the day set out in the Notice, August 19, 2008.

The second procedural point raised by the Union concerns the allegation that the hearing officer would not accept nor record the objections of the Union representative at the investigation. This issue must be resolved by assessing which of the parties has provided the more plausible version of events based on the evidence adduced before the arbitrator. The most reliable and persuasive evidence of what occurred at the investigation in my view is the transcript of the proceedings. As the Company points out, there is no indication in the transcript that procedural objections were raised at any time either prior to or during the investigation itself. Of most significance in that regard is the final Q and A 33 where the following question was put to the grievor:

> Q 33: Are you satisfied with the manner in which the investigation has been conducted?
>
> A 33: Yes.

Further, although the Union officer, Mr. Shore, did not sign the investigative statement, the grievor himself did initial each page and sign the statement on the signature page along with the Company representative. There is no indication by Mr. Shore on the face of the document that he was dissatisfied in any way with the recording of the proceedings or otherwise. It was certainly open to Mr. Shore to indicate in his own handwriting why he refused to sign but there is no such acknowledgement to that effect on the signature page. It is incumbent on the parties, in the end, to raise procedural objections in a timely manner, failing which they will be deemed to have acquiesced in the description of events set out in the investigation record.

I agree with the Company that the rights of the grievor were not compromised and that he was provided with a fair and impartial investigation.

Turning to the merits, the evidence clearly supports the allegation set out in the joint statement that the grievor intentionally stacked containers in the rail cars without IBCs in place, in contravention of the safe work practices. The grievor indicated at the investigation that he behaved the way he did to "make a point". The grievor further admitted that double-stacking without pins contravened the safety procedures and could result in a safety hazard. I share the Company's view that the grievor's deliberate actions in double stacking the containers without pins was a dangerous manoeuvre which compromised the safety of the work area. The grievor is deserving of discipline for his behaviour on August 19, 2008.

The grievor has some twenty-eight years of service. Unfortunately, his disciplinary record is replete with offences, including damage to Company equipment, insubordination and issues of anger management. The assessment of twenty demerits is consistent with similar cases of this kind where workplace safety has been compromised as a result of the deliberate actions of an employee. Those twenty demerits added to the existing fifty demerits have resulted in the grievor's termination.

Given that the current discipline is a culminating incident which resulted in the dismissal of the grievor, it is important to consider whether the employment relationship

has any potential for rehabilitation. I have regrettably arrived at the conclusion that the employment relationship is no longer viable. The grievor has been given numerous opportunities over the years to learn from his mistakes. He has elected instead to continue to defy his employer, even when he was on the edge of dismissal with his disciplinary record sitting at fifty demerits. Given the grievor's disciplinary history, there is no real basis for any optimism that the his career will take a positive turn if he is reinstated.

After considering all the circumstances, I must deny the grievance.

June 25, 2009

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