CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3786

Heard in Montreal, Tuesday, 14 July 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Assessment of thirty (30) demerits to the grievor for a violation of CROR rule 104 resulting in derailment of locomotives CN 9581 and CN 5353 and subsequent dismissal from the Company for accumulation of demerits in excess of sixty (60).

COMPANY'S STATEMENT OF ISSUE:

On January 28, 2009, the grievor was working as an assistant conductor on assignment YWTS30-28. During his tour of duty two locomotive units derailed. The grievor attended an employee statement concerning the circumstances surrounding the derailment and was assessed thirty demerits for his responsibility and violation of CROR rule 104. As the grievor's discipline record was at fifty-nine demerits the assessment of thirty demerits led to the grievor's dismissal for the accumulation of demerits in excess of sixty.

The Union contends that the discipline assessed was unwarranted and that the grievor should be reinstated and made whole.

The Company disagrees with the Union's contentions.

FOR THE COMPANY:
(SGD.) P. PAYNE
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

A. Daigle	– Manager, Labour Relations, Montreal
F. O'Neill	– Manager, Labour Relations, Toronto
D. Morin	– Assistant Chief Engineer, Montreal
S-P Paquette	– Counsel, Montreal

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The issue in the instant case is whether the grievor was responsible for the derailment of two locomotives from a three locomotive consist at a switch leading to the shop track in Edmonton at the conclusion of the grievor's West Tower yard assignment on January 28, 2009.

On that day the grievor was working as the yard helper on assignment YWTS30-28. At the conclusion of the assignment he and his yard foreman were required to move their three locomotives to the shop track. To do so they were required to line a spring switch on track EF-05 to give their units access to the shop. It does not appear disputed that at that time it was -4° C and it was snowing.

The employees encountered some difficulties with the arm of the switch so that it required both of them to move it. According to their unchallenged account of what transpired, they successfully moved the switch into position and placed a lock on it as a "keeper" to hold the switch in place. By their account the point of the switch was tight to the rail and all outward appearances suggested that they could proceed with their movement towards the shop track.

While there is some disagreement as to the precise wheels involved, it does not appear ultimately disputed that the second and third of the three locomotives in the power unit derailed while proceeding over the switch. It is also not disputed that after

the derailment the switch was tightly closed to the rail, as it would be in a normal position.

Following an investigation, the Company concluded that the switch must in fact have been open by a small but critical amount after it had been moved into place by the grievor and his yard foreman. By the Company's account, the most probable explanation is that the switch was difficult to close because it had ice or snow packed within it. That obstruction, the Company suggests, would have likely not caused the first unit to derail, but by reason of lateral pressures once the initial unit had moved past the switch, the second and third power units would have been forced to climb over the switch by reason of the gap between the switch and the track. The final aspect of the Company's theory is that the action of climbing and derailing by the two power units could also have crushed or dislodged the snow or ice obstruction which was holding the switch slightly open, so that it had returned to a tight closed position after the derailment was complete by the natural operation of the switch's hydraulic spring mechanism.

Separate investigations of the grievor and his yard foreman took place on January 31, 2009. It does not appear challenged that neither of the employees was given notice of the interview or investigation of the other, and therefore no opportunity to attend and put questions to the other employee or hear such account as that employee might give with respect to their own actions. It may be noted, however, that in the end there is nothing controversial or contradictory in the statements of either of the employees, which essentially relate what is described above in this award.

The Union submits firstly that the Company has not discharged the burden of establishing that there was just cause to assess any discipline against the grievor. Secondly it submits that, in any event, the Company failed to observe the requirements of the collective agreement with respect to the conducting of a fair and impartial investigation by failing to give to the grievor notice of the investigation of his co-worker as required by article 117.2 which provides as follows:

> **117.2** Employees may have an accredited representative appear with them at investigations, they will also have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility.
>
> Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation. Employees under Company investigation or his/her accredited representative shall have the right to attend any Company investigation, which may have a bearing on the employee's responsibilities. The employee or their accredited representative shall have the right to ask questions of any witness/employee during such investigation relating to the employee's responsibilities.

On the foregoing basis counsel for the Union submits that the discipline should, in any event, be viewed as void *ab initio*.

The Arbitrator is compelled to agree with the Union on both counts. First, as this Office has stated in the past, an arbitrator does not have the luxury, as might an employer, of converting suspicion into legal conclusions. There is, very simply, no direct evidence that confirms or substantiates the Company's theory of what "must" have occurred. The employer simply stresses that all of the trucks and wheels on the

locomotives as well as the switch itself were found to be in normal and proper working order, which must, it argues, prove that the switch was in fact partially open by reason of an obstruction which they grievor and his workmate simply failed to observe and correct. While that may be a possibility, the Arbitrator cannot find that it is a fact proved on the balance of probabilities on the basis of the rather slim evidence advanced by the Company. Both of the only eye witnesses to the event confirm, without contradiction between them, that the switch was fully closed at the commencement of the operation, as indeed it was found to be at the end of the movement and derailment. Whatever may have happened, there would appear to be a degree of plausibility and credibility to what the two employees have stated. In the Arbitrator's view the bare facts asserted by the Company do not, of themselves, meet the standard to establish that there was a violation of rule 104 by the grievor.

On the foregoing basis the grievance must be allowed. Alternatively, should the Arbitrator be in error with respect to the assessment of the evidence in the case at hand, the grievance must also succeed on the basis that the Company did fail to observe the mandatory requirements of article 117.2 of the collective agreement by denying the grievor notice and access to his workmate's statement. It is well settled that a failure of the obligation to provide a fair and impartial investigation in keeping with those provisions will render discipline void *ab initio*.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation in full for all

wages and benefits lost and without loss of seniority, with his record to contain no reference to the derailment of January 28, 2009 in Edmonton.

July 20, 2009

MICHEL G. PICHER
ARBITRATOR