CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3816

Heard in Montreal, Wednesday, 14 October 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of twenty (20) demerits resulting in dismissal for accumulation of demerits in excess of sixty to J. Hutchinson for delay to assignment on October 3, 2008.

UNION'S STATEMENT OF ISSUE:

On October 3, 2008, J. Hutchinson was working as conductor on train G84141-03. On October 10, Conductor Hutchinson was issued a notice to appear for an investigation regarding the "… circumstances surrounding in the delay to train G84141-03 …". [sic] The grievor attending this investigation on October 16, 2008. Following the investigation the grievor was assessed twenty demerits for delay to assignment and dismissed for accumulation of demerits in excess of sixty.

It is the Union 's position that the Company did not conduct the investigation in a fair and impartial manner as the grievor did not receive proper notice of the matter being investigation. The investigation focused on the setting out of two bad order cars and delay associated with that requirement. The Union submits that it is improper and unreasonable to assess discipline to the grievor for any alleged delay associated with theses actions.

The Union requests that discipline be reduced and the grievor be reinstated and made whole.

The Company disagrees.

FOR THE UNION:

(SGD.) B. R. BOECHLER
GENERAL CHAIRMAN

There appeared on behalf of the Company:

K. Morris	– Sr. Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg
D. Crossan	– Manager, Labour Relations, Prince George

And on behalf of the Union:

M. Church	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
T. Markewich	– Sr. Vice-General Chairman, TCRC-LE, Edmonton
B. Willows	– General Chairman, TCRC-LE, Edmonton
J. Holliday	– General Chairman, Prince George
J. Robbins	– General Chairman, Sarnia

AWARD OF THE ARBITRATOR

A preliminary issue has arisen with respect to the proper count of the grievor's prior disciplinary record. In particular, the Union challenges the continued recording on Mr. Hutchinson's record of thirty demerits, a measure of discipline assessed against him on October 28, 2006 in relation to a rule violation during the course of his service as a locomotive engineer.

It does not appear disputed that following the incident giving rise to that discipline the Company's supervisors immediately treated the grievor as being disqualified from any further service as a locomotive engineer. It does not appear disputed that he did not perform any locomotive engineer's functions from the time the thirty demerits was assessed until a joint conference meeting held between the parties on January 25, 2008.

Evidence of what transpired at that meeting was given before the Arbitrator by Union representative Terry Markewich. The Union maintains that what transpired was the negotiation of a settlement which would see the thirty demerits against Mr. Hutchinson removed from his record in the event that he should prove unable to re-qualify as a locomotive engineer. The recollection of Mr. Markewich is that during the course of the meeting that alternative was discussed and it was finally resolved to have the grievor reoriented and retested for qualification as a locomotive engineer. It appears that there was some question as to whether a person could be found to be his mentor, a hurdle which was in fact overcome. It is not disputed that following the meeting of January 25, 2008 the grievor was returned to locomotive engineer service in a training capacity under the overall supervision of Engine Service Officer R.B. Smith. The material before the Arbitrator further reveals that by way of a letter dated May 14, 2008 Mr. Smith informed Mr. Hutchinson that on the strength a qualification tour conducted on May 2, 2008 he decided to disqualify him as a locomotive engineer and to terminate any further training or attempts to re-qualify him. It would appear that Mr. Smith's letter of May 14, 2008 was addressed only to the grievor and that it was not copied either to the Company's Industrial Relations officers nor to the grievor's Union.

Significantly, the thirty demerits which were the subject of discussion between the parties seemed to vanish from the grievor's record. For example, the form 780 provided to Mr. Hutchinson for the assessment of fifteen demerits on April 2, 2008 indicated that his prior active discipline stood at ten demerits, leaving him with a total active discipline record of twenty-five demerits as of that date. It appears that it is only with the assessment of the demerits which are the subject of this grievance that the thirty demerits from 2006 re-surfaced in the grievor's record. Although the grievor's prior record as recorded in April of 2008 indicated that he had total active discipline of forty-five demerits, in fact the Company came to the conclusion that the thirty demerits assessed against him should not have been removed and that in fact prior to the assessment of twenty demerits which led to his discharge, he had sixty-five demerits outstanding on his disciplinary record. The Company's position is that by oversight it simply failed to recognize the proper count of the grievor's discipline.

The Arbitrator has substantial difficulty with the position advanced by the Company. Put at its highest, through the evidence of Mr. Laidlaw which the Arbitrator accepts without qualification, the status of the thirty demerits was left somewhat "in abeyance" while the grievor was allowed to attempt to re-qualify as a locomotive engineer following the joint conference meeting of January 25, 2008. At the very least it appears to have been the understanding of the Union that if the grievor should not qualify as a locomotive engineer his discipline would be considered to be his permanent demotion to the rank of conductor, and the thirty demerits would be removed from his record. That indeed appears to be what occurred, at least to the extent that the notice of discipline received by the grievor dated April 29, 2008 placed his total active discipline at forty-five demerits. There does not appear to be any indication in the record, and indeed it does not appear disputed, that there was any attempt on the part of the Company to notify the grievor of his corrected discipline status. The Arbitrator finds it difficult to accept that no attempt was made to advise the grievor of his total demerits standing at sixty-five, particularly as that placed him in a dismissible position and obviously in an extremely precarious situation in relation to any future discipline.

On the basis of the material before me, I am satisfied that the Company can no longer rely on the assessment of the thirty demerits which were effectively removed from the grievor's record for a time, and thereafter reinserted. It should go without saying that it is important that an employee have clear notice of his or her disciplinary status at any given time. In the case at hand the grievor was advised in April of 2008 that his record stood at forty-five demerits. I can see no equitable basis upon which the Company can now assert that in fact the grievor's true disciplinary record was sixty-five demerits when it in fact conveyed contrary information to him. For the foregoing reasons the Arbitrator is satisfied that the grievor's prior disciplinary record must be viewed as having stood at forty-five demerits prior to the incident giving rise to the discipline which is the subject of this grievance.

As reflected in the *ex parte* statement of issue, on October 3, 2008 the grievor worked as conductor on train G84141-03 from Winnipeg to Rivers, Manitoba. Prior to departing Symington Yard the grievor was required to

double over two cars from track ER-03 to be coupled to their train in track ER-04. One of the two cars in question eventually was placed immediately behind the locomotive. During a subsequent pull-by inspection it was discovered that the handbrakes on that car had not been released and, as a result, the wheels skidded to the point flattening the wheels, causing the car to be removed as a bad order car. The Company maintains that the time required to set off the car caused a delay of the grievor's train, a delay which would not have been incurred but for his failure to have properly verified and released the hand brakes on the car in question.

The Arbitrator agrees with the Union's submission that the discipline assessed against the grievor was not for failing to release the hand brakes, but rather for a delay of his train. The fact remains, however, that the two events are intertwined, as the grievor did not readily admit to not having made any verification of the hand brakes, although he did indicate during the course of his disciplinary investigation that he had "missed" the hand brakes on the car in question.

The Union maintains that the Company failed to conduct a fair and impartial investigation, in part by reason of certain statements made by the investigating officer, General Manager Tom Brown. It appears that at the first scheduling of the investigatory statement the matter was adjourned to a later date at which point Mr. Brown advised the grievor that he was being held from service and apparently uttered words to the effect that he might not work again. The Union also draws to the Arbitrator's attention a statement made by the investigating officer during the course of the investigation wherein he declared to the Union's representative, in response to an objection, that a CROR rule had been broken and that it mattered not whether it was committed transportation employee, a mechanical employee or an engineering employee. Whatever the cause, the investigation must proceed.

The Arbitrator cannot accept the Union's characterization of Mr. Thompson's statements as being so extreme as to have vitiated the possibility of a fair and impartial investigation. It was a simple matter of fact that given the grievor's prior disciplinary record, whether it stood at forty-five or fifty-five demerits, he was in jeopardy of losing his job as a result of the incident in question. Nor can the Arbitrator find fault with the fact that the supervisory officer expressed the self-evident proposition that if the hand brakes on the car in question had not been released there must have been a violation the CROR rules with respect to hand brakes and that the role of the investigation was to determine who may have violated the rule. Nothing in those statements, in my view, is sufficient to establish bias or the likelihood of bias on the part of Mr. Thompson.

With respect to the merits of the dispute, the Arbitrator is compelled to come to the conclusion that, on the balance of probabilities, it was the grievor's failure to release the hand brakes on the car when it was removed from the storage track and coupled to the grievor's train which ultimately caused delay to the train, at least such delay as could be attributed to the removal of that car. The Company estimates that removing the car, along with another bad order car which had to be removed in any event, would have occupied some thirty minutes. The grievor's estimate is that it would have taken no more than ten minutes the damaged car from its position on the head end of the train. The Arbitrator considers the precise time in question of less significance than the fact that the grievor did, by his failure to follow the rules, occasion an unscheduled delay of his own train. Whether that delay was for ten, twenty or thirty minutes is immaterial to the failure of vigilance demonstrated on his part to the extent that he did not release the hand brakes on a car for whose movement he became responsible.

In the Arbitrator's view the assessment of twenty demerits was not, *prima facie*, unreasonable in the circumstances. The twenty demerits, coupled with the forty-five demerits on the grievor's record placed him within a dismissable position. However, in the Arbitrator's view there are mitigating factors to consider. The grievor is sixty-one years of age, will be eligible for an unreduced pension in approximately two years and he has been employed by the Company since 1988. When regard is had to his twenty years of service, and the fact that he has been restricted to conductor service, it appears to the Arbitrator that a substituted penalty in the form of substantial suspension is appropriate in all of the circumstances to communicate the necessary rehabilitative message to Mr. Hutchinson.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that Mr. Hutchinson be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. His continuing employment shall be subject to the Company's discretion to restrict him to conductors' work.

November 6, 2009

(signed) MICHEL G. PICHER
ARBITRATOR