CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3821

Heard in Montreal, Thursday, 15 October 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Assessment of discipline to the record of F. R. Boutilier resulting in dismissal.

UNION'S STATEMENT OF ISSUE:

On February 16, 2009 the Company assessed the employee with 25 demerits for his alleged "unacceptable work performance as a Yard Coordinator in Rockingham on January 13,2009 which resulted in service not being provided to customers." The discipline was sufficient enough to result in an accumulation of demerits in excess of 60. On February 16, 2009, the Company advised that the employee was dismissed for the accumulation of demerits, effective January 13, 2009.

The Union appealed the discipline as being excessive, unwarranted and, as well, being a violation of article 30 and 32 of the collective agreement. The Union also submits that the Company has violated the Workplace Environment provisions of the collective agreement which renders the discipline null and void.

Further, and without prejudice to the above, the Union protested that the Company's actions were a violation of the **Canada Labour Code**; as it appears that the Company has targeted the employee for his involvement as a Union representative. The Union also protested the excessive and unwarranted discipline as such was a blatant violation of the Brown system of discipline, as has been committed to in the collective agreement.

It is respectfully submitted that the employee is entitled to reinstatement forthwith, without loss of earnings, benefits or pensionable service. Further, and without prejudice to pursuing this matter through other avenues available, the arbitrator ought to consider a remedy consistent with the provisions of Addendum 123 of the collective agreement.

The Company disagrees with the position of the Union.

FOR THE UNION:

(SGD.) J. M. ROBBINS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

A. Daigle	– Manager, Labour Relations, Montreal
D. Gagné	– Manager, Labour Relations, Montreal

There appeared on behalf of the Union:

J. M. Robbins	– General Chairman, Sarnia
F. Boutilier	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator does confirm that the grievor was less than fully efficient in his work performance as Yard Coordinator at Rockingham on January 13, 2009. There would appear to be little doubt but that his failure to respond to deficiencies occasioned by the coupling of two locomotives, which essentially rendered one of two crews idle, coupled with his failure to resort to overtime to accomplish work which was clearly in arrears, did merit some discipline. I am also satisfied, however, that, apart from the procedural issue dealt with below, the grievor's length of service would, in all likelihood, have resulted in an award from this Office which would have seen him reinstated into his employment.

The Union, however, raises a preliminary objection, asserting that the Company violated the grievor' entitlement to a fair and impartial investigation as contemplated under the terms of the collective agreement. Upon careful consideration the Arbitrator is compelled to sustain that conclusion. It would appear that in attempting to understand the events of the grievor's tour of duty the Company decided to also investigate the traffic coordinator who was on duty on the shift immediately preceding Mr. Boutilier's shift. Although it appears that management gave some general indication to Mr.

Boutilier, at the conclusion of his own investigation, that an investigation of the other traffic coordinator, Mr. André Hubley, would be necessary, it does not appear disputed that at no time did the Company ever specifically advise the grievor or his chosen union representative of the precise time and place of the investigation of Mr. Hubley. It is common ground that in or about 2004 the parties negotiated an amended provision to be added to the terms of article 82 of the collective agreement which governs discipline and disciplinary investigations. The newly added language reads as follows:

> (b) An employee 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 any questions of any witness/employee during such investigation relating to the employee's responsibilities.

This Office has confirmed that the right of an employee to attend the investigation of another employee where that investigation may have some bearing on his or her responsibility implies an obligation on the part of the Company to give adequate notice of the time and place on any such investigation. The failure of such notice has been found to constitute a violation of the obligation to conduct a fair and impartial investigation. That issue was dealt with in the following terms in **CROA&DR 3732** where the following appears:

> The record discloses, without controversy, that following the disciplinary examination of Mr. Adam separate statements were taken of Yardmaster Steven Spencer as well as the Yard Foreman on the grievor's assignment, Dave Collins. Neither the grievor nor his Union representative received notice of the statements to be taken from either the yardmaster or the yard foreman, and obviously had no opportunity to offer any rebuttal to evidence which they might give. On that basis the Union submits that the discipline assessed against the grievor must be viewed as null and void *ab initio*.
>
> The Arbitrator is compelled to agree. It would appear undeniable that evidence to be given by the yardmaster who oversaw the grievor's yard assignment, and the

> yard foreman who was part of Mr. Adam's crew, could plainly be expected to be evidence which would have a bearing on his responsibility for the collision which occurred. That would be so whether or not the evidence of those individuals would, in the end, be negative towards the grievor. In essence, Mr. Adam was simply denied the opportunity to hear what either of his co-workers had to say about the incident or to put questions to them which might have elicited facts in mitigation of his own responsibility. That is plainly contrary to the intention of article 86.4 of the collective agreement and, for reasons well established in prior awards of this Office, the discipline cannot therefore stand. (See, **CROA 628, 1163, 1575, 1858, 2077, 2280, 2609, 2901, 3221** and **3214**.)

With respect, the Arbitrator cannot accept the suggestion of the Company's representatives that a general comment made to Mr. Boutilier that there would be an investigation of Mr. Hubley is sufficient notice for the purposes of the paragraph reproduced above. I am satisfied that it was not. While evidence that the grievor was in fact aware of the time and place of the investigation might negate a finding against the Company, that is not in evidence before the Arbitrator in the case at hand. On the foregoing basis, therefore, the Arbitrator must find and declare that the discipline assessed against the grievor was void *ab initio*.

The Union further submits that the case at hand should bring into play the special remedy provisions negotiated within the collective agreement, as reflected in Addendum 123 and dealt with in **CROA 3310**.

The provisions of Addendum 123 are difficult to apply in a discipline case. They are generally intended to create a deterrent against repeat violations of collective agreement provisions by the Company where there is a violation of the "reasonable intent of application of the collective agreement …".

It is obviously difficult to bring the extraordinary remedy provisions to bear within the context of the interpretation and application of the just cause provision of the collective agreement. The very concept of just cause is obviously flexible and is one on which honest persons may well differ, depending on the case under consideration. That is not to say, of course, that the provisions of Addendum 123 may be brought to bear in a clearly egregious and abusive series of cases of discipline, but the burden of showing such a sequence would require clear and compelling evidence of ongoing, repeated abuse. With respect, the sequence of discipline assessed against Mr. Boutilier in the three cases presented (see **CROA&DR 3819** and **3820**) in fact demonstrates three instances in which he was arguably deserving of discipline, and the most that can be said is that the Union does not agree with the level of discipline assessed. While it is true that there was one comment from a Company supervisor that would suggest displeasure with the grievor's picket line activities during the course of a strike, the evidence falls far short of demonstrating bad faith or conscious abuse on the part of the Company in its disciplinary handling of Mr. Boutilier who, it appears, does appear somewhat reluctant to accept responsibility for errors which he has committed.

For the reasons related above, and in particular with regards to the failure to of the Company to respect the procedural requirements of a fair and impartial investigation, the Arbitrator must declare that the discipline is void *ab initio*. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost.

October 29, 2009

(original signed by) MICHEL G. PICHER
ARBITRATOR