CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3823

Heard in Calgary, Wednesday, 11 November 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS, LOCAL 2004

DISPUTE:

The discharge of M. Larry Cartier effective July 1, 2009 for violation of CROR rules 803, 815(ii) and GEI 10.9 when he was responsible for Gang GW 51 being outside their track occupancy limits on June 18, 2009.

JOINT STATEMENT OF ISSUE:

The Union submitted an appeal contending that Mr. Cartier's discharge was excessive and unwarranted given the circumstances. The Union's appeal requested that Mr. Cartier be immediately reinstated into his position without loss of seniority and assessed 20 demerit marks instead of the discharge and that he be made whole for all lost earnings and benefits.

The Company disagrees with the Union's contentions and has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. GATZKA	(SGD) D. BRODIE
STAFF REPRESENTATIVE	FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton

There appeared on behalf of the Union:

P. Jacques	– Chief Steward, Mountain Region, Edmonton
R. Gatzka	– Staff Representative, Edmonton
L. Cartier	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that Mr. Cartier was responsible for a cardinal rules infraction when he caused the gang for which he was responsible in his capacity as foreman to be outside their track occupancy limits on June 18, 2009. There is no doubt but that the grievor's error was deserving of a serious measure of discipline.

The sole issue in these proceedings is to resolve the parties' disagreement at to the appropriate measure of discipline in the circumstances. The Arbitrator can readily understand the Company's concern. It argues that the grievor has an extensive disciplinary record, involving previous rules infractions. Its representative notes, in part, that the grievor was previously discharged for a similar infraction involving a violation of rule 803 when he failed to obtain proper protection for the movement of his crew on October 2, 1994, as related in **CROA 2688**. A similar infraction recurred on June 30, 2000, as is reflected in **CROA 3250** which dealt with the Company's decision to then suspend and demote the grievor.

The Company submits that these incidents, and several others dating back to 1987, gave reasonable grounds to the Company to invoke the principle of the culminating incident in terminating the grievor's services by reason of the events of June 18, 2009.

While the Arbitrator can appreciate the Company's perspective, there are, as noted by the Union, mitigating circumstances to be considered. While it is true that the grievor has a negative disciplinary record which, on its face, might justify recourse to the principle of the culminating incident, certain facts must be carefully weighed. As reflected in **CROA 3250,** this Office recognized that at the time of the incidents giving rise to that grievance Mr. Cartier was suffering from clinical depression. His return to work in a demoted position was made conditional upon his undertaking to follow the proper course of medication prescribed by his physician. Indeed it appears that that directive was followed and that in a subsequent supplementary award to CROA 3250 dated December 14, 2007, it was determined that the grievor's medical condition was under control and could no longer be operative as a reason for his ongoing demotion. On that basis the Arbitrator found him "… entitled to return to full duties, including duties which would require him to hold a Track Occupancy Permit."

In the Arbitrator's view it is also not insignificant that the grievor incurred no significant rules-related discipline from August of 2000 until the time of his termination in July of 2009, a period of some nine years of discipline free service. That span of good service is to be contrasted with the relatively regular incidents of discipline which marred his employment record in the period between 1990 and 2000. In that ten year period he was disciplined at various levels on some fourteen occasions. In the Arbitrator's view it is not insignificant that the grievor's spotty performance during that decade must be understood to have resulted, at least in substantial part, from his condition of clinical depression which was eventually diagnosed and, as the record clearly demonstrates, eventually resolved.

While the Arbitrator can understand the Company's viewpoint, in my views a better way of viewing Mr. Cartier's infraction in the case at hand is to ask what might be the appropriate measure of discipline for an employee of close to ten years' service with no prior discipline whatsoever. It does not appear disputed that in a circumstance of that kind the normal measure of discipline for a track occupancy violation would be in the order of twenty to thirty demerits. I am satisfied that this is not an appropriate case for compensation. However, given that Mr. Cartier is sixty years old and has some twenty-six years of service, I am satisfied that this is an appropriate case for reinstatement, albeit on conditions fashioned to protect the Company's legitimate interests.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that Mr. Cartier be reinstated into employment forthwith, subject to his being permanently restricted from being assigned in any position which involves holding a track occupancy permit. His reinstatement shall be without loss of seniority and without compensation, with his record to reflect twenty demerits for the events of June 18, 2009, including the violation of CROR rule 857(ii), incorrectly referred to as CROR rule 815(ii) in the Company's initial documentation. Should the grievor decline to accept the conditions of the reinstatement so fashioned, the grievance will be dismissed.

November 18, 2009

(signed) MICHEL G. PICHER
ARBITRATOR