CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3824

Heard in Calgary, Wednesday, 11 November 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Assessment of twenty (20) demerits to Conductor Kevin Gelowitz of Melville, SK, for "failure to comply with CROR 101(d) AND CROR 112 …" while working as yard conductor on April 22, 2008.

UNION'S STATEMENT OF ISSUE:

On April 22, the grievor, Kevin Gelowitz, was working as yard conductor on the 14:00 Belt Pak assignment. While switching in Melville yard, cars that had been previously placed by the grievor rolled back, sideswiping his movement, resulting in a minor derailment.

The Union submits that, while some discipline may be warranted, discharge is excessive in all of the circumstances. The Union requests that the grievor be reinstated an made whole for all losses.

The Company has declined the grievance as untimely.

FOR THE UNION:

(SGD.) R. A. HACKL
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. Thompson	– Vice-General Chairman, Edmonton

PRELIMINARY AWARD OF THE ARBITRATOR

The Company objects to the arbitrability of this grievance by reason of the Union having failed to respect the time limits within the collective agreement.

The material facts are not in dispute. The grievor, Yard Conductor Kevin Gelowitz was discharged following a side swipe incident during the course of his tour of duty on April 22, 2008. Mr. Gelowitz was terminated effective April 28, 2008 and no grievance was filed against his termination until January 12, 2009, some nine months later. The provisions of the collective agreement governing the filing of the grievance are found under the terms of article 121.1 which reads, in part, as follows:

> **121.1** A grievance concerning the interpretation or alleged violation of this agreement (including one involving a time claim) shall be processed in the following manner:
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> An appeal against discharge, suspension, restrictions, including medical restrictions, demerit marks in excess of 30, or demerit marks which result in discharge for accumulation of demerits shall be initiated at Step 3 of this grievance procedure. All other appeals against discipline imposed shall be initiated at Step 2 of this grievance procedure.
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> …
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> **Step 3 – Appeal to Vice-President**
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> Within 60 calendar days of the date of decision under Step 2 the General Chairperson may appeal the decision in writing to the regional Vice-President.
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> The appeal shall be accompanied by the Union's contention, and all relevant information concerning the grievance shall be examined in a meeting between the Vice-President, or delegate, and the General Chairperson. The Vice-President shall render his decision in writing within 30 calendar days of the date on which the meeting took place. Should the Vice-President consider that a meeting on a particular grievance is not required, he or she will so advise the General Chairperson and render the decision in writing under 60 calendar days of the date of the appeal.

The Company relies on the provisions of article 121.4 in support of its view that the matter is not arbitrable. That article reads as follows:

> **121.4** Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 121.5, be progressed to the next step in the grievance procedure.

The Company's representative submits that the nine month delay in filing the grievance is not acceptable, and raises a prejudice to the Company's interest to the extent that the grievance would seek the reinstatement of the grievor with full compensation for all of the period from his termination to his possible reinstatement. The Company implicitly suggests that the time limits within the collective agreement were expressly agreed to precisely to avoid any such excessive delays and resulting financial liability.

The Union does not deny that it failed to meet the time limits contained within the provisions quoted above. It submits, however, that the circumstances of the case justify the exercise of the Arbitrator's discretion to extend the time limits, as is now provided under section 60(1.1) of the **Canada Labour Code**, Part I which allows for the exercise of such discretion "… if the arbitrator or arbitration board is satisfied that there reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension."

Counsel for the Union draws to the Arbitrator's attention the fact that on the date of the grievor's termination the bargaining rights were then held by a predecessor union, the United Transportation Union. It does not appear disputed that the grievor's local chairperson did prepare a grievance which he forwarded to the office of the UTU's General Committee of Adjustment for furtherance to the Company in accordance with the collective agreement. It

appears that the parties were then in the early months of a new grievance tracking system (GTS) and that the local chairperson instructed an office administrator to forward the grievance to the Company electronically through the GTS system. It would now appear that that was in fact not done. It also appears that the administrative staff of the then GCA office was entirely dismissed some months later, in September of 2008, by the United Transportation Union in the face of what became a successful displacement campaign by the Teamsters Canada Rail Conference, the current Union which now seeks relief.

In essence, the submission of the new Union is that there was a degree of turmoil and disorganization in the former office of the UTU which has caused a number of grievances to go untended and in respect of which the officers of the current Union had little or no control as they had been effectively ousted from office at the time by the actions of the international leadership of the United Transportation Union. The history of these events was also considered at some length in the award in **CROA&DR 3761**.

In considering the merits of instant preliminary objection, the Arbitrator is persuaded that it is appropriate to extend the time limits and to allow the grievance to be heard. In that regard a number of considerations are compelling. Firstly, the case at hand involves the discharge of an employee, a matter of obvious grave consequence. In that regard the following comments in **CROA&DR 3761** are pertinent:

> In the Arbitrator's view these facts, particularly as regards the accumulation of demerits leading to the discharge of an employee, do provide a reasonable basis for an extension of the time limits. While the Company may argue that internal political struggles within a union should not be seen as a reasonable basis for an extension of time limits, the converse of that proposition is that the progressive discipline and eventual discharge of an employee should not lightly be placed beyond access to arbitration by reason of such "political" events beyond his or her control, particularly when there is no specific prejudice to the employer made evident in the material before the Arbitrator.

If it is generally reasonable to consider the extension of time limits if the case of an employee's termination, what, if any, are the elements of prejudice which would be faced by the Company in this case? It is notable that in his submission to the Arbitrator the Union's counsel expressly stated that the Union will not seek damages or compensation for any part of the period of delay occasioned by the error of the Union. In other words, there will be no financial liability visited upon the Company for any time period beyond the normal period of delay contemplated in the collective agreement and normally resulting from a timely arbitration.

Obviously, while a nine month delay is not ideal, this is not a circumstance where there has been a long-time abandonment of the grievance by the Union or where it submits that documents that would be in evidence have since gone missing or that witnesses are no longer available. (**CROA&DR 3771**) Bearing in mind that an underlying purpose of the discretion granted to the Arbitrator under the **Canada Labour Code** to extend time limits is to avoid undue technicality in the administration of a collective agreement which would defeat the legitimate interests of employees and their Union, as well as an employer in the case of a Company initiated grievance, there are ample reasons to consider it appropriate to extend the time limits in the case at hand, and I am satisfied that I should do so.

For the foregoing reasons the Company's preliminary objection is declined and the General Secretary is directed to list this matter for hearing on the merits.

November 18, 2009

(signed) MICHEL G. PICHER
ARBITRATOR

On Thursday, 10 December 2009, there appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton
D. Gagné	– Sr. Manager, Labour Relations, Montreal

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms, beyond dispute, that the grievor did violate CROR 101(d) and CROA 112. On April 22, 2008 while working as the Yard Conductor on the 14:00 Belt Pack assignment in Melville, Saskatchewan, Mr. Gelowitz was involved in switching rail cars within the Melville Yard. His first move was to switch a single car in to track MA10, and thereafter to move five other cars into track MR05.

Controlling the belt pack unit the grievor pushed car CNLX 10262 into track MA10. He had lightly secured the hand brake to that car, presumably to avoid it moving once it reached a stationary position. In fact, while the grievor was engaged in moving equipment into track MR05 car CNLX 10262 commenced to roll back in the direction from which it had come, eventually sideswiping the grievor's movement in track in MR05, and derailing.

That the grievor violated the rules charged against him is not substantially contested. The sole issue is the appropriate measure of discipline. Following a disciplinary investigation the Company assessed twenty demerits against the grievor. As his prior record stood at forty demerits, that resulted in his discharge.

The Union argues that the grievor has demonstrated his ability to work discipline free for extensive periods of time, stating that he was experiencing a difficult time in his personal life when a number of incidents leading to discipline occurred, eventually culminating in the instant grievance.

With respect, the Arbitrator has some difficulty with that submission. Firstly, the grievor cannot claim excessive long service, having been first hired in 1991. During his seventeen years of service between 1994 and his termination he was disciplined on eight occasions, including his discharge. A review of his record reveals that the Company did apply progressive discipline to him, with his earliest infractions being dealt with by the assessment of demerits in the order of ten and fifteen points. In November 2006 he was assessed twenty demerits for a rule violation during yard switching, and shortly thereafter, on January 6 of 2007, a further twenty demerits for the violation of CROR rule 104.5(b) resulting in a derailment during yard switching. In fact, when a further rules infraction ensued, on January 26, 2007 he was given a seven day suspension for a further violation of CROR rule 104.5, again resulting in a derailment. In fact, prior to the culminating incidents, Mr. Gelowitz's record reflects three separate rules violations involving derailments. Against that record the Company maintains that the fourth and final derailment resulting in his termination for the incident of April 22, 2008 is a culminating incident which appropriately justifies the termination of his services.

On a review of the record the Arbitrator cannot disagree. Notwithstanding the application of progressive discipline by the Company, including the assessment of a suspension for the penultimate incident involving Mr. Gelowitz in January of 2007 to avoid his discharge by the assessment of demerits, the grievor's recurring inattention to carefully observing operating rules resulted in yet another derailment. I do not see in the record before me compelling mitigating circumstances which would justify a reduction in penalty.

For the foregoing reasons the grievance must be dismissed.

December 14, 2009

(signed) MICHEL G. PICHER
ARBITRATOR