

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3860

Heard in Montreal, Tuesday 9 February 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of twenty (20) demerits to Kim Essar of Biggar, for violation of CROR 120, 121, and 122, resulting in dismissal for accumulation of demerits in excess of sixty and discharge for failure to follow the direction of a Company officer, all during her tour of duty on L50151-29 on January 29, 2009.

UNION'S STATEMENT OF ISSUE:

On January 29, 2009, Kim Essar was working as conductor on Train 501 out of Biggar. While switching at the initial terminal, the grievor was monitored by Company officers. ...The same two Company officers later observed the Ms. Essar at Unity when a communication was initiated by the engineer of an approaching train. ...

The grievor was required to provide an employee statement with respect to this event, following which she was issued twenty demerits, for violation of rules 120, 121, and 122. These demerits, when added to the demerits already on her record, totalled 65, resulting in dismissal.

The grievor was then required to provide a second employee statement with respect to the exact same incident but with a different charge. The grievor was then issued an outright discharge for failure to follow the direction of a Company officer.

The Union submits that the Company has failed to conduct either investigation in a fair and impartial manner and all discipline assessed ought to be declared void *ab initio*, and the grievor be made whole. Further, while the grievor may not have entirely complied with CROR 120, 121, and 122, this assessment rests on the grievor's failure to use the word over on a single occasion. Discharge of a twenty year employee is certainly excessive and unwarranted in these circumstances, and, in any event, there is no evidence of any failure to follow any directions of a Company officer that would justify discharge. The Union also submits that the investigation and assessment of discipline for the exact same incident is classic case of double jeopardy and a fundamental breach of natural justice. Accordingly, no discipline can be assessed with respect to the second investigation. Finally, the Union submits that the Company has singled out the grievor as a "focus employee" and has acted in a discriminatory and improper manner in these assessments of discipline.

The Company disagrees.

**FOR THE UNION:
(SGD.) R. A. HACKL**

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

- D. Brodie – Manager, Labour Relations, Edmonton
- K. Morris – Sr. Manager, Labour Relations, Edmonton
- P. Payne – Manager, Labour Relations, Edmonton
- T. Brown – Assistant Superintendent, General Manager, Prairie Division

And on behalf of the Union:

- M. A. Church – Counsel, Toronto
- B. R. Boechler – General Chairman, Edmonton
- R. A. Hackl – Vice-General Chairman, Edmonton
- R. S. Donegan – Local Chairman, Biggar
- D. Bolianaz – Local Chairman, Winnipeg
- K. Essar – Gsrievor

AWARD OF THE ARBITRATOR

The Union raises a number of objections with respect to the discipline assessed against the grievor, and what it alleges was a failure on the part of the Company to respect the requirements of a fair and impartial investigation.

Essentially the Company assessed twenty demerits against the grievor for her failure to respect the requirements of CROR 120, 121 and 122 during the course of radio communications. The record indicates that on January 29, 2009 efficiency tests were conducted of the grievor's crew. During the monitoring of their radio communications during yard switching supervisors noted that the crew was not identifying the train or engine number when making radio broadcasts nor consistently using the terms "over" and "out". It appears that they were spoken to by the supervisors and reminded of the importance of observing those rules.

Later that day the same supervisors observed the grievor while she was on the ground to provide a visual inspection on the passing by of train 198 at a meet between her own train and train 198 at Unity, Saskatchewan. It was observed that the grievor engaged in a social radio conversation with the engineer of train 198. Following that incident the Company conducted an investigation and assessed twenty demerits against the grievor for having engaged in the improper social conversation with the engineer using the radio system, and for having, by reason of the same action, failed to obey the instruction of her supervisor.

If it were necessary to rule upon it, the Arbitrator is inclined to agree with the position of the Union that the second discipline, being the discharge of the grievor for failing to obey a supervisor's instructions, does in fact amount to double jeopardy. Essentially the grievor is required by the rules to observe communication protocols in accordance with CROR 120, 121 and 122. The fact that she had been reminded to do so by her supervisor earlier the same day does not, in the Arbitrator's view, cause her later violation of that rule to create two separate grounds for discipline. There was but a single offence. At most, the reminder made by her supervisor might go to the measure of discipline for the rule violation but not, in the Arbitrator's view, to setting up a second and separate infraction.

However, the greater concern in the case at hand arises from the Union's objection that the grievor was denied the elements of a fair and impartial investigation. It is not disputed that a critical point of fact was whether Ms. Essar had used the terms

“over” and “out” during the course of her conversation with train 198. That conversation, it does not appear disputed, was with the locomotive engineer of that movement. The grievor maintains that she had used those terms during her communication, and was particularly certain of having used the “out” at the end of her transmission. The two supervisors who monitored the conversation maintain the contrary. It would seem evident that in the circumstances the account of events which might be provided by Locomotive Engineer Jake Jameson, the engineer operating train 198, could have a bearing on the discipline to be assessed against the grievor. To that end, article 82.2 of the collective agreement provides, in part:

82.2 Employees may have an accredited representative to appear with them at investigations, will have the right to hear all of 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.

It is common ground that the Company conducted an investigation of Locomotive Engineer Jameson on February 17, 2009, following the grievor's own investigation on February 6, 2009. However, neither the grievor nor her Union representative were given notice of the investigation of Mr. Jameson. It appears that by mere chance the grievor's Union representative was in the building at the time the investigation had commenced and, learning of that fact, was allowed to sit in, albeit only for a portion of the time.

In the Arbitrator's view the Union is correct in asserting that the Company clearly failed to abide by the requirements of article 82.2 by effectively failing to give either the grievor or her Union representative a proper opportunity to hear “all of the evidence” submitted by a witness whose testimony would clearly have a bearing on the grievor's

own responsibility. In the result, the Arbitrator is compelled to find that there was a violation of article 82.2 of the collective agreement and that the discipline assessed against the grievor must be ruled as void *ab initio*.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into her employment forthwith, without loss of seniority and with compensation for wages and benefits lost.

February 26, 2010

(signed) MICHEL G. PICHER
ARBITRATOR