CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3875

Heard in Calgary, Tuesday, 9 March 2010

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the assessment of a discharge to Locomotive Engineer S for "conduct unbecoming at the commencement of your tour of duty on August\ 16, 2009 in violation of your Behavioural Agreement signed August 7, 2008."

UNION'S STATEMENT OF ISSUE:

On August 16, 2009, Locomotive Engineer S was assigned to a 14:30 Yard Assignment, YCXS02 when she had an interaction with Company officer Connal. … Subsequent to an investigation Employee S was discharged.

The Union contends that the Company failed to consider mitigating factors which contributed to the incident as well as mitigating factors surrounding the actual investigation. The Union contends as well that the investigation was not conducted in a fair and impartial manner as per the requirements of article 86. The Union also contends that the discipline is excessive and unwarranted.

The Union requests that the discipline assessed be expunged or, in the alternative, reduce the discipline and compensate Employee S for all loss of wages and benefits.

FOR THE UNION:

(SGD.) T. MARKEWICH
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
K. Morris	– Sr. Manager, Labour Relations, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton
E. Connal	– Assistant Trainmaster, Vancouver

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Vice-General Chairman, Edmonton
Employee S	– Grievor

AWARD OF THE ARBITRATOR

At the hearing the counsel for the Union advised the Arbitrator that the Union was not pursuing the allegation that the grievor was denied a fair and impartial investigation. The sole issues, therefore, are the facts of the incident and the appropriate measure of discipline in the event that the grievor was involved conduct unbecoming.

The material before the Arbitrator confirms that the grievor has a record of aggressive behaviour towards supervisors and other employees. That record resulted in the grievor achieving reinstatement into her employment following a serious incident, but subject to a "Behavioural Agreement" dated August 7, 2008. That agreement, lasting twenty-four months, required the grievor to refrain from causing offence or humiliation to any employee or Company officer on the condition that "… Failure to do so will result in dismissal or other corrective disciplinary action deemed appropriate."

I am satisfied that on August 16, 2009 the grievor openly stated in the workplace that she was tired of her supervisor's "smartass comments." Her supervisor maintains that she uttered those words directly to him in a disrespectful fashion. The grievor, supported by the account of another employee, maintains that while she pronounced the words, they were not addressed to the supervisor who was then in an adjoining room, and must have overheard them.

It is clear, at a minimum, that the supervisor obviously overheard them and was offended by them. I consider it unnecessary to determine the precise truth as to whether the supervisor was present in the same room or in an adjacent room where he could plainly overhear what was being said. Suffice it to say that the grievor used words and a tone in the workplace which she knew or reasonably should have known could be offensive to someone within earshot, and did so in a manner inconsistent with the undertaking in the Behavioural Agreement she agreed to respect.

Is the grievor's termination the appropriate result? But for certain mitigating factors it might be. However, the Arbitrator is persuaded that there are grounds for according Employee S a last chance. It emerges from the record that she suffers from clinical depression and has had some experience with therapy and anger management. In the Arbitrator's view that medical disability is a factor which should be considered in determining whether her employment should be summarily terminated. In my view it is more appropriate to give her a final chance, subject to certain conditions, having particular regard to the length of her service, which is in excess of twenty years.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into her employment forthwith, without loss of seniority and without compensation, subject to her accepting the condition that her Behavioural Agreement shall be renewed for a period of not less than two years following the date of her reinstatement. Additionally, the grievor shall accept, should the Company require it, that she undergo medical evaluation for her condition of clinical depression and that she faithfully follow any course of medication, therapy or anger management, if any such course should be suggested by the physician conducting the assessment. For the purposes of clarity the medical assessment need not be completed prior to the grievor's return to work, but it should be pursued without unreasonable delay. Any cost relating to the assessment shall be borne by the grievor, and any report resulting from it shall be shared with the Company's Occupational Health Services department.

March 15, 2010

(signed) MICHEL G. PICHER
ARBITRATOR