CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3920

Heard in Montreal, Tuesday, 13 July 2010

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of 20 demerits for alleged violation of GOI section 8 on September 23, 2009, and the assessment of 10 demerits for alleged violation of CROR rules 34, 44 and 106 on November 5, 2009 and the resultant dismissal for accumulation of demerits in excess of 60.

UNION'S STATEMENT OF ISSUE:

The parties agree that the grievor, Peter Champagne, was working as conductor on two separate tours of duty on September 23 and November 5, 2009. Various incidents took place during these tours that led to the employee investigation, the assessment of discipline and ultimate discharge of the grievor.

It is the Union's position that the Company has not demonstrated that any GOI violations, as alleged, actually occurred and, as such, no discipline is warranted. It is also the Union's position that the "efficiency test" conducted on November 5, 2009 was not fairly conducted and, accordingly, no discipline can be assessed as a result of such test. It is further the Union's position, with respect to the efficiency test, that the Company has treated the grievor differently and therefore discriminatorily with respect to the assessment of discipline.

In all of the circumstances, the Union submits that the grievor has been unduly scrutinized, harassed and targeted for dismissal by the Company contrary to the workplace environment provisions of the collective agreement. The Union also submits that neither investigation was conducted in a fair and impartial manner and the discipline assessed ought to be declared void *ab initio*. Additionally, the Union submits that the Company failed to abide by the terms of the reinstatement agreement with respect to the grievor causing further prejudice.

In all of the circumstances the Union relies on all of the allegations as presented in the Step III grievance and notes that the Company has failed to respond to many of these allegations. The Union submits that the Company is now estopped from raising further or new arguments with respect to these aspects they have chosen not to address.

Further, the Union submits that the Company has acted in an egregious manner, contrary to article 152 of the collective agreement and an appropriate remedy is mandated in all of the circumstances.

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
D. VanCauwenbergh	– Director, Labour Relations, Toronto
G. Wolnairski	– Assistant Superintendent, Transportation, Winnipeg
D. Crossan	– Manager, Labour Relations, Prince George

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
M. Rutzki	– GST/LC, Melville
J. Dwyer	– Local Chairman, Saskatoon
P. Champagne	– Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns grievances against two heads of discipline. The first involves the assessment of twenty demerits against the grievor for work performed in relation to yarding his train at Symington Yard on September 23, 2009. The second involves an alleged failure to respond to a yellow flag on the Rivers Subdivision on the morning of November 5, 2009 while in the operation of train 102 from Melville to Winnipeg. Both incidents involved alleged rules infractions committed by the grievor during the course of observations of his work being made by supervisors who were in the course of performing efficiency testing of employees.

I turn first to the incident of September 23, 2009. On that occasion the grievor was yarding his train in Symington Yard while being observed by Trainmaster Donovan Broesky. According to Mr. Broesky's report Mr. Champagne detrained improperly from the locomotive of his movement contrary to GOI section 8, item 12.5 and subsequently violated GOI section 8, item 12.10 by placing himself between equipment which is less than fifty feet apart.

According to Mr. Broesky's report, the grievor effectively hopped off the locomotive's ladder, failing to maintain three-point contact with his hands and at least one foot until such time as the other foot was securely on the ground. According to the trainmaster he also made his detraining gesture in such a way as to face away from the direction of the movement, contrary to what is required.

Mr. Champagne disputes entirely Mr. Broesky's description of his method of detraining. According to his account he detrained in full compliance with the requirement of three-point contact, and did so facing the direction of his locomotive's movement. With respect to this aspect of the case, it is significant, in the Arbitrator's view, that Mr. Broesky was not at the arbitration hearing, while the grievor was. In other words, the grievor was present to give evidence and be cross-examined on the manner in which he detrained while there was no witness on behalf of the Company with respect to the incident in question. As previously noted in awards of this Office, in such a circumstance, where credibility is critical, the finding of fact may be resolved against the

party which fails to produce a witness. I am satisfied that that is the appropriate outcome in the case at hand.

Nor can the second aspect of the discipline stand. The Form 780 which issued to the grievor following the investigation alleges that he violated GOI section 8, item 12.10 while being observed by the trainmaster. The Company maintains that his violation of that rule involved moving between cars which were not a minimum of fifty feet apart. An examination of paragraph 12.10 of the GOI confirms that the minimum distances which should separate cars and locomotives are expressed as being intended to prevent the crossing of drawbars during the coupling of equipment. Those paragraphs of rule 12.10 which deal with procedures for uncoupling make no reference to minimum distances. As the Company argues, however, it is obviously unsafe for employees to place themselves between pieces of equipment which are in close proximity, even during the uncoupling process. As true as that may be, however, the grievor comes to the arbitration hearing entitled to defend himself against the allegation made to justify the discipline assessed against him. On the material before me I can find no specific part of rule 12.10 which can be said to have been violated by the grievor on September 23, 2009.

The Union also alleged that the Company denied the grievor a fair and impartial investigation. There appears to be considerable substance to that allegation, especially given that the investigating officer placed some two years' accumulation of PMRC reports into evidence, over the objection of the Union's representative, and attempted

on at least one occasion to question the grievor about a detraining incident which occurred on September 25, 2008. It also appears that the presiding officer did not allow the grievor to pass notes to his representative while the latter was putting questions to the Company's witnesses. If it were necessary to so rule, I would find that the two elements reviewed above would constitute the denial of a fair and impartial investigation. The grievor was not put on notice that he would be questioned about prior incidents spanning some two years, which were not the subject of the investigation he was attending. Additionally, it is difficult for the Arbitrator to appreciate why the grievor, whose very job security was at risk, must be prohibited from writing notes to his representative while the latter is in the course of questioning Company witnesses. If it were necessary to do so, therefore, I would dismiss the discipline against the grievor as being void *ab initio*, by reason of his having been denied a fair and impartial investigation in accordance with the requirements of the collective agreement. Given the disposition of this grievance on its merits, however, it is not necessary to do so.

The Arbitrator therefore directs that the twenty demerits assessed against the grievor for the incident of September 23, 2009, be removed from his record. As that removal would place him in less than a dismissible position with respect to the accumulation of demerits, he shall be reinstated into his employment forthwith, with compensation for all wages and benefits lost and without loss of seniority.

I turn to consider the second head of discipline. The record confirms that on November 5, 2009 Company officers James Newton and Miles Rutherford placed a

yellow flag at Mile 20.35 on the north side of the north track on the Rivers Subdivision. They did so for the purpose of observing whether train crews would respond to the signal which is intended to broadcast an unusual track condition. According to the rules they should reduce their speed to 10 mph and communicate with the Rail Traffic Controller when sighting a yellow flag which is not part of their operating orders. It appears that in fact two trains passed the yellow flag during the course of the efficiency test being conducted, and that the crews of neither of them saw the flag nor responded to it.

The Union submits that the circumstances are similar to those reviewed by this Office in **CROA&DR 3815**. In that case the ten demerits assessed against a conductor for passing a yellow flag in violation of CROR 44(e), at exactly the same location, were removed. In that regard counsel for the Union cites the following passage from the arbitrator's award:

> The Arbitrator has considerable difficulty with the case as presented by the Company. Firstly, I am less than persuaded that the test was in fact fair. At most, what can be said with respect to the grievor is that his reaction, or failure of reaction, to the yellow flag placed him well within the majority of all employees who encountered it. The fact that the crews of three out of four trains failed to observe the yellow flag in the circumstances in which it was erected does, in my view, tend to support the argument of the Union that it was in fact not sufficiently visible given its proximity to the structures surrounding the level crossing at mile 20.3 on the Rivers Subdivision.

The Arbitrator finds some merit to that argument. When the facts in CROA&DR 3815 are coupled with the facts in the case at hand it would appear that five out of six trains exposed to the yellow flag at the point where it was placed failed to observe it. While that does not justify the failure of the employees who should have seen the flag, it

tends to support the conclusion that it was placed in a location whose surroundings tended to make it less than easily visible. The ultimate question in this case is whether ten demerits should be assessed against the grievor, contributing to the accumulation of demerits to cause his discharge after forty-three years of service, when close to 85% of all employees exposed to the same test performed exactly as he did. I think not.

In the Arbitrator's view the counselling of the grievor with respect to the missed flag would, given the general failure of other employees to observe the same flag in the same location, be an appropriate outcome. In my view this is not a situation which would properly justify discipline.

The Arbitrator therefore directs that the ten demerits assessed against the grievor be removed from his record. As noted above, he shall be reinstated into his employment forthwith with compensation for all wages and benefits lost and without loss of seniority.

July 19, 2010

(signed) MICHEL G. PICHER
ARBITRATOR