

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

**CASE NO. 3921**

Heard in Montreal Wednesday, 14 July 2010

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**EX PARTE**

**DISPUTE:**

Appeal the assessment of 20 demerits to Locomotive Engineer L. Wyporowich for "Conduct unbecoming and failure to comply with General Rule A(ix) and (xii), CROR 122 and GOI section 8, item 12.2 when communicating by radio while working as a locomotive engineer on the 1400 Yard, Melville, SK, February 18, 2009" and 30 demerits for "Failure to comply with CN Attendance Management Standards between November 13, 2008 and January 2, 2009" resulting in a discharge for accumulation of demerits in excess of 60 demerits on May 20, 2009.

**JOINT STATEMENT OF ISSUE:**

Ms. Wyporowich was alleged to have violated the CN Attendance Management Standard between November 01, 2008 – February 02, 2009, when unavailable on 4 occasions due to illness. Subsequent to the investigation Ms. Wyporowich was assessed 30 demerits.

The Union contends that Ms. Wyporowich cannot be disciplined for being unavailable due to illness and that by assessing the discipline the Company has violated the *Canada Labour Code*.

In addition, Ms. Wyporowich was charged with conduct unbecoming a CN employee and violation of CROR radio rules, use of profanity over the radio, during her tour of duty as the Locomotive Engineer on February 18, 2009. Subsequent to the investigation Ms. Wyporowich was assessed 20 demerits. As a result of the assessed discipline, Ms. Wyporowich was discharged for an accumulation of demerits in excess of 60 demerits.

The Union contends that the words cannot be considered as profanity given their everyday accepted usage in society. The Union contends that the Company failed to consider all mitigating factors involved in each separate incident.

It is the Union's position that Ms. Wyporowich's discipline was unwarranted and should be expunged or, in the alternative, the discipline should be significantly reduced. Ms. Wyporowich should be compensated for all loss of wages and benefits.

The Company has not responded to the Union's grievance which was submitted at Step III of the grievance procedure on July 15, 2009.

**FOR THE UNION:**

**(SGD.) T. MARKEWICH**

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

- D. Criossan – Manager, Labour Relations, Prince George
- D. Brodie – Manager, Labour Relations, Edmonton

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- B. Willows – General Chairman, Edmonton
- T. Markewich – Vice-General Chairman, Edmonton
- L. Wyporowich – Grievor

**AWARD OF THE ARBITRATOR**

There are two aspects to the instant grievance. The first is the assessment of twenty demerits to Locomotive Engineer Wyporowich for conduct unbecoming and the violation of radio protocols while she worked a yard assignment in Melville, Saskatchewan on February 18, 2009. The second concerns the assessment of thirty demerits for her failure to respect attendance management standards in the period between November 13, 2008 and February 2, 2009.

The chronology of events in relation to these two heads of discipline is interesting in itself. The record discloses that on February 20, 2009 the grievor attended an investigation conducted by Company supervisor Brent Strachan, to deal with her absences from work on some four occasions between November 1, 2008 and February 2, 2009. It appears that that same day Mr. Strachan received a memo from Assistant Superintendent Gregg Wolnairski. Mr. Wolnairski's memo related to Mr. Strachan that

he had overheard the grievor's voice on the yard channel of his Company radio while travelling in his car. Among other things he heard the grievor speaking to the yard foreman about supervisors who were coming to the work scene to assist her helper who apparently had been injured. Mr. Wolnairski's memo quotes the grievor as saying, over the radio, "Jesus Christ, they can't even talk to each other". After the yard foreman's response the grievor is then quoted by the assistant superintendent as having said "My heart bleeds purple piss for them."

Mr. Wolnairski states that he overheard the conversation on the night of February 18, 2009. As noted above, he related his report to Mr. Strachan two days later, on the same day Mr. Strachan was involved in conducting a disciplinary investigation of Ms. Wyporowich for her attendance issues. However, as reflected in his memorandum, he had already advised Trainmaster Strachan of the incident by telephone at 20:17 hours on the 18th, asking him to schedule a formal investigation.

On February 24, 2009 Trainmaster Strachan gave written notice to the grievor of a second investigation to be scheduled on February 27, 2009 concerning her alleged conduct unbecoming and violations of CROR radio rules. Mr. Strachan also conducted the investigation in relation to that matter. As the record discloses, the decision as to discipline for both events, by way of Form 780 communications, were communicated separately to the grievor under the date of May 20, 2009.

As noted above, the grievor was discharged for the accumulation of sixty-five demerits by reason of the imposition of both the thirty demerit penalty for her attendance record and the twenty demerits for conduct unbecoming. When coupled with the fifteen demerits which stood on her record, she was dismissed for the accumulation of sixty-five demerits. That penalty was reversed in September 30, 2009 and she was then reinstated into her employment, with the thirty demerits removed and the period from her discharge to her reinstatement being recorded as a suspension for her attendance record. The Union challenges that suspension as well as the alternative penalty of 30 demerits.

The Arbitrator has substantial difficulty with the Company's treatment of the grievor's absences. In all cases of her non-attendance at work the grievor claims that she was ill. It is not disputed that in the three month period examined she was absent on four separate occasions for a total of nine days. There is no suggestion in the material before the Arbitrator that she was not ill on each of those occasions. The Arbitrator can appreciate that continued absences at that rate, which would amount to thirty-two days if projected over a one year period, might give the Company cause to consider the administrative termination of the grievor for non-culpable absenteeism. However, it is less than clear to me on what basis, absent any evidence of the grievor having feigned illness, that the Company could assess discipline against her for effectively being ill. Given that the Company does not challenge the bona fide nature of the illness claimed by the grievor, it is difficult to dismiss the submission of counsel for

the Union that she was effectively disciplined for being sick, contrary to section 239(1) of the **Canada Labour Code** which provides as follows:

**239(1)** Subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of an absence due to illness or injury.

I am compelled to agree with the Union's position. It is difficult to understand the Company's action as being other than the imposition of thirty demerits, and thereafter a lengthy suspension in substitution, for the grievor's absence due to illness. There is no suggestion on the part of the Company that it challenged the bona fides of the grievor's illness, beyond the fact that it noted during the course of the disciplinary investigation that she did not produce any medical certificates to confirm her condition. It must also be noted, however, that she was never asked by the employer to produce any such certificates at the time of her absences. In these circumstances the Arbitrator must conclude that the Company had no just cause for the assessment of any discipline against the grievor in respect of her absence from work due to illness. On that basis the thirty demerits and suspension must be stricken from her record, and she is to be compensated for all wages and benefits lost in relation to the time she was out of work by reason of the impact of the thirty demerits which prompted her discharge and subsequent suspension.

What of the alleged violation of radio protocols by the grievor, and the use of language unbecoming? With respect to that aspect of the grievance the Arbitrator sees greater merit in the position of the Company. While there may be some latitude for unvarnished "shop talk" in the workplace, radio communications, which can obviously

be overheard by others, demand a degree of decorum and professionalism which the grievor plainly failed to observe. Given the grievor's relatively extensive disciplinary record, I am not inclined to disturb the assessment of twenty demerits for that incident. The second aspect of the grievance is therefore dismissed.

The Arbitrator therefore directs that the thirty demerits and substituted suspension assessed against the grievor be stricken from her record and she be compensated for all wages and benefits lost between the time of her termination and her reinstatement.

July 19, 2010

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**