CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3975

Heard in Montreal, Tuesday 8 February 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The discipline assessed Conductor Richard Goretzki who was discharged for alleged violation of CROR 564(e) and CROA 436 on June 28, 2009.

UNION'S STATEMENT OF ISSUE:

On June 28, 2009, the grievor was working as conductor on train 101 when it collided with train 301. Following an investigation the grievor was discharged which was subsequently reduced to a suspension.

The Union submits that the Company failed to provide a fair and impartial investigation. The Union also submits that, in all of the circumstances, discharge is unwarranted and inappropriate and that, if discipline is warranted, a lesser amount ought to be substituted and that the grievor be reinstated and made whole.

The Company disagrees.

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

There appeared on behalf of the Company:

D. Gagné	– Sr. Manager, Labour Relations, Montreal
T. Ovell	– Manager, Operating Practices, Toronto
D. Larouche	– Manager, Labour Relations, Montreal
E. Steinbeck	– Trainmaster, BC South, Vancouver
D. VanCauwenbergh	– Director, Labour Relations, Toronto
K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Prince George

There appeared on behalf of the Union:

R. A. Hackl	– Vice-General Chairman, Edmonton
J. Robbins	– General Chairman, Sarnia

AWARD OF THE ARBITRATOR

The facts of the instant case are related in **CROA&DR 3871** and need not be repeated here. The following excerpt from that award, which concerned the discharge of the Rail Traffic Controller, gives the essential factual background:

> The evidence reflects that the grievor also issued a Rule 564(e) authority to train Q10131-27 allowing that train to pass the stop signal at Favel West. When he gave that train its authority, Mr. McKoy told the crew that there was no equipment in the block ahead of them, the territory for which he was giving them authority. In fact, train M30131-27 was stopped in the block, as described above.
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> At approximately 07:40 train Q10131 rounded a corner on the Redditt Subdivision while travelling at 40 kph when its crew saw the tail end of train M301. They immediately applied their emergency brakes, but were not able to stop in time, resulting in a collision with the tail end of train M301, estimated to be at a speed of twenty-five miles per hour at Mile 105 of the Redditt Subdivision. The collision derailed the tail end six cars of the stationary train and the three locomotive units of train Q101. Serious injuries resulted to the locomotive engineer and conductor of train Q101, who, it appears, remain off work to this date. Additionally, the cost of the derailment is estimated at approximately $1,400,000.00.

In the instant case the Company submits that the failure of the grievor, the conductor on train Q10131-27, to respect the rule 564(e) authority contributed to the rear-end collision which occurred. Essentially, its representative stresses the requirements of CROR rule 564, and in particular sub-paragraph (e) which contains the following:

> (e) the train or transfer must approach the next signal prepared to stop and there be governed by the indication displayed.

In the case at hand it is not disputed that after he was issued CROR 564(e) authority to move beyond signal 99.7 on the Redditt Subdivision the grievor and his train proceeded towards a further restricted signal at 104.3. Compliance with rule 564(e) would have required that his train be operated in such a way as to stop at the restricting signal and/or to proceed beyond it at no more than 15 mph. In fact the grievor's train proceeded through the restricting signal at mileage 104.3 at forty miles per hour, when it immediately saw the tail end of train M30131-27 which was stopped ahead, only four to five car lengths west of the restricting signal.

It is common ground, as noted in **CROA&DR 3871**, that the Rail Traffic Controller had erroneously advised the grievor that there was no equipment in the block ahead of him. That error, coupled with the RTC's prior disciplinary record, resulted in his discharge, which was sustained by this Office. The Company submits that quite apart from the actions of the RTC, however, the grievor was in clear violation of CROR 564(e) in that he did not handle his train at such a speed as to be able to respect the restricting signal at mileage 104.3 and, possibly, to have avoided the collision which did occur.

Following the collision the Company conducted disciplinary investigations of both the crew of train M30131-27 and of the Rail Traffic Controller. As the grievor was injured in the collision and remained absent for some nine months, his investigation was delayed until April 8, 2010. At the outset of the investigation the grievor's Union representative sought to be given copies of the records of the investigation of both the

crew of train M30131-27 and the Rail Traffic Controller. The Company effectively takes the position that those investigations were not germane to the responsibility of the grievor, and they were therefore not provided. It may be noted that there was no disciplinary investigation of the grievor's locomotive engineer. He was also injured in the collision and following recovery from his injury he retired.

The Union submits that in the circumstances the Company has gravely violated the requirements of a fair and impartial investigation, including article 117.2 of the collective agreement which provides as follows:

> 117.2 Employees may have an accredited representative appear with them at investigations, they will also have the right to hear all 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. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation. **Employees under Company investigation and/or his/her accredited representative shall have the right to attend any Company investigation, which may have a bearing on the employee's responsibilities. The employee and/or their accredited representative shall have the right to ask questions of any witness/employee during such investigation relating to the employee's responsibility.**
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> (emphasis added)

It may be noted that on the day before the grievor's investigation the grievor's Local Union Chairman, M.G. Zarecki, communicated with Company officers by email. That message contains the following:

> We also request that we be provided with all information that has been used in all investigations surrounding that matter in which R. Goretzki is being investigated for namely his alleged involvement in a collision and derailment between M30131-27 and Q10131-27 on June 28, 2009.

In fact Mr. Zarecki made the same request for all relevant investigation material, including the investigative statements of Engineer Shewchuk and Conductor Peden, the crew of train M30131-27 as early as July 6, 2009. He was advised, correctly, that in fact such information would not then be provided, but would be available at the time of the investigation of Conductor Goretzki. As noted above, it was not.

A review of the statements of Conductor Peden and Locomotive Engineer Shewchuk confirm that during the course of their investigations they were asked questions in relation to the crew of train Q10131-27. They provided information to the effect that they did not see the crew of that train when they went on duty, that they did not hear any radio communication from the grievor's train and they provided information as to the nature of the interaction which they had with the grievor and his locomotive engineer following the collision.

The Company's representative submits that there was no real pertinence to the information contained in the investigation of the crew of train M30131-27 as they were in effect "innocent bystanders" whose train was struck from the rear by the grievor's train. It is submitted that there is nothing in the information which they could have provided would have any bearing on the merits of the grievor having violated the requirements of CROR 564(e) and CROR 436. The same, he argues, is true of the investigation of the Rail Traffic Controller. In that regard he notes that there is no substantial dispute as to the radio communication between the Rail Traffic Controller and the grievor and, more

importantly, nothing in the RTC's account could have any bearing on whether the grievor did or did not respect the rules 564(e) and 436 of the CROR.

The Arbitrator has difficulty with that submission. Firstly, it is significant that the Company did not give the grievor notice to attend an investigation into alleged violations of any particular rules of the CROR. The notice provided to Mr. Goretzki, dated July 2, 2009, states, in part:

> You're required to attend an investigation to provide a formal employee statement in connection with tail-end collision and subsequent derailment between M30131-27 and Q10131-27 at Mp. 104.4 Redditt Sub on June 28, 2009.

From the face of the notice the grievor could not know what, if anything, was being alleged against him. It can also be fairly said that in a sense both the crew of train M30131-27 and the RTC were material witnesses to what occurred immediately before and immediately after the collision.

Given the broad nature of the notice given to the grievor, could it be assumed, before his investigation commenced, that the statements of those three individuals are not statements "which may have a bearing on the employee's responsibilities"? I find it difficult to conclude that they would not. Could the statement of the Rail Traffic Controller contain an assertion that he in fact warned the grievor about the presence of train M30131-27 in the block ahead of him? Could the statements of the crew of train M30131-27 not have possibly included statements negative to the grievor, as for example questioning whether he was sober at the time, or what he might or might not have said on the radio, so as to have a possible bearing on his responsibility?

In the Arbitrator's view it is no answer to say that in fact no such statement emerged during their investigation. This Office has repeatedly affirmed that provisions such as article 117.2 of the instant collective agreement are a form of fundamental due process protection intrinsic to the disciplinary procedure to which an employee is subject and which are inherently critical to the expedited form of arbitration conducted within this office, reliant as it is on the results of disciplinary investigations as primary evidence. (See **CROA 3732**.) In the administration of this provision it must be borne in mind that fairness in the conduct of investigations must not only be done, it must also manifestly be seen to be done. How can the grievor be assured that there is not prejudicial or exculpatory information in the hands of the Company, gained through the investigation of the three other employees involved, unless he or his union representative is given notice of those investigations and full access to the final record which emerges from them? In the case at hand, at the time of the investigation the grievor's job was at risk. There can be no responsible basis on which the Company could have done anything but to provide to him and his union representative all investigation material relating to the incident in which he was involved. The fine analysis of the various rules which emerged, albeit only during the process of the grievor's own investigation and not previously, is in my view no answer to the failure to give the grievor full access to the testimony of the other witnesses to the event.

In the result, the Union's objection must be sustained. The Arbitrator is advised that in fact the grievor has been reinstated, subject to a lengthy suspension. That

suspension is therefore the sole issue in these proceedings. On the basis of the prior jurisprudence and the facts before me, I am compelled to conclude that the Company did violate article 117.2 of the collective agreement, and that the grievor's suspension must therefore be deemed void *ad initio*.

The Arbitrator therefore directs that the grievor be compensated for all wages and benefits relating to the period of his suspension, and that the suspension be removed from his record forthwith.

February 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR