CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3985

Heard in Calgary, Wednesday, 9 March 2011

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of twenty (20) demerits to Conductor L. Adams of Sioux Lookout for "failure to follow instructions as prescribed in GOI, Section 8, Item 12.4 while working as conductor on February 13, 2008 resulting in delay to assignment.

UNION'S STATEMENT OF ISSUE:

On February 12, 2008, Conductor Adams was required to travel by air to Armstrong, Ontario where he was ordered to take a work train to a mainline worksite. Conductor Adams was advised that a member of the crew would be required to ride the lead car in extreme winter conditions for a distance of some 18 miles. Conductor Adams invoked his right to refuse unsafe working conditions under Part 2 of the *Canada Labour Code*, section 128.

An employee investigation was held with respect to this matter following which Conductor Adams was assessed twenty demerits.

The Union submits that the Company has improperly discipline Conductor Adams for exercising his rights under the *Canada Labour Code*. As such the discipline ought to be expunged and Conductor Adams be made whole. Further, the Union submits that the Company's instructions were unreasonable, contrary to the collective agreement and, that the investigation that was not held in a fair and impartial manner, that the Conductor Adams was denied substantive rights under the collective agreement with respect to representation and not being allowed to record the investigation, and that the Company has acted contrary to the *Canada Labour Code* by failing to properly address Conductor Adams' refusal to perform unsafe work. For all of the foregoing reasons the Union submits that the discipline assessed to Conductor Adams be declared void *ab initio*.

The Company has not responded to this grievance.

FOR THE UNION:

(SGD.) B. R. BOECHLER
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Gagné	– Sr. Manager, Labour Relations, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Toronto
R. Baker	– Superintendent, Capreol
K. Morris	– Sr. Manager, Labour Relations, Edmonton

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
A. W. Franko	– Vice-General Chairman, Edmonton
L. Adams	– Grievor

AWARD OF THE ARBITRATOR

The material facts in relation to these grievances are not substantially disputed. An urgent situation involving a derailment required a work train to be dispatched to a wreck site in the early morning hours of February 13, 2008. It is common ground that at that time there were extremely cold winter conditions with some falling and blowing snow. As part of his related work train assignment Conductor Adams was responsible for overseeing the shoving of some twenty-two loaded cars from Wycliff on the Redditt Subdivision a distance of some 6.5 to 7 miles to the site of the derailment. The train was carrying vital equipment, including rail panels, necessary to the urgent cleanup of the wreck site.

As the train was to be pushed for the entire distance, through the darkness of the early morning hours, running rules required that an employee be stationed at the point of the movement. That role was to be performed by the grievor. He refused to do it,

invoking his right to refuse dangerous work under Part II of the **Canada Labour Code**. Mr. Adams maintained that the assignment to ride the point was excessively hazardous, given the dark and wintery conditions which then prevailed. He also had concern with respect to riding the side ladder of the leading car as the movement would be required to go through several narrow rock cuts with close clearance. As conductor of the movement he also took the position that the work should not be performed by his assistant conductor, Damien Swanson.

Upon hearing of the grievor's work refusal two supervisors who were at the site of the derailment proceeded to his train by hy-rail truck, General Manager Dennis Broshko and Superintendent Rick Baker. When Mr. Broshko and Mr. Baker entered the locomotive cab there ensued a discussion with the work train's crew. Mr. Adams reiterated that he considered it unsafe to ride the point of the train in the extreme winter conditions and darkness that then prevailed. He stated that he would, however, be willing to walk at the point of the movement. When they were asked whether they were willing to perform the work, Assistant Conductor Swanson and Locomotive Engineer Shawn Gaudry responded that they were prepared to do so. The Arbitrator accepts the evidence of Mr. Baker that it was not then practicable to use the hy-rail as a lead vehicle because the circumstances at the wreck site did not then allow for the removal of the hy-rail from the track and required the lead end of the work train to move into extremely close proximity to the derailment site to facilitate the unloading of rail panels. The alternative of walking was impracticably slow given the urgency of the situation. Mr. Broshko and Mr. Baker then instructed Assistant Conductor Swanson to take his

position on the lead, with the apparent understanding that he could be relieved if he found the task too tiring or difficult. With Mr. Swanson riding on the point the train then began to proceed towards the site of the derailment.

After a short time Mr. Swanson radioed that he was too tired to maintain his position on the ladder of the leading car. At that point Mr. Baker relieved him and stayed on the point of the movement until its arrival at the site of the derailment. According to his evidence, which the Arbitrator accepts, the night visibility, enhanced to some degree by snow on the ground, allowed him to instruct the engineman to increase his speed to fifteen miles per hour. During his evidence he specifically related that he knew the territory over which they were travelling to be clear, as he had specifically ensured that it would be by an arrangement with the officer responsible for the territory, and he had himself travelled the length of the distance in the hy-rail vehicle before boarding the work train. It does not appear disputed that once the train reached the work site the grievor continued on duty, doing his part to assist in cleaning up the derailment and restoring the track.

The record before the Arbitrator appears to confirm that following the incident the Company's Risk Manager, Rick Theberge, initiated a report of the grievor's work refusal with Transport Canada. There appears to be some divergence in the information provided to the Company and to the Union with respect to the role of the Safety Officer of Transport Canada. The Company relates that at some point the officer verbally advised that as the work with respect to riding the point had been performed safely by

someone else, the grievor's refusal to work did not involve a danger under the **Canada Labour Code**. However, when subsequent inquiries were made of the same officer by the Union, it appears that he indicated that he was awaiting further information from the Company. In any event, now some three years later, there has been no report issued by Transport Canada with respect to this incident. It also appears that it has been the subject of a complaint before the Canadian Industrial Relations Board, a complaint which is in abeyance at this time.

Several weeks following the incident, apparently after the Company was advised that there was no dangerous condition according to the Transport Canada officer, an investigation was convened by the Company with respect to the actions of Mr. Adams. Following that investigation he was assessed twenty demerits for "failure to follow instructions outlined in GOI section 8, item 12.4, while working as conductor on February 13, 2008, resulting in delay to assignment." In essence Mr. Adams was disciplined for his refusal to perform the work in relation to riding the point on the work train on the night in question.

The Union raises a number of objections in respect to the manner in which the Company conducted the disciplinary investigation. Firstly it submits that the grievor was denied a fair and impartial investigation because the Company did not allow three National union officers, who had then been removed from office as a result of an internal union controversy, to act as his representatives during the investigation process. The Union also objects to the fact that the investigating officer did not allow the

grievor to have Health and Safety Committee member Mike McCarl attend either as a representative of the grievor or as a witness. When Mr. Adams was eventually represented by UTU Local Chairperson Garth Gastmeier and Secretary/Treasurer Dave Brunton the Unions' representatives indicated to the investigating officer that they wished to tape the investigation. It is not disputed that he refused them the ability to do so. On all of these grounds counsel for the Union submits that the grievor was denied a fair and impartial investigation in accordance with the provisions of article 117 of the collective agreement.

The Union also alleges a violation of article 152 of the collective agreement. That article, entitled "Workplace Environment" reads as follows:

> **152.1** Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free workplace environment. An employee alleging harassment and intimidation by management may submit a grievance to the General Chairperson to be progressed by the General Chairperson at his or her discretion. An employee subject to this agreement may, without prejudice, elect to submit a complaint under CN's Harassment Free Environment Policy.

Counsel for the Union submits that the foregoing provision was violated by the Company in a number of respects. He submits that the length of time of some sixty-five days before the Company conducted an investigation of the grievor's actions, a time during which the Union pursued a number of separate grievances concerning what it characterizes as the inaction of the Company in relation to the grievor's right to a proper investigation and report by Transport Canada, were essentially actions taken in bad faith which constituted a form of harassment. In essence, it submits that the investigation which was eventually convened and the resulting discipline were a form of

reprisal for the grievor having asserted his rights to refuse unsafe work under Part II of the **Canada Labour Code**. Additionally, counsel submits that during the course of the encounter between Mr. Baker and Mr. Adams in the cab of the locomotive, when Mr. Adams was refusing to ride the point of the work train, Mr. Baker thrust his face in close proximity to Mr. Adams' face as they were speaking. According to Mr. Adams' recollection, when he asked Mr. Baker to remove himself from his personal space Mr. Baker asked him whether he would like to go outside to settle the matter. In effect, according to counsel for the Union, Mr. Baker was threatening to engage in a physical altercation with Mr. Adams, something he characterizes as a clear form of harassment in violation of article 152 of the collective agreement.

With respect to the merits of the grievance, the Union submits that at all times the grievor acted in good faith, based on his personal belief that it was unduly hazardous to operate the work train using a point observer over a distance of some seven miles in extremely dark and cold conditions, and that there was no just cause in the circumstances to impose any discipline upon him for what he fairly believed was the exercise of his rights under the **Canada Labour Code**. He also submits that it was not proper for the Company to conduct a disciplinary investigation in relation to the incident which occurred given that, at least in the Union's perspective, the process of investigation and a report by Transport Canada under the **Code** was not exhausted. Counsel further submits that the actions of the grievor, which he took in good faith, are comparable to those found in another refusal of unsafe work as recorded in **CROA&DR 3903**.

With respect to the merits of the dispute the Arbitrator is satisfied that Mr. Adams did act in good faith when he declined to ride the point of the movement, believing it to be an unsafe situation. I am equally satisfied, however, that the contrary view held by Mr. Baker, who eventually did ride the point himself, was equally held in good faith. While it is not for this tribunal to determine whether the condition was in fact safe or unsafe, it is fair to comment that the circumstances were such that honest persons might well differ on that question. If it were necessary to do so I would be compelled to the conclusion that in fact the grievor should not have been disciplined, as I accept that he did honestly believe that his refusal to perform the work was made in good faith and in compliance with his rights under the **Canada Labour Code**, whether he might or might not have eventually been vindicated in that regard by a report of Transport Canada.

More fundamentally, however, quite apart from the merits of the grievance, I am compelled to find that the Union is correct in its assertion that the grievor was denied a fair and impartial investigation, in violation of the requirements of article 117 of the collective agreement. It does not appear disputed that the most recent amendments to that article, made prior to the incident here under examination, involved an addition to the provisions of article 117, ordered by Interest Arbitrator Andrew Sims. Under the present wording of the article either party has a right to tape a disciplinary investigation conducted under the provisions of article 117 of the collective agreement. In defence of what occurred the Company makes two submissions. Firstly it argues that the

investigating officer was simply not aware of the new amendment to the article, as the collective agreement has not been produced in a final printed form. Secondly it submits that the denial of the right to tape the proceedings did not in fact work any substantial prejudice to the grievor.

With the greatest of respect, those two arguments cannot succeed. It is trite to say that ignorance of the law is no excuse. It is likewise no excuse for the Company to argue that officer who violated the collective agreement was simply not aware of its terms. Secondly, and perhaps more importantly, the issue of whether prejudice did or did not result form the violation of the grievor's right is not one that becomes debateable in these circumstances. As noted in prior awards of this Office (**CROA 3362, 3322, 1734, 2073**) the expedited form of arbitration conducted in this Office relies heavily on the integrity of the disciplinary investigation process conducted by the Company. The following was stated in **CROA 1734**:

> In the Arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long established practice, this Office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the **minimal procedural requirements which the parties have placed into the Collective Agreement** to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.
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> (emphasis added)

In that context it is paramount to recall that justice must not only be done, but must manifestly be seen to be done. I must therefore conclude that the refusal of the investigating officer to allow the Union to exercise its right to tape the investigation proceedings did constitute a violation of article 117 of the collective agreement. On that basis alone, the discipline assessed against the grievor must be found to be null and void *ab in*itio. I do not therefore consider it necessary to examine in detail and rule upon the alternative allegations of the Union with respect to the alleged unfairness of the investigation which was conducted.

What of the allegation of the violation of article 152 of the collective agreement? Upon a close examination of the evidence I find that the Union has not discharged its burden of proof with respect to its allegations in that regard. Firstly, the delay in holding the investigation is, I think, properly explained by virtue of the fact the Company felt that it could not proceed to a disciplinary investigation until it had information from the officer of Transport Canada with respect to the final disposition of his investigation. The assertion of the Company, which I accept, is that it was verbally advised by the investigating officer that given that another employee and the superintendent in fact performed the work, there was no dangerous condition disclosed. Whatever the formalities of the Transport Canada reporting process, in the particular circumstances of this case, I am satisfied that the Company did not proceed in an abusive or harassing manner in taking the decision to conduct an investigation of Conductor Adams' actions on the night in question. Nor am I satisfied that there was, as the Union asserts, a virtual threat of physical altercation made by Superintendent Baker. I accept the testimony of

Mr. Baker given at the hearing, that as there were five individuals in the cab of the locomotive at the time of the discussions concerning the safety of the point assignment, he had little alternative but to be in close proximity to Mr. Adams, and that when the latter objected to that he suggested if Mr. Adams wished they could go outside where they would be in a less crowded condition. I am compelled to find that the rather implausible suggestion that Mr. Baker would have invited the grievor outside to fight is simply not made out on the evidence before me, on the balance of probabilities. For these reasons I cannot find that a violation of article 152 of the collective agreement is disclosed, and that aspect of the grievance is dismissed.

The grievance is therefore allowed, in part. The Arbitrator finds and declares that the Company did fail to respect the requirements of article 117 of the collective agreement in its investigation of the grievor. On that basis the discipline against him cannot stand. I therefore direct that the twenty demerits assessed against his record be removed from his record forthwith.

March 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR