CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4007

Heard in Montreal, Tuesday, 12 July 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Conductor D. Hind for the violation of CROR General Rule C(vi) and GOI section 8.12.4, while working as a conductor on L5863102 switching at Ford Talbotville on February 2, 2010.

JOINT STATEMENT OF ISSUE:

On February 8, 2010 an investigation was held into his alleged failure to comply with CROR General Rule D, General rule C(vi) and GOI section 8.12.4 while working as conductor on L5863102 switching Ford Talbotville. On February 12, 2010 conductor Hind was required to attend a supplemental investigation to "provide further clarification to your comments made but not limited to question 35 of an investigation conducted on Monday Feb. 8,2010." During the supplemental investigation the Company entered and relied upon evidence that was published post February 2, 2010. Evidence entered as item 13 of the February 12, 2010 investigation is dated February 5, 2010.

Subsequent to the February 12, 2010 investigation the Company assessed the employee's record with a discharge for "Violation of General Rule C(vi) and GOI section 8.12.4 while working as conductor on L5863102 switching at Ford Talbotville on February 2, 2010."

It is the Union's position that the discipline was excessive, inappropriate and unwarranted. The evidence relied upon is in violation of article 82 and, as such, the discipline is void ab initio. It is also the Union's position that the Company is now attempting to rely on alleged rule violations that were never investigated or previously referred to. As such, no discipline cab be assessed with respect to these allegations.. Further, that the Company violated s.125(q), (s), (v), (z) and (z.03) of the *Canada Labour Code*.

The Company disagrees with the Union's position.

FOR THE UNION:
(SGD.) J. R. ROBBINS
GENERAL CHAIRMAN

FOR THE COMPANY
(SGD.) S. FUSCO
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Fusco	– Manager, Labour Relations, Toronto
B. Hogan	– Manager, Human Resources, Toronto
D. Gagné	– Sr. Manager, Labour Relations, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Toronto
G. Hare	– Assistant Superintendent Transportation, Toronto

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
J. R. Robbins	– General Chairman, Sarnia
T. Redrift	– Local Chairman,
B. R. Boechler	– General Chairman, CN Lines West, Edmonton
P. Vickers	– General Chairman, Sarnia
R. A. Hackl	– Vice-General Chairman, CN Lines West, Edmonton
D. Hind	– Grievor

AWARD OF THE ARBITRATOR

The grievor was reinstated into his employment following the Arbitrator's preliminary award in this matter concerning the extension of time limits, and award dated May 16, 2011. Additionally, it appears that the Company no longer relies upon the second basis of the original discharge, namely the alleged making of false statements by the grievor during the course of his first disciplinary investigation. That issue no longer forms part of the Dispute and Joint Statement of Issue. The thrust of the merits of the grievance, therefore, concerns the alleged violation of GOI section 8, Item 12.4 by the grievor at the Talbotville Ford plant of February 2, 2010.

There is no dispute that Mr. Hind rode the side of the leading car of a movement operating inside the Talbotville plant. He was observed doing so by a Ford supervisor who had advised him that the practice was contrary to an understanding between the Company and Ford and who reported his conduct to higher officers of the Company.

That is no doubt due, in part, to the fact that another CN employee had been killed while riding equipment inside another Ford plant some three weeks previous.

The first issue to be addressed is whether the grievor did violate GOI section 8, Item 12.4 of February 2, 2010, as alleged. The Company relies on the fact that the Talbotville plant is posted with a “restricted clearance” sign. On that basis its representatives maintain that no employee should ride moving equipment inside the plant. The Union submits that in fact Item 12.4 does not specifically prohibit the activity engaged in by the grievor, and that prior to the incident in question there was no communication of any prohibition against riding equipment inside the Talbotville plant. Indeed the thrust of the Union’s submission is that for years employees have ridden the side of cars moving through the plant where actual clearance permitted, without any adverse disciplinary consequence.

Upon a review of Item 12.4 the Arbitrator is compelled to conclude that it does prohibit, in a general way, riding on the side of moving cars in areas of restricted clearance. In my view that is the only way to interpret the following language of Item 12.4:

> 12.4 When riding equipment, employees MUST ALWAYS:
>
> …
>
> - be aware of and react to restricted clearances

On the basis of the foregoing I am satisfied that there was a violation of the rule by Conductor Hind. The more difficult issue concerns the appropriate measure of

discipline and the Union's allegation that the grievor was denied a fair and impartial investigation.

I deal firstly with the issue of the Union's objection to the Company's conduct of the investigation proceedings. It appears that following his initial disciplinary interview, for which the grievor was assessed a discharge for violating Item 12.4, the Company convened a subsequent investigation relating to an allegation that he had misled the Company during his first statement. On the occasion of that investigation certain documents were entered into evidence which were not entered into evidence in the first investigation. The Union maintains that the withholding of those documents at the initial investigation represents a violation of the Company's obligation to conduct a fair and impartial investigation in accordance with article 82 of the collective agreement.

I am compelled to conclude that the Union's objection cannot stand. There are three documents in question. The first is a memo to file from Assistant Superintendent Geoff Hare essentially relating the substance of a letter provided to the Company by Ford Safety Engineer Rod Jarvis, the content of which was clearly provided to the Union. The other documents are internal Ford notices to all North American operations. They are dated February 5, 2010, clearly after the incident involving Mr. Hind and essentially add nothing as to the incident of February 2, 2010. Most importantly, these three documents were tabled in relation to the examination of the grievor concerning his alleged false statement, an allegation which the Company has now effectively removed. Additionally, there is nothing in the material before me to confirm that the memo of Mr.

Hare was in the possession of the investigating officer at the time of the first statement. On these grounds the Union's objection with respect to the alleged violation of article 82 must be rejected.

I turn to consider the issue of the appropriate discipline. I must accept the submission of the Union that the summary discharge of the grievor for this single incident is excessive. The material before me indicates that the normal discipline for a violation in relation to Item 12.4 is the assessment of demerits. The grievor's record was clear at the time of the incident here under examination. It is difficult to escape the conclusion that the Company reacted strongly in the case of Mr. Hind because of the recent fatality experienced in another Ford plant. As understandable as that reaction may be, it is incumbent upon the employer to administer discipline in a relatively consistent manner. It is also of some concern that it would appear that the prohibition against riding equipment within the Ford plant at Talbotville has been less than consistently enforced.

On the other hand, the record confirms that the Union failed to do anything with respect to the grievor's discharge for an initial period of some eight months. It was only in October of 2010 that the Union appears to have become aware of the grievor's circumstances and commenced to progress a grievance on his behalf.

In my view, the Company knew, or reasonably should have known, that the summary discharge of an employee of twenty-three years' service, who had a clear

record at the time, for a single Item 12.4 infraction was not justified. I am satisfied that the assessment of thirty demerits would have been appropriate. Compensation should not issue, however, for the period of delay between the grievor's termination on February 13, 2010 and the eventual filing of the grievance by a letter dated November 22, 2010. I am satisfied, however, that the grievor should be compensated for the period between November 22, 2010 and his reinstatement into employment in May of 2011, following the preliminary award herein.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be compensated for all wages and benefits lost between November 22, 2010 and the date of his return to work in May of 2011. His record shall be amended to remove any reference to discharges or suspension for his violation of Item 12.4, with thirty demerits to be substituted for that infraction.

Finally, the Arbitrator cannot find that the Union's alternative argument respecting alleged violations of section 125 of the **Canada Labour Code** is made out. The provisions argued concern the employer's general obligation to provide a safe working environment and related instructions and programs for the prevention of hazards in the workplace. I am satisfied that the evidence before me discloses no violation of those obligations.

July 21, 2011

(Signed) MICHEL G. PICHER
ARBITRATOR