

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

CASE NO. 4010

Heard in Montreal, Wednesday, 11 May 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE – UNION:

Assessment of discipline and discharge to Conductor A.J. Khalsa on the basis of allegations involving an incident with Trainmaster Terry Lee while employed as the brakeman on L-55231-11; specifically the physical altercation on the right of way in Oakville on March 11, 2010.

UNION'S STATEMENT OF ISSUE:

On March 11, 2010, Conductor A.J. Khalsa was employed as a brakeman on the above noted assignment. As a result of an incident with Trainmaster Lee and based on allegations brought forward against Conductor Khalsa by the Company, he was disciplined/discharged from his service with the Comp[any on March 18, 2010.

The Union contends: **(a)** that the Company had no cause to issue any discipline to Conductor Khalsa let alone a discharge; **(b)** that the evidence used in his discharge was flawed; **(c)** that the investigation was not fair and impartial; **(d)** that the investigation process and resultant discipline is void *ab initio*; **(e)** that the Company violated the terms and conditions of the collective agreement including, but not limited to, Articles 82 and 85; **(f)** that the Company violated the *Canada Labour Code* including, but not limited to, articles 56, 124 and 125; and **(g)** that the Company violated the *Canadian Human Rights Act*.

The Union submits that the investigation, discipline and other decisions/actions taken by the Company in this case against Conductor Khalsa violated his right to have a fair and impartial investigation and due process and as such all discipline issued to Conductor Khalsa ought to be rescinded and that he be immediately reinstated without loss of seniority and benefits and compensated for all loss earnings and that all reference to the discipline and incident be removed (expunged) from his record.

The Union also requests that a remedy be awarded in accordance with Addendum 123 of the collective agreement. The Union also requests that Conductor Khalsa receive general damages for pain and suffering for himself and his family. The Union also requests payment for all legal costs, including those associated with the criminal charges laid against Conductor Khalsa on behalf of the Company. The Union also requests payment for punitive damages due to the circumstances of this case.

The Company has not responded to the Union's grievance process. The Company disagrees with the Union's contentions.

DISPUTE – COMPANY:

Discharge of Conductor A.J. Khalsa on the basis of allegations involving an incident with Trainmaster Terry Lee while employed as the brakeman on L55231 11; specifically the physical altercation on the right of way in Oakville on March 11, 2010.

COMPANY'S STATEMENT OF ISSUE:

On March 11, 2010, Mr. Khalsa was employed as a brakeman on the above noted assignment. As a result of the incident with Trainmaster Lee and based on allegations brought forward against Mr. Khalsa by the Company, he was discharged from his service with the Company on March 18, 2010.

The Union contends that the Company had no cause to issue any discipline to Conductor Khalsa let alone a discharge.

The Company deems the discipline assessed as both appropriate and warranted in this case, specifically due to the violent nature of the incident.

The parties have agreed to bifurcate these proceedings and proceed solely on the issue of whether discharge was warranted in this matter. If the grievance is not denied, the parties will appear before this Office and make additional submissions regarding related allegations of collective agreement violations and the appropriate remedy(ies) relating thereto.

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

FOR THE COMPANY:
(SGD.) WM. HLIBCHUK
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

Wm. Hlibchuk	– Counsel, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Toronto
M. Marshall	– Sr. Manager, Labour Relations, Toronto
B. Hogan	– Manager, Human Resources, Toronto
T. Lee	– Trainmaster, Toronto North

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
J. R. Robbins	– General Chairman, Sarnia
B. R. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
B. Huppé	– Local Chairman, Montreal
A. J. Khalsa	– Grievor

AWARD OF THE ARBITRATOR

The grievor has been discharged for his alleged assault of Trainmaster Terry Lee during the course of his tour of duty on March 11, 2010. It is not disputed that an altercation, un-witnessed by anyone else, occurred between Mr. Khalsa and Trainmaster Lee during the course of switching operations within the Oakville Yard in the late evening hours.

The two participants in the fight which took place give dramatically differing accounts of what occurred. Trainmaster Lee states that he proceeded to the grievor's location in the yard when he was not pleased with a response he had received from Mr. Khalsa on the radio. The call concerned what Mr. Lee perceived as a delay in the preparation and departure of the grievor's train from the yard. Essentially, Mr. Lee states that when he confronted the grievor, asking him why he used a disrespectful tone on the radio, Mr. Khalsa became enraged, that heated words followed and that when Mr. Lee attempted to turn and leave the grievor asked him to repeat a comment he had made and then grabbed him physically about the head and neck screaming that he was going to kill him. According to Mr. Lee, Mr. Khalsa attempted to physically push him toward a moving train, saying again that he was going to kill him. He states that there was a pause in the physical altercation at which point he rose from the ground and punched the grievor in the face with his right fist, which was followed by still more physical attacks from the grievor. According to Mr. Lee's account Mr. Khalsa picked up a hand lantern and threatened to strike him with it, until he restrained both of the

grievor's arms with his own hands. Mr. Lee states that at that point the grievor rose to his feet and called on his radio to the Oakville Yardmaster saying: "Call the police. I have been assaulted by the Trainmaster." Mr. Lee states that he then left the scene and returned to the yard office where he contacted a superintendent to report the incident.

Mr. Khalsa denies that he assaulted Trainmaster Lee. He acknowledges that he made what may have been taken as a sarcastic remark to him in their radio communication about the possible delay to the train. Shortly thereafter, he states, Mr. Lee came towards him in the yard and began to yell at him and jab his finger into his chest. According to Mr. Khalsa Mr. Lee said: "You don't speak to me that way, I'm your supervisor." According to the grievor: "I asked him what his problem was because he was lying." According to Mr. Khalsa's recollection when he pushed him away again Mr. Lee punched him in the face and they then wrestled on the ground for a short time. He states that while he was in fact attempting to put Mr. Lee to the ground, he was not attempting to throw him under the train as he claims. He also denies ever attempting to strike him, whether with his fists or with a hand lantern. Mr. Khalsa relates that the incident ended when he got off Mr. Lee and radioed the yardmaster to call CN Police and an ambulance as he had been assaulted by the trainmaster.

It does not appear disputed that Mr. Lee suffered minor contusions to his head and scrapes to his knees while Mr. Khalsa required emergency room hospital attention for a bleeding nose and a cut lip.

Following an investigation by CN Police, criminal charges were laid against the grievor, charges which were subsequently withdrawn by the Crown for reasons of insufficient evidence. Following a disciplinary investigation, the Company came to the conclusion that the grievor was, as Mr. Lee alleges, the instigator of the altercation and terminated his employment.

Having reviewed the evidence in some detail, the Arbitrator cannot find that the Company has discharged the burden of proof which is upon it to demonstrate that the Company had just cause to discharge the grievor in light of the facts presented. I cannot find that the evidence confirms, on the balance of probabilities, that Mr. Khalsa struck the first blow any more than it confirms that Mr. Lee did so. However the evidence, according to the grievor's own admission, would indicate that there was a degree of provocation on the part of Mr. Khalsa. The record indicates, to the Arbitrator's satisfaction, that Mr. Khalsa did make a sarcastic remark to Mr. Lee over the radio a few minutes earlier, essentially mocking his suggestion that their train had been delayed fifteen minutes since it had received a permissive light. According to Mr. Khalsa, as confirmed by other members of their crew, they had only been delayed some two minutes. However, the grievor admits that when he was confronted in the yard by Mr. Lee: "I called him a fucking liar and asked him what he has got against me." In the circumstances, whoever may have struck the first blow, I am compelled to the conclusion that the grievor did bring an important element of provocation into the incident, and clearly engaged in conduct unbecoming an employee, no matter what he may have thought of his supervisor's attitude.

In the result, I must come to the conclusion that the Company did have cause to assess serious discipline against the grievor. The evidence, however, falls short of establishing who was the initial assailant in the physical altercation which subsequently took place. However, the evidence does establish, on the balance of probabilities, that the provocative words used on at least two occasions by Mr. Khalsa contributed substantially to what occurred.

The grievance is therefore allowed in part. While the Arbitrator finds and declares that the Company did have cause to assess serious discipline against the grievor, the facts as revealed in the evidence presented by the Company, which bears the burden of proof, do not confirm that discharge was appropriate, having regard to the grievor's length of service, which is in excess of twenty years. The Arbitrator therefore directs that the grievor be reinstated into his employment, as discharge was not warranted. The circumstances as found do not merit an order of compensation for wages or benefits lost. As agreed by the parties, the matter is remitted back into their hands for possible further submissions with respect other alleged collective agreement violations and appropriate remedies.

Additionally, the Arbitrator has considered and is compelled to reject the submissions of the Union to the effect that the Company failed to provide a fair and impartial investigation prior to the discharge of the grievor. I am satisfied that all relevant documents in the possession of the Company's officers responsible for the investigation

were shared with the Union in a manner consistent with the standard of investigation contemplated in article 82 of the collective agreement. The Union's right under the collective agreement is to have access to all of the evidence in the possession of the investigating officer, not all other evidence it might wish produced. That is a right it can exercise through the power of subpoena at the arbitration stage. The right to have access to a recorded conversation described in article 84.10 does not arise in the investigation but in the grievance procedure, after discipline has issued. Assuming that a timely request for a conversation between Mr. Lee and the RTC was made, I would be compelled to agree with the Company that an argument Mr. Lee may have had with a third party is irrelevant to the issue before me, which is his conduct towards the grievor. Moreover, that Mr. Lee exhibited anger is independently established through another witness. Finally, a violation of article 84 of the collective agreement would not go the quality of investigation held under article 82, although it could obviously be the basis of a grievance and could, in an appropriate case, justify the adjournment of an arbitration pending production.

May 20, 2011

(signed) MICHEL G. PICHER
ARBITRATOR