CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4017

Heard in Edmonton, Wednesday, 15 June 2011

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The discharge of Conductor Steven Pass of Vancouver, B.C. for being involved in a car accident while operating a CN vehicle.

UNION'S STATEMENT OF ISSUE:

On October 3, 2009, Conductor Pass was operating a CN vehicle while on duty in order to expedite the installation of an SBU on the last car of his movement,

Conductor Pass made a U-turn and was involved in a car accident resulting in a citation being issued with respect to the accident. Following an investigation, Conductor Pass – who had no active discipline on his record – was discharged.

The Union submits that the discipline assessed was excessive and inappropriate and, in any event, discharge was not warranted in the circumstances, especially given the fact that Conductor Pass was not obligated to operate a motor vehicle in the performance of his duties.

The Company responded to the Union advising that it would not accept the Union's "letter" as a grievance due to time limits and refused to address the merits of the Union's grievance.

The Union acknowledges that the time limits in the collective agreement have been exceeded but there are extenuating circumstances which the Company is fully aware of that make this an appropriate case for the extension of time limits and requests that the arbitrator exercise his discretion under the *Code* to do so.

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

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Prince George
K, Morris	– Sr. Manager, Labour Relations, Edmonton

D. Brodie – Manager, Labour Relations, Edmonton
D. Taylor – Superintendent, BC South, Vancouver
B. Butterwick – Assistant Superintendent, BC South, Vancouver

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
R. Thompson – Vice-General Chairman, Edmonton
W. Franco – Vice-General Chairman, Edmonton
D. Saunders – Local Chairman, Vancouver

PRELIMINARY AWARD OF THE ARBITRATOR

The sole issue in this preliminary award is whether the Company's objection as to timeliness of the grievance should be sustained.

The Union does not deny that its local chairman, who is no longer in office, negligently failed to process a grievance on behalf of Conductor Pass. It would appear that the Union's local officer did not communicate Mr. Pass' desire to grieve nor forward to the General Chairperson, who is located in Edmonton and exercises the authority to file a grievance against discharge, any information or documentation in relation to his case. The unchallenged representation before the Arbitrator is that, as reflected in a complaint under section 37 of the **Canada Labour Code** made by the grievor against his Union which it received December 8, 2010, on or about October 28, 2009 Mr. Pass had delivered information and his request to grieve to his then Local Chairman, Mr. Randy Shyanne. Close to a year later, it would seem that Mr. Pass was advised by the new Local Chairman, Mr. Dustin Saunders, that in fact there was no grievance on his behalf being processed. That was because the General Chairperson's office in

Edmonton had not received any grievance or information in relation to his case from the Local Chairperson at Vancouver.

Following the grievor's complaint to the CIRB the office of the General Chairperson contacted the Company to obtain such information as might be available with respect to the grievor's discharge. When the Company's complete file was forwarded to the Union on January 19, 2010, the instant grievance was filed the following day.

The Company submits that the grievance so filed is plainly untimely and draws to the attention of the Arbitrator the following provisions of the collective agreement:

> **121.1** A grievance concerning the interpretation or alleged violation of this agreement (including one involving a time claim) shall be processed in the following manner:
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> An appeal against discharge, suspension, restrictions, including medical restrictions, demerit marks in excess of 30, or demerit marks which result in discharge for accumulation of demerits, shall be initiated at Step 3 of this grievance procedure. All other appeals against discipline imposed shall be initiated at Step 2 of this grievance procedure.
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> Step 3 – Appeal to Vice-President
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> Within 60 calendar days of the date of decision under Step 2 the General Chairperson may appeal the decision in writing to the regional Vice-President.
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> The appeal shall be accompanied by the Union's contention, and all relevant information concerning the grievance and shall be examined in a meeting between the Vice-President, or delegate, and the General Chairperson. The Vice-President shall render his decision in writing within 30 calendar days of the date on which the meeting took place. Should the Vice-President consider that a meeting on a particular grievance is not required, he or she will so advise the General Chairperson and render the decision in writing within 60 calendar days of the date of the appeal.
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> **...**

> **121.4** Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 121.5, be progressed to the next step in the grievance procedure.

With respect to the exercise of the Arbitrator's discretion to extend the time limits under section 60(1.1) of the **Canada Labour Code**, the Company maintains that no reasonable grounds for such an extension are disclosed. Its representative stresses that the Union was well aware, even at the level of the General Chairperson's office, that the grievor had been dismissed, as that matter had been casually discussed between the parties at the level of the General Chairperson on more than one occasion. It submits that in all of the circumstances the lengthy delay caused by the Union also gives rise to prejudice to the Company, particularly as it may be made liable to an order for compensation covering an extensive period during which the Union effectively did nothing to assert the grievor's rights.

The Company's representative also questions the jurisdiction of the Arbitrator to grant relief, given the language of the memorandum of agreement establishing the CROA&DR. In that regard reference is made to paragraphs 6 and 9 of the memorandum of agreement which provide as follows:

> **6.** The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
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> (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between

> such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
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> (B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Disputes Resolution for final and binding settlement by arbitration;
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> but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.
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> …
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> **9.** No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last step of the grievance procedure.
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> No dispute of the nature set forth in section (B) of clause 6 may be referred to the Office of Arbitration until it has first been processed through such prior steps as are specified in the applicable collective agreement.

To complete the record, it may be noted that the complaint before the CIRB is presently in abeyance. In a letter decision dated March 25, 2010, on behalf of unanimous Board panel, Vice-Chairman Graham J. Clarke dealt with an initial preliminary question as to the timeliness of the grievor's duty of fair representation complaint, filed on November 30, 2010. The Board ruled that the complaint before it was timely but declined the request of the respondent Union to extend the time limits for filing a grievance under the collective agreement. In that regard its Vice-Chairman notes that the Board has no jurisdiction to issue remedies without first finding a violation of the **Code**. In effect, the CIRB ultimately deferred to the Arbitrator, citing the jurisdiction available at arbitration under section 60(1.1) of the **Code**, effectively reserving on all issues pending a determination of the instant preliminary matter by this Office.

How then is the dispute to be resolved? The approach to be taken by this Office in resolving the application of section 60(1.1) of the **Canada Labour Code** was addressed in **CROA&DR 3493** where the following passage appears:

> As can be seen from the foregoing the Arbitrator is compelled to undertake a two part analysis before deciding to extend time limits in the exercise of his discretion. Firstly consideration must be given to whether there are reasonable grounds for the extension and secondly, the Arbitrator must examine whether an extension of the time limits would unduly prejudice the opposite party, in this case the Company.
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> In the leading decision of **Re Becker Milk Company Ltd. and Teamsters Union, Local 647** (1978), 19 L.A.C. (2d) 216 (Burkett), a board of arbitration was called upon to consider the virtually identical provisions of the **Ontario Labour Relations Act**, R.S.A. 1970, c. 232, s. 35(5a), the board of arbitration found that it was appropriate to consider three factors: the reason for the delay given by the offending party; the length of the delay; and the nature of the grievance.
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> Boards of arbitration have made it clear that where it is apparent that there was unexplained laxity on the part of the offending party in progressing a grievance, it may not be appropriate for a board of arbitration to exercise its discretion to relieve against the time limits. (See, e.g., **Re Corporation of the City of Brantford and Canadian Union of Public Employees, Local 181** (1983), 9 L.A.C. (3rd) 289 (Samuels); **Re Helen Henderson Care Centre and Service Employees' Union, Local 183** (1992), 30 L.A.C. (4th) 150 (Emrich); **Re Laidlaw Transit Ltd. and Canadian Union of Public Employees, Local 2151** (2000), 93 L.A.C. (4th) 386 (Devlin).)
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> In the case at hand has the Union demonstrated reasonable grounds for an extension of the time limits? It is incumbent upon the offending party to demonstrate that such grounds do exist. If, for example, it could be shown that the Union officer having carriage of the grievance was ill or indisposed for a period of time, or absent from his or her duties for some reason beyond that individual's control there might be a basis to conclude that there is a reasonable explanation for the delay and, to that extent, reasonable grounds for granting the extension of time limits. No such explanation is brought forward in the case at hand, however. Indeed, placing it at its highest, the submission of the Union seems to be simply that progressing the grievance in a timely fashion was simply overlooked in the normal crush of business. With respect, that is not a sufficient or compelling explanation, particularly having regard to the language of the parties' collective agreement which clearly emphasises the need to exercise care and expedition in the processing of disputes.

It is of course axiomatic that the provisions of a collective agreement, and by extension the Memorandum of Agreement establishing this Office, cannot trump or

avoid the provisions of a statute such as the **Canada Labour Code**. The Company's arguments with respect to the provisions of these agreements and their alleged ouster of the Arbitrator's jurisdiction cannot succeed.

The issue then becomes the operation of section 60(1.1) of the Code. At first blush, it is arguable that no reasonable grounds for the extension have been demonstrated in the instant case, to the extent that the Union's delay appears to be attributable entirely to what may be characterized as the gross negligence of past Vancouver Local Chairman Randy Shyanne who, it appears, did not progress the grievance or any grievance materials on behalf of the grievor to the General Chairperson's office in Edmonton when requested to do so. It also seems that he later deceived the grievor in saying he had done so and that the grievance had been rejected at the level of the office of the General Chairperson. It may well be questioned why a board of arbitration should exercise its discretion to extend time limits when the only explanation for the Union's delay is the dereliction of duty and deception exhibited by its principal local representative. If the matter was to be addressed on that basis, without more, I have some difficulty seeing how an extension of time limits could be justified.

But a closer analysis gives me pause. The **Code** does not, it should be stressed, require that the Union provide a reasonable explanation or a reasonable excuse for the delay so as to prompt an arbitrator to extend the time limits. The question for the arbitrator is whether overall there are "reasonable grounds" to grant such an extension, coupled with the question of whether an extension would prejudice the opposite party. In assessing the question of reasonable grounds, some weight must be given to the nature of the grievance, which in the instant case relates to the discharge of an

employee. The substantial consequence of a discharge is of itself a consideration of some importance in assessing whether there are grounds for the extension of time limits. When the question is so framed, considering that a discharge is involved coupled with a CIRB complaint, I am compelled to conclude that on the facts of the instant case reasonable grounds for an extension of the time limits are made out.

In coming to that conclusion I consider it important to recognize that there are pending proceedings before the Canada Industrial Relations Board. Should this Office not extend the time limits there can be little doubt but that the matter will return to the Board for hearing of the unfair representation complaint upon its merits. While it is obviously not the place of this Office to anticipate what the CIRB might do, given the history of this file it is not unreasonable to expect that a finding that the Union, particularly at the Vancouver Local level, and not at the level of the General Chairperson's Edmonton office, did fail to properly represent the grievor in accordance with its obligations under the **Code**. Such a finding would arguably result in a remedy which could include the Board exercising its discretion to then refer the matter to arbitration on its merits. In my respectful view, that outcome is not only possible, but probable. In the result, to grant the preliminary objection of the Company in the instant case might well do little more than compel the parties to pursue further time and expense in litigation before the CIRB, with the very real possibility that they will in any event end up at arbitration on the merits of the grievance. Within that perspective, in my opinion, there are reasonable grounds demonstrated for the extension of time limits, to avoid a multiplicity of proceedings and to allow the matter to proceed more directly to arbitration without further delay and expense.

What of the issue of prejudice to the Company? That issue, I think, can be substantially mitigated by the determination that this Office will remain fully open to a submission by the employer that the Union's delay should operate in substantial mitigation of any order of retroactive compensation for wages and benefits lost in the event the grievor should succeed and be reinstated by this Office. Given that possible protection, there would appear to be little meaningful prejudice to the Company in the event the extension of time limits is allowed.

For the foregoing reasons I am satisfied that it is appropriate to exercise my discretion to allow an extension of time limits so as to allow the instant grievance to be arbitrated. The matter shall therefore be docketed for hearing on its merits.

June 20, 2011

(original signed by) MICHEL G. PICHER
ARBITRATOR