

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

CASE NO. 4022

Heard in Montreal, Tuesday, 12 July 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS UNION – LOCAL 2004

EX PARTE

DISPUTE:

The suspension and removal of Todd Cotie, the full time Health & Safety representative of USW Local 2004.

UNION'S STATEMENT OF ISSUE:

On December 1, 2010, the Company issued a letter addressed to Mr. Todd Cotie in which they state that he would be held out of service pending an investigation into conduct prejudicial to the interests of CN and insubordination.

The Union filed a grievance regarding this matter citing violations of articles 18.2 (a), (d) and (f) and 18.5(a) of agreement 10.1, as well as sections 125, 136 and 147 of Part II of the Canada Labour Code on behalf of Todd Cotie. The Union also argues that the grievor, the Local Union and the Company have an agreement stating the role and responsibility of the Union's appointed full time Health & Safety representative which was adhered to by Mr. Cotie. The Union has argued that the discipline is excessive and unwarranted and that the 90 day suspension be removed, that Mr. Cotie be reinstated to his position as the Health & Safety representative and that he be reimbursed for all lost wages, travel, expenses for all the time he was held out of service. The Union has argued that the grievor is a long service employee with a good work record with no previous offences.

The Company submits that the grievor is deserving of the discipline and that they have not violated the collective agreement.

FOR THE UNION:

(SGD.) M. PICHÉ
STAFF REPRESENTATIVE

There appeared on behalf of the Company:

S. M. Blackmore	– Manager, Labour Relations, Edmonton
R. Bateman	– Director, Labour Relations
S. Grou	– Sr. Manager, Labour Relations, Montreal
M. Loureiro	– Chief Engineer, Track
D. Morin	– Regional Chief Engineer,
D. James	– Sr. Manager, Engineering

There appeared on behalf of the Union:

M. Piché	– Staff Representative, Toronto
P. D. Wright	– President, Moncton
P. Wills	– Unit 33 Chair, Toronto
R. Tompkins	– Chief Steward, GLD,
T. Cotie	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, to my satisfaction, that the grievor was deserving of an important sanction. The record discloses that he was given a special appointment as Health & Safety Coordinator, a position which he initially held from February 19, 2007 to October 5, 2008. In that job he represented neither the Union nor the Company, but was answerable to both in the important task of coordinating health and safety in the workplace. Unfortunately, Mr. Cotie was unable to leave his partisanship behind, and he apparently made some public comments disparaging of the Company. As a result of that he was removed from the Health & Safety Coordinator's position on October 5, 2008.

Approximately one year later the Union persuaded to reinstate Mr. Cotie into the same position. That was done, effective October 1, 2009. However in November of 2010 the Company discovered that the grievor had posted and maintained health and

safety comments critical of the Company on prominent public web sites, including FaceBook and YouTube.

While there is some dispute as to whether those postings were in fact made prior to Mr. Cotie resuming the duties of Health & Safety Coordinator, it is not disputed that they remained on-line during the time he held that position. Among the comments on his FaceBook site was one to the effect that flawed statistics are still the basis for behavioural safety programs such as the SaFe program of CN Rail. The site was also critical of Company practices. Under the title Myths, Mud and Behavioural BS (Why SaFe don't work) Mr. Cotie's FaceBook site contained the comment: "A 'blame the worker' programs such as SaFe is a good example of the 'Mud'." Very simply, the evidence confirms that the grievor did maintain internet postings on the topic of health and safety which were openly and directly critical of the Company. Those postings remained in place while he held the bipartisan position of Health & Safety Coordinator. Becoming aware of these circumstances, the Company removed the grievor from his position on December 1, 2010 and, following a disciplinary investigation, assessed a ninety day suspension against him.

The Union submits that the penalty is excessive and requests both a reduction in the penalty and that the grievor be reinstated to his paid full-time Health & Safety Coordinator position. The Union further asks that the Arbitrator find violations of the **Canada Labour Code**, including section 147 of Part II of the **Code** which governs health and safety.

The Arbitrator has considerable difficulty with much of the Union's submission. Firstly, the position of Health & Safety Coordinator is not a bargaining unit position. I have some difficulty seeing how it would be open to me to reinstate an employee into a position which does not fall under the collective agreement. I feel compelled to accept the submission of the Company that the grievor holding the bipartisan position of Health & Safety Coordinator was a matter of the Company's discretion and that the arrangement made between the parties in that regard was entirely outside the collective agreement.

I also have difficulty with respect to the remedies sought in relation to Part II of the **Canada Labour Code**. Relief in respect of those matters appears to be reserved to the exclusive jurisdiction of the Canada Industrial Relations Board. In that regard section 133 of the **Canada Labour Code** provides, in part, as follows:

133.(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

I do, however, consider that I have proper jurisdiction to deal with the grievor's suspension. He was plainly suspended as a member of the bargaining unit and had full access to the grievance and arbitration protections of the collective agreement with

respect to that aspect of the Company's disciplinary action. While I am satisfied that the Company is correct in its conclusion that the grievor's web site postings were inconsistent with the bipartisan duties and responsibilities of the person holding the office of Health & Safety Coordinator, I consider that the assessment of what is effectively a three month suspension is excessive, in all of the circumstances. In my view, having regard to the grievor's positive prior record and length of service, a thirty day suspension would have been sufficient to bring home to Mr. Cotie the importance of refraining from posting or maintaining web site material which is clearly critical of the Company and negative to its business interests, especially when he held the bipartisan position of Health & Safety Coordinator.

The Arbitrator cannot agree that the grievor was denied a fair and impartial investigation contrary to article 8.2(d) of the collective agreement. There can be no question but that in substance he was well aware that his FaceBook and YouTube postings were the subject of the investigation. The great majority of the questions put to him related to FaceBook entries which were in fact copied to him and his Union representative at the commencement of the investigation hearing. It would appear that one item, which is not in dispute, involving the working of a CN snow jet was not among the documents provided, although there is no denial of it being on the web site. On the whole I do not find in that fact a fundamental deviation from the obligation to provide a fair and impartial investigation.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor's record be amended to reflect a thirty day suspension, with compensation to be paid to him for the balance in wages and benefits lost.

July 21, 2011

(Signed) MICHEL G. PICHER
ARBITRATOR