CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4052

Heard in Montreal, Thursday, 13 October 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal the assessment of a discharge to Locomotive Engineer S. Errington for violation of CROR Rules 33, 125, 136, 142, 311, 315 and GOI Section 8.3.1 while working as the locomotive engineer on L57051-04 which resulted in a collision between CN 8847 and the patrol truck on February 6, 2011.

UNION'S STATEMENT OF ISSUE:

Mr. Errington was assigned to train L57051-04 when he was required to protect against Foreman T. McLean at Mile 32 on the Squamish Subdivision. The train failed to stop at Mile 32 and continued

FOR THE UNION:

(SGD.) T. MARKEWICH
VICE-GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Crossan	– Manager, Labour Relations, Edmonton
K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
R. Robinson	– Engine Service Officer, Western Canada, Edmonton
K. Smolynec	– Sr. Manager, Occupation Health, Edmonton

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Vice-General Chairman, Edmonton

S. Errington – Grievor

AWARD OF THE ARBITRATOR

For the reasons stated in **CROA&DR 4050**, I am satisfied that the grievor was responsible for the violation of CROR rules 33, 125, 136, 142, 311 and 315, and GOI section 8.3.1 in the operation of train L57051-04 on February 6, 2011. Locomotive Engineer Errington shared equal responsibility with his conductor, John Monteith, in a lapse of vigilance which resulted in the operating of his train into the TOP limits of Patrol Foreman Troy McLean, resulting in a collision with Mr. McLean's hy-rail vehicle which, fortunately, resulted in no fatality or serious injury.

The Union raises a preliminary issue with respect to the conduct of a disciplinary investigation which ensued. Firstly, it submits that the Company violated the requirements of article 19.1.6 of the collective agreement by failing to immediately provide to the Union a copy of a video which was entered into evidence during the Company's investigation. The article in question reads as follows:

> **19.1.6** A locomotive engineer will be given a carbon copy of his evidence and provided with copies of material introduced in evidence at the hearing which may have a bearing upon his responsibility.

Secondly, the Union argues that the grievor was denied proper notice of his right to attend the statement of Conductor Monteith.

I am satisfied, after careful examination of the record that neither of these objections can hold. I deal firstly with the second objection concerning notice to the

grievor of Conductor Monteith's investigative statement. The record confirms that by letter dated February 6, 2011, Locomotive Engineer Errington was convened to attend his own disciplinary investigation at 11:00 February 10, 2011. That written notice, prepared by Trainmaster K. Cheema concludes with the following:

> The following individual(s) is(are) also being investigated in connection with the same incident / accident:
>
> > John D. Monteith – Wednesday, February 9, 2011 at 11:00 AM – 51 Phillips ave North Vancouver [sic]

Counsel for the Union submits that it was not sufficient for the Company to advise the grievor of the time and place of Mr. Monteith's investigation. He argues that, in keeping with a fair and impartial investigation, it was incumbent upon the Company to advise the grievor that he had the right to attend Mr. Monteith's investigation. I cannot agree. Article 19.1.5 of the collective agreement provides a clear statement of the employee's right, in the following terms:

> **19.1.5** The locomotive engineer shall have the right to be present during the examination of any witness whose evidence may have a bearing on the engineer's responsibility, or to be accorded the right to read the evidence of such witness and offer rebuttal thereto.

I must agree with the Company that it is not the Company's obligation to advise the grievor of his rights under the collective agreement. If neither the grievor nor his Union representative, to whom the notice of February 6, 2011 was copied, was aware of their rights under the collective agreement, that is not a failing which can be placed at the feet of the employer. I am satisfied that this ground of objection cannot be sustained.

Nor can I sustain the position of the Union with respect to the Company providing it a copy of the video used during the disciplinary investigation. The record before me confirms that the video was such as to operate only on software which is largely the particular property of the Company. It is also not challenged that the Company indicated to the Union that it could view the video at any time it wished, although it would have to be on Company software and hardware. Moreover, when the Union's objections with respect to the issue of the video continued after the grievor's termination, the Company did offer to provide the Union a copy of the video, subject to the Union respecting certain undertakings with respect to the private nature of the video and the non-disclosure of its contents beyond the purposes of the grievance. The Union declined to accept those conditions.

In my view the Company has not effectively deprived the grievor of a fair and impartial investigation on the basis of the facts disclosed. Nor, in my view, can it be said to have violated article 19.1.5 of the collective agreement other than in the most technical sense. The substance of the requirement of that article is to give the employee fair access to any material entered into evidence during the disciplinary investigation. I am satisfied that in the facts disclosed fair access was accorded to the grievor and his Union and that no violation of the substantive intent of that article is disclosed. On that basis the first ground of objection must also be dismissed.

I turn to consider the issue of the appropriate measure of discipline. In doing so, I am compelled to agree with counsel for the Union that there are mitigating factors to be taken into account. Locomotive Engineer Errington has been a railroader for thirty years, having served his last eighteen years with the Company. During that eighteen year period he was disciplined on only five occasions, the last serious discipline being a five-day suspension fourteen years prior to the incident here under examination. It is not disputed that he received no discipline of any kind in the last seven years.

For reasons well expressed in **CROA&DR 4050**, the errors committed by Mr. Errington and the incident in which he was involved on February 6, 2011 were extremely serious, deserving of a grave level of discipline. In the circumstances, I am satisfied that his prior service justifies a reduction of penalty, albeit to a level sufficiently serious to convey to him the importance of respecting all operating rules, and in particular communicating adequately to protect any patrol foreman with whom he may be working.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost, and without loss of seniority. The period between his termination and reinstatement shall be recorded as a suspension for the event of February 6, 2011.

October 18, 2011

(signed) MICHEL G. PICHER
ARBITRATOR