CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4057

Heard in Calgary, Wednesday, 9 November 2011

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal on behalf of Conductor P. Champagne of the assessment of 25 demerits for his violation of GOI Section 8, Item 12.12 while working as conductor on Train Q10531-16 at Symington Yard in Winnipeg on January 18, 2011 and his resulting discharge for accumulation of demerits in excess of sixty effective March 4, 2011.

COMPANY'S STATEMENT OF ISSUE:

On January 18, 2011, Mr. Champagne was assigned as the conductor on train 105 and was observed committing the above-noted rules infraction by a Company officer.

The Company conducted an investigation of the incident and determined that Conductor Champagne had violated the rule noted and was deserving of discipline which subsequently discharged him for accumulation of demerits.

The Union contends that the Company has improperly assessed discipline and discharged the grievor and that he ought to be reinstated and made whole, and that an appropriate remedy is warranted under the circumstances. The Union further contends that all of the discipline ought to be declared void ab initio due to various alleged procedural flaws which, in the Union's view, resulted in the investigation not being conducted in a fair or impartial manner.

The Company disagrees with the Union's contentions.

FOR THE COMPANY:

(SGD.) D. BRODIE
FOR: VICE-PRESIDENT, HUMAN RESOURCES

There appeared on behalf of the Company:
D. Brodie – Manager, Labour Relations, Edmonton

K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. VanCauwenburgh	– Director, Labour Relations, Toronto
D. Broesky	– Trainmaster, Winnipeg

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairman, Edmonton
B. R. Boechler	– General Chairman, Edmonton
A. W. Franco	– Vice-General Chairman, Edmonton
B. Willows	– General Chairmen (LE), Edmonton
P. Champagne	– Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor did violate GOI Section 8, Item 12.12 while he was assigned as conductor on train Q10531-16 on January 28, 2011 in Symington Yard. The record establishes that the coupling knuckle on the grievor's locomotive was unable to couple with the knuckle on the leading car of his train because of ice and snow impeding the function of the locomotive's coupling knuckle. The grievor attempted by a number of means to free up the locomotive's coupling mechanism, without success, being observed during that process by Trainmaster Donovan Broesky. The unchallenged evidence before the Arbitrator is that on several occasions Mr. Champagne asked Mr. Broesky to request the use of a high pressure hose being used by a track maintenance crew working nearby. For reasons which are unclear, Mr. Broesky declined to act on that request for the better part of an hour, after which he did summon the air hose and it was used to successfully free the locomotive's ice and snow which had been impeding its operation.

The evidence also indicates that as part of his attempt to jar the ice and snow from the locomotive's coupling mechanism the grievor attempted coupling the

locomotive to the lead car of his train on three occasions. Those efforts were unsuccessful, but caused the drawbar on the lead car to shift in its position. Mr. Champagne was then observed by the trainmaster pushing the drawbar of the rail car with his foot, in a kicking motion, to line it up. It is not disputed that that method of aligning the drawbar is not consistent with operating rules, and in particular GOI Section 8, item 12.12. The proper method of manual alignment prescribed by the rule is to lean one's back against the knuckle and, while keeping a straight back, to bend the knees and push back on the knuckle and drawbar to effect a proper alignment.

Following this incident the grievor was summoned to a disciplinary investigation after which he was assessed twenty-five demerits for the rule violation, which resulted in his termination after forty-four years of service.

The Union raises a number of issues. It submits that the grievor was denied a fair and impartial investigation for a number of reasons. It further asserts that the grievor was targeted by Trainmaster Broesky in a manner which was unfair and constituted harassment. In that regard the Union relies on the fact that the trainmaster apparently declined several requests to have the pressure hose brought to the locomotive to solve the problem. In effect, the Union submits that the grievor was effectively entrapped by the trainmaster, as the latter simply observed the situation unfold without responding to the request for the pressure hose, which caused the abortive attempts at coupling and the displacement of the drawbar on the leading car. In the circumstances the Union requests the Arbitrator to remain seized for the purposes of assessing an extraordinary

remedy, citing article 152 of the collective agreement with respect to the Company's obligation to maintain a harassment free workplace environment, although that article is not particularly identified either in the Company's *ex parte* statement of issue, which appears to be the only such document before the Arbitrator, or expressly within the text of the Union's brief presented at the hearing.

The Arbitrator has considerable difficulty with the procedural objections raised by the Union. It submits that a fair and impartial investigation was not provided by reason of the fact that at one point late in the afternoon the investigating officer became impatient and angry, and apparently threw a cell phone. The Union also objects to the fact that the grievor and his representatives were not allowed to remove documentation from the place of the investigation to the Union's offices to review the material. Additionally, the Union objects to the fact that Trainmaster Broesky did not attend at the investigation in person, but was made available only by telephone.

In my view these objections are without merit. While the language of the collective agreement does contemplate the grievor and his Union representative being provided copies of documentation at the outset of an investigation, there is nothing in the language of that document which gives to the grievor and his representatives the right to carry the documentation off site to review it and prepare a rebuttal. While that may occur on occasion as a matter of courtesy, it is not something which the Union or the grievor could claim as matter of right. Nor is the Arbitrator persuaded that the fact that the trainmaster was made available for questioning by the Union by way of

telephone rather than in person is itself a violation of the obligation to provide a fair and impartial investigation. Such testimony is not uncommon in disciplinary investigations. Moreover, a review of the record of the investigation does not reveal to the Arbitrator any objection taken by the Union, at that time, to the fact that Mr. Broesky was not physically present.

In the Arbitrator's view no violation of article 117 of the collective agreement is disclosed. Article 117.2 provides, in part:

> The employee and/or their accredited representative shall have the right to ask questions of any witness/employee during such investigation relating to the employee's responsibilities.

In my view that requirement was complied with. Given the time and exigencies of disciplinary investigations it is not uncommon for witnesses to be involved by telephone contact, as occurred in the instant case. There is nothing on the face of the record which would indicate that following that procedure prejudiced the grievor or his union or in fact departed from the essential requirements of article 117 of the collective agreement.

The investigation procedure was drawn out over several days, due partially to the fact that the grievor insisted on writing each answer to the questions put to him before providing it to the investigating officer. A review of the investigation report leaves little doubt that the process was tedious, slow and contentious. While it is regrettable that the investigating officer lost patience late in the course of one day, causing him to express his anger and throw an object, a gesture for which he immediately apologized profusely,

I am not prepared to find that that incident discloses that the grievor was denied a fair and impartial investigation. For all of these reasons I am satisfied that the grievor was not denied a fair and impartial investigation, as alleged by the Union.

What of the merits of the grievance? I must agree with the Union that concern arises with respect to the measure of discipline assessed in all of these circumstances. The parties appear to be agreed that in over 4,000 cases heard in this office, none has involved discipline for the improper alignment of a drawbar. Nor, it seems, is the Company aware of any employee in its history having been disciplined by the assessment of demerits for such an infraction. On what basis, then, can the assessment of twenty-five demerits be sustained, particularly as they led to the summary discharge of an employee of forty-four years' service with a relatively good record with respect to operating rules?

In the Arbitrator's view the incident in question should have resulted in nothing more than a written reprimand registered against the grievor. It is true, as the Company stresses, that Mr. Champagne appeared to maintain through the investigation process that there was nothing improper in the manner he used to align the drawbar and that he is generally more combative that cooperative. I am satisfied that using his foot was inconsistent with the proper way of aligning drawbars described in GOI Section 8, item 12.12. I can appreciate the Union's suggestion that the assessment of twenty-five demerits, which the Company knew would result in the termination of the grievor's service, might give rise to concerns that he was being unfairly targeted. I make no

finding or comment on that allegation, as I am satisfied that the disposition of this case should be sufficient to right the accounts between the parties with respect to the error of judgement committed by the Company.

As noted above, the grievor is an employee of forty-four years' service. While his record is not without disciplinary blemish, it is not heavily laden with rules infractions. His record shows six rules infractions over the whole of his career, with only one having occurred since 1995, when he received fifteen demerits in 2007 for not wearing appropriate safety apparel.

The grievor should appreciate that these observations do not give him *carte blanche* to disregard instructions or to be openly disrespectful to Company officers, a trait which has apparently contributed to a substantial part of the discipline which he has incurred over the years. By the same token, it is to be hoped that Company officers will appreciate the concerns which naturally arise when an employee of over forty years' service is summarily discharged for a relatively minor infraction which, insofar as the parties appear to be aware, has never before been invoked in the history of the Company for the assessment of discipline in the form of demerits.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost, with interest. A reprimand shall be recorded on his record for his improper handling of a drawbar.

November 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR