

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

CASE NO. 4076

Heard in Montreal, Wednesday 11 January 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Assessment of a thirty (30) day suspension to Employee R for "conduct unbecoming an employee on March 5, 2011."

COMPANY'S STATEMENT OF ISSUE:

On March 5, 2011, the grievor and a locomotive engineer operated train M35551DO5 from McBride to Blue River and were accommodated at the away from home terminal of Blue River at the Glacier Mountain Lodge. The grievor and his locomotive engineer were reordered to return to McBride on train M35451 04 at 22:00 March 5, 2011.

While travelling into Red Sand siding, the grievor pulled the emergency brake handle, placing the train into emergency. The incident was reported to the RTC whereby allegations of conduct and safety were brought into question. Both crew members were removed from service. Following an investigation the grievor was assessed a thirty (30) days suspension.

The Union contends: (1) The Company has improperly relied on evidence that was not properly adduced; (2) The Company failed to provide a fair and impartial investigation; (3) The grievor was not properly notified of the locomotive engineer's investigation. The Union further contends that it was incumbent on the Company to explain his right to the grievor as he did not have the benefit of Union representation at the investigation.

Based on the foregoing the Union requests that the thirty day suspension be expunged and that the grievor be made entirely whole.

The Company denied the request and disagrees with the Union's contentions.

FOR THE COMPANY:

(SGD.) P. PAYNE

FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

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| P. Payne | – Manager, Labour Relations, Edmonton |
| D. VanCauwenbergh | – Director, Labour Relations, Toronto |
| K. Gilks | – Trainmaster, Edson |
| K. Smolynec | – Sr. Manager, Occupational Health Services |

There appeared on behalf of the Union:

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|----------------|-----------------------------------|
| M. Church | – Counsel, Toronto |
| B. R. Boechler | – General Chairman, Edmonton |
| R. A. Hackl | – Vice-General Chairman, Edmonton |
| Employee R | – Grievor |

AWARD OF THE ARBITRATOR

The grievor was assessed a thirty day suspension for conduct unbecoming an employee during the course of his tour of duty from Blue River to McBride on March 5, 2011. The allegation is that the grievor was loud and obstreperous towards his locomotive engineer before they began their tour of duty in the Glacier Mountain Lodge, hectoring and berating his locomotive engineer during the operation of their train and finally making an unnecessary application of the emergency brake while entering a siding at Red Sand. Having reviewed the evidence, on the merits of the grievance, the Arbitrator would be inclined to sustain the position of the Company with respect to all of the charges against Employee R.

However, the Union raises an issue with respect to whether the grievor was denied a fair and impartial investigation in respect to the facts which led to his discipline. The record before the Arbitrator confirms that at approximately 23:10 hours on March 5, 2010 Trainmaster Kirk Gilks received word from Chief RTC Paul Capper that the grievor had put his train into emergency while pulling into Red Sand. Together they decided to withdraw the crew from service with Mr. Gilks to drive to the location to speak with the

locomotive engineer. In doing so he encountered the grievor walking on the highway and gave him a ride. Mr. Gilks heard information about what had occurred in the car and also met Mr. Laporte in the station at McBride. His memo recounting these events notes, in part: "I met Mr. Laporte at the station in McBride. He was visibly upset and what I feel was almost to the point of tears."

A disciplinary investigation ensued. That investigation was in fact conducted by Trainmaster Gilks on March 9, 2011. At the outset of the investigation the grievor was provided with a number of documents, including written statements from the General Manager of Glacier Mountain Lodge and written statements by both Locomotive Engineer Laporte and Employee R. Remarkably, the memo prepared by Mr. Gilks himself, and which was plainly relied upon by the Company, was not placed in evidence and was not provided to the grievor.

Counsel for the Union submits that in the circumstances the investigation cannot be viewed as having been in conformity with the collective agreement and within the standard of a fair and impartial hearing. I am compelled to agree. Article 117.2 of the collective agreement provides as follows:

117.2 Employees may have an accredited representative appear with them at investigations, they will also have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation. Employees under Company investigation and/or his/her accredited representative shall have the right to attend any Company investigation, which may have a bearing on the employee's responsibilities. 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 the Arbitrator's view there can be little doubt but that the memo of Trainmaster Gilks is a form of evidence which was in the possession of the Company and which would be considered in determining the grievor's responsibility. That "evidence submitted" was not provided to the grievor at the time of his investigation as it should have been, and indeed was not provided to the Union until such time as it was quoted during the course of correspondence at Step III of the grievance procedure. On the foregoing basis alone, the disciplinary investigation cannot be viewed as having conformed to the requirements of the collective agreement, and the discipline assessed against Employee R is void *ab initio*. It might be added that it was questionable to have Trainmaster Gilks conduct the investigation, given that he was himself a participant in the events at McBride and registered his own impression of the state of both the grievor and his locomotive engineer at that time in a memo which ultimately was not shared with the employee or his Union.

For the foregoing reasons the Arbitrator is compelled to declare that the Company did fail to meet the standards of a fair and impartial investigation and that the thirty-day suspension assessed against the grievor must be viewed as void, *ab initio*. That suspension is to be stricken from his record and he shall be compensated forthwith for all wages and benefits lost from the time he was held out of service until he declined to undergo a physical and psychiatric evaluation on April 12, 2011.

January 16, 2011

(signed) MICHEL G. PICHER
ARBITRATOR