CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4180

Heard in Montreal, February 13, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of the termination of Locomotive Engineer Rob Hewitt.

JOINT STATEMENT OF ISSUE:

On July 25, 2012, Locomotive Engineer Rob Hewitt's crew was involved in a work refusal which the Union contends was initiated pursuant to section 128 of the *Code*. Following an investigation into this incident, on August 20, 2012, Locomotive Engineer Hewitt was discharged "For your deliberate refusal to follow the instructions of a supervisor with respect to the yarding of your trains, for abandoning your train and leaving Company property without authority, resulting in the blockage of an emergency access route and delays to trains 223-25, 232-25, 241-25, 246-25, 254-25, 423-25, a violation of General Notice, General Rules A Paragraph (iv), (v) and CROR Rule 106, while working as Locomotive Engineer on Train 609-460 on July 25th, 2012 in Toronto Yard."

Union Position: The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Locomotive Engineer Hewitt be made whole. The Union contends that Locomotive Engineer Hewitt's dismissal is unjustified, unwarranted and excessive in all of the circumstances. In addition, the Union contends that the assessment of discipline and discharge in the circumstances constitutes a direct violation of section 147 of the *Code*. The Union requests that the discipline be removed in its entirety, that Locomotive Engineer Hewitt be ordered reinstated forthwith without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position: The Company disagrees and denies the Union's request

FOR THE UNION:
(SGD.) B. Brunet
General Chairperson

FOR THE COMPANY:
(SGD.) D. Burke
Labour Relations Officer

There appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
R. Hartline	– General Manager, Eastern Region, Toronto
D. Freeborn	– Labour Relations Director, Calgary
R. Smith	– Director Regulatory Affairs, Calgary
D. Daguette	– Assistant Superintendent, Toronto
K. Edwards	– Trainmaster, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
B. Brunet	– General Chairman, CP East LE, Montreal
M. Hamel	– Vice General Chairman, CP East LE, Chapleau
J. Campbell	– Vice General Chairman, CP East LE, Toronto
S. Kimit	– Local Chairman, CP East LE, Smiths Falls
R. Smith	– National Legislative Director, Ottawa
B. Hiller	– General Chairman, CP East CTY, Toronto
R. Hewitt	– Grievor, Smiths Falls

AWARD OF THE ARBITRATOR

The record confirms that on July 23, 2012 the grievor operated train 609-460 from Smiths Falls to Toronto, departing Smiths Falls at 19:45. The grievor and his crew gave notice of their intention to take rest while on route, which means that they would be finished their tour of duty in ten hours. In accordance with Article 27.14 of the Collective Agreement, once the crew was inside the outer switch limits for Toronto by 03:05 they would be advised to yard their train efficiently. Should they not be inside the outer limits they would normally be relieved.

The crew in fact arrived at Toronto yard before the expiry of ten hours. They were instructed to yard their train in track FT01. Although that track would hold their whole train, the record confirms that in fact they stopped some thirty-six hundred feet into the

track, contrary to the instruction given to them. It does not appear disputed that they then boarded a yard crew van and left the premises.

The Union maintains that the grievor, Locomotive Engineer Hewitt, was in fact suffering from extreme fatigue and invoked the provisions of Part II of the **Canada Labour Code** to cease working when he did. The record confirms that when the grievor was in radio contact with a supervisor who expressly asked him if he intended to yard his train as instructed. The grievor then responded “this sounds like an ultimatum to me”. According to the Supervisor, he then paused and uttered words to the effect of : “I guess I’m going to invoke Part II.” Whatever the grievor’s intention, it was not apparent to his Supervisor that he believed himself to be formally invoking the right to refuse unsafe work under Part II of the **Canada Labour Code**. In fact the grievor and his crew abandoned their train at that point, without any further comment or explanation to anyone.

I am compelled to agree with the Company that the grievor’s purported invoking of Part II of the **Canada Labour Code** was plainly deficient, and well outside what should be expected. An employee claiming an unsafe condition must clearly communicate that situation to management, leaving no doubt that they are refusing to do any further work. Further, they are normally to stay on the premises for the purposes of an immediate investigation of their claim, an investigation which might well involve calling a Federal Safety Inspector to the premises. None of these things were done or, it appears, anticipated to be done by the grievor. He simply made a vague reference to

the possibility of invoking Part II of the **Code** and summarily left the workplace. The record confirms that his actions resulted in the blockage of a number of tracks and the delay, for several hours, of some six trains.

As a preliminary matter the Union submits that the Company failed to provide to the grievor a fair and impartial investigation as required under the Collective agreement. That objection appears to be grounded, in part, on the fact that the Company declined to call as witnesses certain individuals the Union wished to have examined. As recognized in prior award of this office (e.g. CROA 3461) there is no obligation on the part of the Company to call witnesses suggested or demanded by the Union. While the refusal to examine a witness whose evidence might have a critical bearing on the facts could arguably establish a violation of the standard of a fair and impartial investigation, that is clearly not the case in the matter at hand. It does not appear disputed that the Union provided a memo from an individual it wanted the Company to call, but whom the Company refused to call. I can see no substantial prejudice to the Union the manner in which the investigation was conducted and no violation of the requirement of a fair and impartial investigation.

What of the merits of the grievance ? A review of the facts leaves the clear impression that the grievor was engaged in a degree of game playing when he abandoned his train. While I accept that Mr. Hewitt and his crew were suffering fatigue, it appears that in fact the grievor proceeded under the impression that he could unilaterally cease all work after the expiry of ten hours, and that his cryptic comment

made to his supervisor was a sufficient invocation of the provisions of Part II of the **Canada Labour Code.** I simply cannot agree. The right to refuse unsafe work under Part II of the **Canada Labour Code** is an extremely important employee protection. The invoking of that right involves a commensurate obligation on the part of the employee involved to be clear and methodical in the manner in which a work refusal is undertaken and executed. At a minimum the employee must make a clear declaration of a refusal and assure himself or herself that the employer well understands that the Code is in fact being invoked. Words by an employee to the effect of his guessing that he will invoke the code or that he or she might invoke the Code plainly do not satisfy the requirement of a clear an unequivocal declaration communicated in unmistakable terms to the employer.

In the circumstances at hand, I am satisfied that Mr. Hewitt and his crew cannot claim the protections of Part II of the **Canada Labour Code** as they simply did not make a clear and unequivocal declaration to the effect that they were refusing unsafe work under the protections of Part II of the **Code**. Nor is it clear to the Arbitrator that the grievor and his crew would have been unable to operate their train for a matter of a few more minutes to yard it as instructed rather than to leave it in a location which obviously impeded yard operations and the movement of other trains. At a minimum, in my view, this was a circumstance in which the crew would have been required to respect the "work now-grieve later" principle, as I am not persuaded that they could not operate for the additional few minutes that would have allowed them to properly yard their train. By

abandoning his train at ten hours and one minute, the grievor seemed more intent upon making a statement of principle than in fact dealing with a legitimate safety hazard.

In my view the grievor did render himself liable to a very serious level of discipline in these circumstances. The issue is whether this is an appropriate case for a reduction of penalty. Given the deliberate and confrontational nature of the grievor's actions, I have some difficulty with that question. However, the grievor's length of service, being twenty-nine years at the time of his termination, does come to bear as a mitigating factor of some importance. In the circumstances I am satisfied that the grievor's reinstatement, which should be clearly understood by him as a last chance opportunity, is not inappropriate in the circumstances.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages and benefits lost and without loss of seniority.

February 18, 2013

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MICHEL G. PICHER
ARBITRATOR