CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4263

Heard in Calgary, November 14, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Yardman Cody Hoogwerf's employment.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, the Grievor was assessed 20 demerits "for failing to take the safe course and be vigilant to avoid risk of injury to yourself, and for using an unapproved tool to remove an air gasket, resulting in a lost-time personal injury to your left palm, a violation of CROR General Notice, CROR General Notice Rule A (vi), (viii), CROR General Rule C (i), Safety Rule Book for Field Operations, Section I: Core Safety Rules, Item # 11, while working as a Yardman on the AG 34-08 on September 8, 2012 in Calgary, Alberta." He was subsequently dismissed for accumulation of demerits.

It is the Union's position that there is no just cause for Yardman Hoogwerf's discharge that this penalty is unwarranted in all of the circumstances and is contrary to ss. 147 and 239 of the *Canada Labour Code.* The Union requests that Yardman Hoogwerf be ordered reinstated 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 disagrees with the Union's contentions and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Olson	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

B. Sly	– Director, Labour Relations, Calgary
M. Moran	– Manager, Labour Relations, Calgary
K. Price	– Rules Instructor, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice General Chairman, Calgary

M. MacDonald – Local Chairman, Calgary
C. Hoogwerf – Grievor, Calgary

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection with respect to the scope of the issues before the Arbitrator. The Company maintains that in the submission for the joint statement of issue the Union added a matter which had not previously been raised or discussed between the parties, the alleged violation of Section 239 of the **Canada Labour Code.** Its representative submits that matter should not be considered by the Arbitrator. I consider that position to be correct.

Among the rules which govern this Office is the following: “No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has been first processed through the last step of the grievance procedure provided for in the collective agreement”.

I am satisfied that to allow the Union to argue the application of Section 239 of the **Canada Labour Code** at this late point in the proceedings would be contrary to the rules of the Office as well as contrary to the established jurisprudence (CROA 3265, and SHP634). On the foregoing basis the preliminary objection is sustained and the Arbitrator excludes any consideration of Section 239 for the purposes of this grievance.

The facts are not in substantial dispute. While on his tour of duty which commenced on September 8, 2012, in the early morning hours of September 9, the grievor encountered a faulty air hose. Upon inspection he noticed that the inner gasket of one of the glad hands to the air hose coupling was excessively worn. When he was unable to remove the gasket using his gloved hand he removed his glove and attempted, without success, to remove it with his bare finger. He then retrieved his pocket knife and attempted to use it to wedge the gasket out of its position. As he did so the knife slipped and caused a serious cut to his left palm. It is not disputed that the injury that resulted required immediate hospital attention, eight stiches, and that the grievor was subsequently unable to work for sixteen days, for which he applied for and received workers compensation benefits.

Following an investigation the Company took the view that the grievor's injury to himself was caused by reason of his careless method of working, and in particular the use of a knife when another tool is recommended. The Company's evidence, adduced in part through a rules instructor Kim Price, is that during the course of field training the new conductors are instructed that they should use a switch key as the instrument of choice to remove faulty air gaskets.

During the course of the disciplinary investigation the grievor indicated that he was taught, after the fact, to use a switch key to remove a faulty air gasket. When pressed on the point he conceded that it is possible that that method may have been

taught as the proper procedure during his training, although he said he could not remember it.

In considering the merits in the instant grievance I am satisfied that it is of relatively little consequence whether the grievor did or did not get specific training as to the possible use of a switch key. For the purposes of this grievance I am satisfied that the use of a sharp four inch pocket knife to attempt to wedge out a faulty air gasket is of itself an inherently risky, if not dangerous, practice. In my view the material before me confirms that the grievor did proceed in an unsafe manner, resulting in an injury to himself. To that extent, I am satisfied that he rendered himself liable to discipline.

Nor can I sustain the suggestion of the Union that the assessment of discipline against the grievor violated section 147 of the **Canada Labour Code.** That provision deals with the prohibition against reprisals for an employee seeking to enforce health and safety conditions or the safety related provisions of the **Code**. There is no suggestion in the material before me that the grievor was disciplined for anything other than carelessness resulting in an injury to himself.

The real issue in the instant case is the appropriate measure of discipline. As the grievor is a relatively junior employee who had fifty-five demerits at the time of the incident, the Company determined that twenty demerits was the appropriate measure of discipline, as a result of which his employment was terminated for the accumulation of demerits.

While the Arbitrator can appreciate the Company's concern, there are mitigating factors which I consider it appropriate to weigh in the instant case. While it is true that the grievor had an extensive record of discipline, the great bulk of the prior demerits which he had received related to earlier problems with attendance. It is true that he had one prior rules infraction for which he received a caution, but his four years of service were not marked by discipline for safety infractions. In the circumstances I deem it appropriate to reinstate the grievor into service, subject to conditions fashioned to protect the employer's legitimate interests.

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. The grievor's reinstatement shall be conditioned upon his accepting to be subject to conditions in respect of his record of attendance for a period of not less than two years following his reinstatement. Should he record a rate of absenteeism during any quarter in the two years following his reinstatement which exceeds the average for his peers at his home terminal he shall be subject to dismissal, with recourse to arbitration only for the purposes of determining the accuracy of the attendance figures used.

November 18, 2013

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MICHEL G. PICHER

ARBITRATOR