CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4344

Heard in Montreal, November 12, 2014

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of probationary employee Mark Ashworth.

JOINT STATEMENT OF ISSUE:

Following an investigation taken on May 6, 2014, Conductor Ashworth was released from his employment with CN. The Company noted in their letter to the grievor "In review of your training progress to date, including a review of your coaching records as well as the safety related incident and your non-adherence to the CROR, the Company is releasing you from employment effective May 7th, 2014".

The Union contends that Conductor Ashworth's dismissal is entirely unwarranted, excessive and discriminatory in all of the circumstances. The Union contends that Mr. Ashworth was terminated for following the advice of his Union. Moreover, Mr. Ashworth was not provided minimal adequate training in respect of the Company's alleged concerns and, further, the Union contends that the Company has not established any violation of the CROR. In this regard, his termination is arbitrary and/or in bad faith.

Further, the Union contends that the termination of Conductor Ashworth breached Article 58, 65A, 82 (right to a fair and impartial investigation), 85, and Addenda 123 and 124.

The Union requests that Conductor Ashworth be ordered reinstated forthwith without loss of seniority and benefits, and that he be made whole for all wages and benefits lost. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) V. Paquet on behalf of J. Orr**
General Chairperson	**Senior Vice President Operations**

There appeared on behalf of the Company:

V. Paquet	– Labour Relations Manager, Toronto
M. Marshall	– Senior Labour Relations Manager, Toronto
D. Gagne	– Senior Labour Relations Manager, Montreal
A. Daigle	– Labour Relations Manager, Montreal

D. Larouche – Labour Relations Manager, Montreal
S. Dale – Assistant Superintendent Transportation, Toronto
B. Meek – Trainmaster, Toronto

There appeared on behalf of the Union:
K. Stuebing – Counsel, Caley Wray, Toronto
J. Robbins – General Chairperson, Sarnia
J. Lennie – Vice General Chairperson, Port Robinson
E. Page – Local Representative, Toronto

AWARD OF THE ARBITRATOR

This matter concerns the termination of a probationary employee.

On October 14, 2013, the grievor commenced his employment with the Company. There is some dispute as to whether or not the grievor was qualified as a Conductor. However, I am satisfied that the evidence demonstrates that he was in fact qualified on April 1, 2014. I am also satisfied that the grievor completed 70 trips prior to being qualified as a conductor.

In terms of the grievor's training, the evidence indicates that the grievor took longer to obtain his qualifications as a conductor when compared to others in his trainee class. However, I note that the grievor did not take significantly longer. Furthermore, there were no significant problems noted by Conductor Trainer's who reviewed the grievor's training. In fact, most of the comments were very positive. The Trainmaster in Oakville went so far as to send an email praising the grievor's work and overall attitude.

The events that precipitated the grievor's release from employment occurred on April 25, 2014. The grievor was assigned as Yard Foreman working with a Helper

performing industrial switching at the Imperial Oil facility in Newmarket Subdivision. There's no dispute that the grievor had some difficulties in performing the tasks that were assigned to him on that evening. At approximately 02:00 the grievor used his personal cell phone to contact the Trainmaster to inquire about what cars needed to be pulled from Imperial Oil. Later, the grievor had problems following instructions from the RTC with respect to zig-zagging his train at Snider from York 2 onto York 1 to enter the yard from the main line. In this regard, the grievor acknowledged that he did not initially understand what the term zig-zag meant.

At the end of his shift, the grievor met with Assistant Superintendent Steve Dale to review the grievor's work that evening. The grievor was clearly advised that the use of a cell phone while on duty was prohibited. In order to clarify the grievor's understanding of the rules Mr. Dale requested that the grievor prepare a draft coaching letter outlining the rules that had not been properly complied with, how his actions were in violation of the rules and what steps he would take to ensure future compliance with the rules. The grievor was asked to submit the letter on May 2, 2014.

On May 2, 2014 the grievor advised Mr. Dale that he would not be writing the coaching letter. When asked why, the grievor claimed that it was on the advice of his Union.

Later on May 2, 2014 the grievor was provided with a notice to appear (NTA) for an investigation regarding his performance on April 25, 2014.

An investigation was held on May 6, 2014. During the investigation the grievor explained that he used his cell phone to contact the Trainmaster after initially trying to contact the Trainmaster by radio for approximately forty minutes. Significantly, when asked what if anything he had learned, the grievor stated as follows:

> "I understand the unauthorized use of my cell phone but did it with all best intentions of being productive. I will not use my cell phone and will not take my cell phone at any future point. I didn't initially understand the term "zig-zag" from the RTC. I now fully understand that terminology and will clarify any unfamiliar railway terms that I hear in the future."

The relevant portion of CROR General Rule A applicable to the matter before me reads as follows:

> (xxii) The use of communication devices must be restricted to matters pertaining to railway operations. Cellular telephones must not be used when normal railway radio communications are available. When cellular telephones are used in lieu of radio all applicable radio rules must be complied with.
> …
> employees bringing any of these devices to their place of employment must leave them powered off in their work bag or grip or leave them in their personal vehicles, lockers, or other location where they will not have access to them while on duty.

During the investigation the grievor was asked why he had his cellular phone in his possession while on duty, the grievor's response was as follows:

> "It was in my possession because when I did Imperial Oil a week previous, I had previously taken a long time to complete the job. The Trainmaster had asked why we had taken so long with the job. We had trouble with communications with the Trainmaster and the Yardmaster when trying to contact them. This time I felt it prudent to take my cell phone, which was switched off, and put it in my grip".

I find that the grievor did not violate CROR General Rule A. The evidence is clear that the grievor did not use his cell phone for personal use. Rather he used his cell

phone for work purposes and only after attempting to use the radio. Furthermore, the evidence indicates that the grievor had the cell phone off in his grip and only turned it on to utilize it for work purposes.

On May 9, 2014 the grievor was released from employment effective May 7, 2014.

The relevant article of the collective agreement respecting the release of a probationary employee is found at article 58.1, and it reads as follows:

Article 58.1 :

> An employee will be considered as on probation until he has completed 90 tours of service under this Agreement. If found prior to the completion of 90 such tours, an employee will not be retained in service and such action will not be construed as discipline or dismissal, but may be subject to appeal by the General Chairperson on behalf of such employee.

The standard of proof which applies in a case of this kind was commented on by Arbitrator Picher in **CROA 1568**:

> It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of “suitability” obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status. By the same token, however, under the instant collective agreement that discretion is not unreviewable. That is plain from the language of article 58.1 of the collective agreement, which expressly permits an appeal against the dismissal of a probationary employee. While the parties addressed argument to the appropriate standard of review in such cases, it is not necessary to exhaustively recount or resolve that debate for the purposes of the instant case. It is sufficient to say that, at a minimum, the Company’s decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.

Applying the standard noted above to the matter before me, I find that the grievance has merit.

While the grievor may have taken a little longer to qualify as compared to other trainees in his class, there is no evidence of any significant issues with his work performance prior to the events of April 25, 2014. As indicated earlier, the grievor received mostly positive reviews.

In terms of the events on April 25, 2014, the evidence does not disclose that the grievor intentionally and flagrantly violated CROR General Rule A. I acknowledge that the grievor certainly had difficulty with his assignment on that evening. However, he had little experience on that particular job and was working with a Helper with even less experience.

Most significantly, it appears to me that the Company would have been satisfied had the grievor submitted the draft coaching letter that he was requested to provide on May 2, 2014. It was not until after the grievor refused to submit the draft coaching letter on that same date, that the matter seemed to escalate and the grievor's employment came into jeopardy.

The Union suggests that the actions of the Company were discriminatory and impeded the grievor's right to Union's representation. I do not believe it is necessary for me to make any finding with respect to the motives of the Company in these

circumstances. That is because I find that the actions of the Company were arbitrary, to the extent that they imposed a more severe sanction after initially indicating that they would be satisfied with a mere coaching letter.

In my view, it appears that the Company would have been satisfied with a coaching letter drafted by the grievor. The Company indicated that the reasons they wished to have a coaching letter was to ensure that the grievor understood rules and learned from his mistakes. When the grievor was interviewed, he specifically acknowledged his short comings and vowed to never make the mistake again. In my opinion, it was then arbitrary for the Company to turn around and release the grievor after they received what they initially wanted from him.

For the foregoing reasons, the grievance is allowed. The grievor shall be reinstated into employment as a probationary employee, credited for his previous tours of service and compensated for all lost wages and benefits.

I retain jurisdiction in the event of any dispute concerning the interpretation or implementation of this Award.

November 20, 2014

JOHN L. STOUT
ARBITRATOR