CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4414

Heard in Montreal, September 8, 2015

Concerning

CANADIAN NATIONAL TRANSPORTATION LIMITED (CNTL)

And

UNIFOR COUNCIL 4000

DISPUTE:

The termination of the Standard Contract of CNTL Owner Operator Pauline Fondeur BW32 for a single vehicle accident in Symington Terminal where two containers were damaged.

JOINT STATEMENT OF ISSUE:

On September 26, 2013 a formal investigative hearing was held in connection with Ms. Fondeur's single vehicle accident in Symington Terminal where two containers were damaged. Following the investigation, the Standard Contract between Ms. Fondeur and CNTL was terminated.

The Union contends that there are mitigating circumstances, the discipline is excessive and unwarranted and in violation of Articles 1.3, 1.6 (a) and (b), 1.8, 1.10, 8.5 of the collective agreement and Article 7.01 of the Standard Contract.

The Company disagrees with the Unions allegations.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. Campbell	**(SGD.) R. Fitzgerald**
Manager Labour Relations	National Staff Representative

There appeared on behalf of the Company:

R. Campbell – Manager Labour Relations, Winnipeg
S. Blackmore – Senior Manager Labour Relations, Edmonton
M. Peterson – Manager Truck Operations, Toronto

L. Schmitke – Driver Manager, Winnipeg
D. Brown – MVC Forensics Inc.

And on behalf of the Union:
R. Fitzgerald – National Staff Representative, Toronto
W. Gajda – Regional Representative, Mississauga
D. Kissack – Regional Representative, Winnipeg
B. Kennedy – President, Edmonton
P. Fondeur – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

Ms. Pauline Fondeur (the "grievor") was a Tractor Trailer Owner Operator whose standard contract with Canadian National Transportation Limited ("CNTL") was terminated following a single vehicle accident on September 23, 2013. The Company deemed the grievor fully responsible for the accident.

There is no dispute that at approximately 17:00 hours, while the grievor was driving a tractor trailer unit (loaded with a container), her vehicle collided with a parked chassis unit that was also loaded with a container. Damage was sustained to both containers as a result of the sideswipe collision.

Photographic evidence provided to the grievor at the investigation held on September 26, 2013, was entered into evidence at the hearing. The damage began as the grievor's unit engaged the bracket assembly for a gas tank that was on the stationary container. The damage continued to become more aggressive and sustained to the rear of the container, consistent with the tractor trailer gradually moving forward and inward at an angle towards the parked vehicle.

The accident at issue – one with an inanimate object - was caused by the grievor driving her vehicle too close to that object. The grievor's description of the accident is as follows:

> As I was pulling on track 1, I was staying close to the left because of the carmen that were working there. He had cones around his unit and in staying left I was also aside from watching him on the right I was also scanning the left for a place to back the trailer in. And I was going very slow, the Packer pulled just past the carman's cone to the west side and was in position to take the can off me. As I turned right, I was swinging around the carmen to position under the packer and the packer took the can off. I didn't realize I had scraped the heaters until I completely straightened out under the packer. It was a heavy load and I didn't feel anything.

In addition, the grievor made clear in her statement that the weather and road conditions at the time of the accident were very good and when asked if she had anything to add, she stated that there were dry roads, it was a beautiful day and "good vision."

The Company relies upon the "three strikes" discipline system described in article 8.1 of the collective agreement between the parties. This particular system has existed for decades. The Company maintains that, in accordance with that system, the grievor was properly disciplined for the accident, and points out that this was her sixth disciplinary event (and a third occurrence at step 3). Therefore, the Company submits, the grievor was terminated in accordance with the collective agreement. The Company also takes the position that, pursuant to section 60.(2) of Part 1 of the *Canada Labour Code,* I lack the jurisdiction to alter the specific penalty for a third occurrence, which the parties have themselves expressly negotiated.

The Union acknowledged the grievor's disciplinary history. The record reveals that, with the exception of the grievor's termination on November 12, 2012 (which was reduced to a 178-day suspension by arbitral award), none of the other disciplinary assessments issued against the grievor were grieved. Nevertheless, the Union argued that the impact of the sunset clauses referenced in article 8.1 is that the accident for which the Company terminated the grievor's standard contract is not a third occurrence as set out in the article.

The grievor's disciplinary record is as follows:

November 17, 2012	Step 3, Termination of contract reduced to 178 suspension in lieu of termination for failed random drug test.
May 11, 2012	Step 1, 1-day Suspension for illegal left turn
October 18, 2010	Step 3, 1-day Suspension in lieu of dismissal for attendance/failure to report Blackberry not working
September 17, 2010	Step 3, 3-day Suspension in lieu of dismissal for not following CNTL procedures, failed DOT inspection
February 19, 2010	Step 2, 2-day suspension for not following CNTL procedures
March 27, 2009	Step 1, Disciplinary letter for not following CNTL procedures

On the merits, the Union acknowledges the grievor's responsibility for the accident, yet it also suggests that the grievor was not the sole cause of the accident. The Union maintains that the grievor was paying attention at all material times and that in analyzing the accident, factors such as congestion in the yard, work crews in the area, and the sunlight on September 23, 2013 are mitigating factors that the Company failed to take into account in determining the appropriate penalty.

In support of its position, the Union retained Testlabs International Ltd., and produced a report authored by Dr. Wayne Tennesey, P.Eng., whose *curriculum vitae* states that he is a Metallurgist/Corrosion Engineer and Mechanical Engineer who practices forensic engineering in Metallurgical and Polymeric Materials Failure Analysis and Fire/Explosions. Dr. Tennesey was retained to review a number of documents related to the accident to determine the circumstances of the accident and state an opinion as to whether the nature of the accident and the extent of the damages warranted a decision to dismiss the grievor.

In response to Dr. Tennesey's report, the Company retained Mr. Dalton Brown, of Motor Vehicle Collision Forensics Inc. who provided a review and analysis of all the available data relating to the incident as well as the report produced by Testlabs. Mr. Brown attended the hearing. Dr. Tennesey did not.

Decision

The Union does not disagree that article 8 reflects the parties bargain of a "three strikes" (or "occurrence") discipline system. In each discipline hearing or discipline assessment an employee's discipline record is set out. This is done to establish where in the three-step process employees are; they cannot get to their third occurrence without having gone through two others. When an employee gets to a third occurrence, the collective agreement provides for the immediate termination of her or his standard contract.

Article 8 of the collective agreement relates to investigation and corrective action and reads, in part:

> 8.1 Pursuant to the terms of their standard contract, owner operators are required to fulfill the duties and responsibilities connected with the provision of transportation services in a safe, proficient and lawful manner. In circumstances where an Owner Operator fails to fulfill such duties and responsibilities or provides unsatisfactory service or engages in misconduct, CNTL may take the following measures:
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> (a) First occurrence:
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> (i) Minor Offense: a written warning or written reprimand to the Owner Operator that the standard contract is liable to suspension or termination. This sanction will be removed from the Owner Operator's record if there is no further assessment of a sanction during the twelve (12) month period following the date the sanction was assessed. NOTE: the Company has the discretion to determine what constitutes a minor offence. For example, violations of federal or provincial statutes or regulations and endangering one's safety or the safety of others are not considered minor offenses.
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> (ii) Other Offence: a deferred suspension of the standard contract for a period of one (1) to three (3) working days depending on the nature of the failure, unsatisfactory service or misconduct. The deferred suspension will be removed from the Owner Operator's record, if there is no further assessment of a sanction during the twelve (12) month period following the date the deferred suspension was assessed.
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> (b) Second occurrence:
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> A temporary suspension of the standard contract for a period of one to five working days depending on the nature of the second occurrence of failure, unsatisfactory service or misconduct. The temporary suspension will be removed from the owner-operators record, if there is no further assessment of any discipline during any consecutive 24 month period following the date the temporary suspension was assessed.
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> (c) Third occurrence: immediate termination of the standard contract.

Having carefully reviewed the grievor's disciplinary record, I cannot agree that any of the prior discipline is improperly counted by the Company contrary to 8.1 of the collective agreement. Only first or second occurrences can come off the record and they

come off only after twelve or twenty-four months respectively, if “there is no further assessment of a sanction” or “there is no further assessment of any discipline” in the stipulated period, respectively.

By way of example the February 19, 2010 second occurrence for which a two-day suspension was meted out took place within twelve months of the disciplinary letter dated March 27, 2009. Therefore the March 27, 2009 first occurrence is on the record. Similarly, the September 17, 2010 third occurrence transpired less than twenty-four month after the previous one, and so on. On the grievor’s disciplinary record, it would appear that the grievor has already been given two “last chances” by the Company, the most recent being by way of an arbitral award.

Having regard to the expert reports before me, they need not be addressed in any great detail. When a vehicle comes into contact with an inanimate object in good weather conditions and with good visibility, it is in all likelihood the result of human error. The accident at issue was preventable and serious. It is a third occurrence. Article 8.1 (c) of the collective agreement therefore applies.

However, were I deem it necessary to rely on expert evidence in this case, which I do not, I would have no difficulty in preferring the Company’s evidence over the Union’s. The latter expert has no experience or credentials in the area of accident investigation, is a forensic engineer and metallurgist, is not an expert in labour relations,

and is without knowledge of the Company's policies and procedures or the collective agreement.

In addition, Dr. Tennesy's most obvious finding, which I do not accept, is that the accident was due to "poor visibility and congested driving/uploading conditions." The accident was due to the grievor's negligence. As for poor visibility and poor driving/uploading conditions, the grievor herself had not indicated that was the case during the Company's investigation. In fact, she specifically admitted that there was "good vision" at the time and that September 23, 2013 was a beautiful day.

Having regard to all of the foregoing, the circumstances surrounding this accident, the relatively short service of the grievor with the Company (approximately six years at the time of termination) and the fact that she has effectively already had two "last chances" under the three strikes system negotiated by the parties, the most recent one imposed by Arbitrator Picher in **CROA&DR 4211**, I am not persuaded me this would be an appropriate case to disturb the penalty imposed, assuming, without finding, that I have the jurisdiction to do so.

The grievance is dismissed.

September 18, 2015

CHRISTINE SCHMIDT
ARBITRATOR