CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3461

Heard in Montreal, Wednesday, 15 December 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The restriction of Conductor J. Lepki from all passenger service including GO Trains.

UNION'S STATEMENT OF ISSUE:

On March 6, 2004, Conductor James Lepki was notified that he was required to attend an investigation in connection with "your alleged conduct unbecoming an employee of CN: specifically as per passenger complaints received regarding your conduct while employed as a brakeman on P69731 on 28 October 2003 and P69731 18 on 18 February 2004."

Immediately upon completion of the investigation, the investigating officer, Mr. K. Gunn, advised Mr. Lepki that he was being restricted from operating in passenger service with respect to "Ontario Northland Railway" (the position held, at the time, by Mr. Lepki). Mr. Gunn supplied Mr. Lepki with a notice from Mr. Gord Ryan, Director Passenger Rail Operations, Ontario Northland, dated March 5, 2004 restricting Mr. Lepki from working passenger service on Ontario Northland.

Mr. Lepki, although appealing the decision of the Company, attempted thereafter to exercise his seniority to "GO Commuter Passenger Service" in Toronto. Mr. Lepki was subsequently advised by CN Rail that he was restricted from working all passenger service, including "GO Service".

Although not limited hereto, the Union submits, *inter alia*, that Mr. Lepki did not receive a fair and impartial hearing consistent with the provisions of article 82 of agreement 4.16 and natural justice.

The Union submits that there is no justification to restrict Mr. Lepki from passenger service, including service with respect to Ontario Northland and GO service.

The Union submits that the discipline was unwarranted but, in any event, too severe. It should be noted that the Union has named both the Ontario Northland Railway and CN Rail, jointly and severally, as respondents to this dispute.

The Union requests that all restrictions (discipline) be removed from Mr. Lepki's record with respect to these matters, that Mr. Lepki be allowed to exercise his seniority in any capacity, including all passenger service (Ontario Northland and GO, etc.) and that he be compensated for all loss wages and benefits.

The Company has denied the Union's request.

FOR THE UNION:

(SGD.) R. A. BEATTY
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

B. Hogan	– Manager, Labour Relations, Toronto
B. Pullen	– Regional Mechanical Officer
J. Krawec	– Manager, Labour Relations, Toronto
J. Coleman	– Counsel, Montreal
G. Ryan	– Director, Passenger Rail, Ontario Northland Railway

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
R. A. Beatty	– General Chairperson, Sault Ste. Marie
J. Robbins	– Vice-General Chairperson, Sarnia
T. Beatty	– Local Chairperson, Belleville
C. Little	– Vice-Local Chairperson, Belleville
J. Lepki	– Grievor

AWARD OF THE ARBITRATOR

As a preliminary issue the Union alleges a violation of the standard of a fair and impartial hearing according to article 82 of the collective agreement. It does so on three grounds. First is the passage of time between the incident of October 28, 2003 and the investigation, held on March 6, 2004. Second is the fact that the Company handed the grievor a letter of removal from passenger service at the conclusion of the investigative

meeting. Third is the Company's refusal to call as witnesses persons suggested by the Union.

The Arbitrator cannot sustain the last two grounds of objection. There is no obligation on the employer to call witnesses requested by the Union, and the failure to do so has been found not to violate the basic standard of a fair and impartial investigation (see, **CROA 2920** and **2934**), although a failure to do so can put the Company at peril of adverse inferences being drawn against it on the merits of any eventual discipline. Nor does the decision to withhold the grievor from passenger service pending a decision on the results of the investigation constitute a violation of that standard. Indeed, it is not uncommon for employees to be held out of service pending a company decision as to the merits of discipline.

The first ground of objection, however, is more significant. I must agree that when, as in this case, the Company was aware of the incident of October 28, 2003 for some four months without taking any action to investigate or discipline the grievor, it is unfair for it to review that incident or to couple it with the fresher re-occurrence on February 18, 2004. On that basis, I must sustain the Union's position that discipline cannot be assessed based on the events of October 28, 2003. By its long inaction, the Company effectively waived its right to deal with the incident. Indeed, it is fair to ask whether the proper and timely handling of the incident of October 28, 2003 might not have caused the grievor to avoid the conduct giving rise to the complaint of February

18, 2004. In that regard, the following comments of this Office in **CROA 1833** are apposite:

> It is, in my view, *prima facie* inconsistent with the exercise of an employer's authority to impose discipline to delay any communication whatever respecting the incident giving rise to the discipline to the employee concerned for a period of close to three months. From a practical standpoint the employee is put at a severe disadvantage, as he or she may have no recall of an event to which the employee attached no particular significance at the time but for which the Corporation has retained a documented negative report from the outset. In the circumstances of this case I find it difficult to conclude other than that the Corporation effectively acquiesced in the grievor's conduct on the occasion in question by failing to bring the matter to his attention for the period of time disclosed.
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> Assuming, without finding, that the reason for the Corporation's non-disclosure was to allow it to await a second and more serious incident without "tipping off" the employee that he was under scrutiny, I would find it equally difficult to square that approach with the fair administration of an enlightened system of progressive discipline. If the Corporation had communicated to Mr. Albert that it was aware of the incident of August, 1987 and was imposing discipline upon him for that event, there might well never have been a second incident, which has become the subject of his discharge and a separate grievance (*see* ***CROA 1834***). It is plainly inconsistent with sound principles of labour relations for an employer to "lie in the bushes" with respect to an incident for which it knows it can discipline an employee, knowingly doing nothing to correct his conduct, and subsequently resurrecting the incident and imposing discipline for it only when it believes it has evidence to prove a second and more serious incident of misconduct.

No protest as to timeliness can be made, however, with respect to the written complaint of February 18, 2004. Moreover, it is appropriate for the Company to consider the latter incident in the context of a number of verbal counselings which had been given to Mr. Lepki in the past, a fact not challenged by the Union in the face of the evidence of ONR representative Gord Ryan at the hearing.

Having regard to the evidence adduced, the Arbitrator is satisfied that the grievor did occasion a serious justified complaint concerning his demeanour towards

passengers on at least one occasion. The evidence is clear that the history of prior counselling and the incident of February 18, 2004 caused the Ontario Northland Railway to take the position that it does not want the grievor to operate as a conductor or brakeman on its passenger trains, a position which it has forcefully communicated to the Company, which is responsible for supplying running trades employees to the ONR. In the result the Arbitrator is satisfied that the Company was justified in the disciplinary action which it took, based solely on the incident of February 18, 2004, although I am of the view that the Union is correct in its submission that the measure of restriction assessed by the Company was somewhat excessive.

The record reveals that Mr. Lepki is an employee of extremely long service, having hired on with CN in 1972. In his thirty-two years of service he has previously received only one minor measure of discipline, in the form of a written warning. It is also notable that twenty-five years of his employment have been in passenger service. In these circumstances I am compelled to agree with the Union's representative that it is excessive to restrict Mr. Lepki from all passenger service, which would include work in GO Train operations at and near Toronto. While I accept that the Company was justified in responding to the concerns of the Ontario Northland Railway, there is nothing in the material before me to suggest that the grievor cannot be expected to perform to an acceptable standard in GO Train service.

The grievance is therefore allowed, in part. The Arbitrator finds and declares that the Company was justified in implementing the request of the Ontario Northland Railway

with respect to the restriction of the grievor from service. The Arbitrator further directs, however, that the removal from service of the grievor in GO Train operations be withdrawn forthwith, and that he be permitted to bid on such work without limitation, in accordance with his seniority.

December 17, 2004

(signed) MICHEL G. PICHER
ARBITRATOR