CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3481

Heard in Montreal, Thursday, 14 April 2005

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE LOCOMOTIVE ENGINEERS DIVISION

DISPUTE:

The 14 days suspension Mr. Montani effective August 29, 2004.

The discharge of Mr. Montani, effective December 13, 2004.

JOINT STATEMENT OF ISSUE:

On July 26, 2004, Mr. Montani was scheduled to provide an employee's statement with respect to Pay System Audit File 224797-2004-10 concerning the alleged improper submission of time returns. As a result Mr. Montani was assessed a 14-day suspension effective August 29 to September 11, 2004.

On December 09, 2004, Mr. Montani was scheduled to provide an employee's statement for the alleged improper submission of time claims for October 30 and 31, 2004 and November 16 and 18, 2004. As a result of the employee's statement, Mr. Montani was discharged on December 13, 2004.

The Union argues the merits of both cases with respect to the discipline assessed to Mr. Montani. In addition, in both instances the Union grieves that the employee was not given a fair and impartial hearing as contemplated under article 71 of the 1.1 collective agreement. The Union has stated that the notice to appear is to vague with respect to the particular subject matter under investigation. Further, the Union argues that article 72.3 of the 1.1 collective agreement applied in this situation and that the Company has only 30 days in which to cut any portion of the employee's claim that may be in dispute.

The Union feels that the discipline assessed in both cases was without just cause and, in the alternative, excessive and should be removed. Mr. Montani is to be fully compensated for lost wages and benefits for the 14 day suspension and reinstated with full compensation for all lost wages and benefits.

The Company disagrees with the Brotherhood's position on both issues. Mr. Montani was afforded a fair and impartial hearing for his time claims on both July 26 and December 9,2004. Further, the discipline imposed was reasonable and warranted in both cases. Mr. Montani was discharged after having been warned on numerous occasions to submit his time claims in a proper fashion. This was the culminating event that led to the discharge of Mr. Montani on December 13, 2004. The discipline as assessed was deemed proper and warranted.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) P. VICKERS	**(SGD.) B. HOGAN**
GENERAL CHAIRMAN	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. VanCauwenbergh	– Senior Manager, Labour Relations, Toronto
B. Hogan	– Manager, Labour Relations, Toronto
Wm. McMurray	– Counsel, Montreal
T. Marquis	– General Manager, Toronto
N. Lalonde	– Auditor/ Assistant Manager, CMC, Moncton
D. Gagné	– Manager, Labour Relations, Montreal

And on behalf of the Union:

C. Morrison	– Counsel, Ottawa
P. Vickers	– General Chairman, Sarnia
S. Montani	– Grievor

AWARD OF THE ARBITRATOR

The first part of this grievance concerns a fourteen day suspension for the alleged submission of improper time returns. The Company maintains that on some nine occasions between October 25, 2002 and March 8, 2004, inclusive, the grievor improperly claimed wages to which he was not entitled. It is common ground that on each of those occasions Mr. Montani, who in addition to being a locomotive engineer is a member and office holder in the United Transportation Union (UTU), was performing work in his capacity as a member of the Health and Safety Committee of the UTU. On

each of the nine occasions in question the grievor's claim had been disallowed, an outcome he apparently chose not to grieve. The record does disclose, however, that the grievor did file a complaint with the Labour Program of Human Resources Development Canada, under the **Canada Labour Code**, in or about June of 2001. The grievor then alleged that he was not being properly paid, in accordance with the provisions of the **Code**, for time spent preparing for, travelling to and attending upon the business of the Health and Safety Committee of the UTU.

On July 23, 2004 the Company gave the grievor notice that he must attend a formal investigation. The notice with respect to the substance of the investigation notice stated, in part:

> You are required to provide a Formal Employee Statement in connection with the contents of Pay System Audit File – S. Montani – 224797 - (45TS) - File: 224797-2004-10

The Union submits that the notice of the investigation was too vague and therefore in violation of the obligation to conduct a fair and impartial investigation as mandated by article 71 of the collective agreement. Article 71.1 provides as follows:

> **71.1** When an investigation is to be held the locomotive engineer whose presence is desired will be properly advised, in writing, as to the time, place and subject matter, which will be confined to the particular matter under investigation.

The evidence discloses that at the outset of the investigation the Company provided to the grievor and his Union representative the entire record of the nine incidents over the 1-1/2 year period in question, and adjourned the proceedings for

twenty-four hours to give the grievor and his Union representative the opportunity to familiarize themselves with the material and to prepare any response, as might be appropriate. Counsel for the Union submits that in the circumstances the Company violated the requirements of article 71.1 of the collective agreement. With respect, the Arbitrator cannot agree. It is clear from the notice provided to the grievor, in writing, that his audited claims in the pay system file would be the subject of the investigation. Given that the purpose is to allow the employee a reasonable opportunity to know the subject matter of the investigation, and that the Company adjourned the proceedings to allow the grievor and his Union representative a full day to review the rather extensive documentary record, I am satisfied that there was, overall, compliance in substance with the requirement of a fair and impartial investigation.

Nor does the Arbitrator accept that in the subsequent investigation leading to the grievor's discharge the investigating officer departed from the standard of a fair and impartial investigation by occasionally consulting with a higher ranked supervisor to obtain advice on particular aspects of the investigation. While it would obviously depart from fairness and impartiality if the proceedings were in fact being conducted by an unseen manager, the fact that an investigating officer might seek advice from an another member of management does not vitiate the proceedings, any more than if the Union representative in attendance seeks an adjournment to consult with another Union officer, provided that the frequency of such consultations is not excessive or abusive. I am satisfied that in the case at hand, with the discharge investigation being concluded within a single day, there was no departure from the acceptable standard.

With respect to the substance of the suspension, however, the Arbitrator is not persuaded that the actions of the grievor which were reviewed during the course of that investigation disclose wrongdoing on the part of Mr. Montani sufficient to sustain a two week suspension. As the evidence before the Arbitrator discloses, if an employee required to be absent from work to attend to the business of the Health and Safety Committee opts to claim the wages of the employee who performed the assignment that he or she otherwise would, there is a degree of guesswork involved. The employee is not given the dollar figure paid to the other employee, and must make their best estimate of that employee's earnings based on the mileage figures which are available.

That obviously results in some inaccuracy. For example, the audit statement returned to the grievor on December 19, 2002 makes a number of adjustments for occasions when Mr. Montani claimed the wages which he believed would have been earned by other employees. Of the four claims dealt with on that audit, two of them were in fact under-claimed by Mr. Montani, one was deemed to be correct and the fourth was found to be an overpayment which was recovered. Upon a review of the audit documents, the Arbitrator is not satisfied that they disclose any deliberate intention on the part of the grievor to defraud the Company. In some cases there are obvious legitimate differences of opinion, as for example in the audit review of January 27, 2004. In that case the grievor made a claim for the actual time worked, in accordance with what he believed to be his right under Part II of the **Canada Labour Code**. The Company took the view that the grievor's compensation was not governed by the

provisions of the **Code**, but by article 70.2 of the collective agreement, whereby he could be paid no more than actual time lost, deemed to be the wages in fact earned by the matching employee. At best, what this instance reveals is a clear example of a difference of interpretation, indeed the kind of interpretation which prompted the grievor to file an earlier complaint under the provisions of the **Code**.

The record does disclose one serious overpayment claim made by Mr. Montani. By his own admission he did make three claims in respect of a twenty-four hour period, one claim of which was clearly in error. On the whole I am satisfied that there was some reason to assess discipline against Mr. Montani, particularly in light of his failure to give his claims an “AD” code designation, as instructed by the auditing reports, as well as the serious error of judgement which he obviously made on one occasion. In my view, however, the assessment of twenty demerits would have been adequate to bring home to the grievor the importance of greater care in the submission of those reports.

For these reasons the grievance in respect of the fourteen day suspension is allowed, in part. The Arbitrator directs that the grievor be compensated for wages and benefits lost, with twenty demerits to be substituted on his record for carelessness and failing to follow instructions with respect to making wage claims for periods of service on the Health and Safety Committee.

With respect to the second investigation, conducted on December 9, 2004, the Arbitrator is satisfied that the Company's evidence does not disclose an intention of the part of the grievor to defraud the Company. Each of the four claims which were the subject of that investigation concerned colourable fact situations which could be the basis of a legitimate claim, beyond sharp practice or fraud. For example, it appears that on October 30, 2004, the grievor made a claim for "doubling miles" for a movement back into and out of Aldershot Yard. The Union's evidence, largely unchallenged, is that for many years that practice was followed by employees without any reduction of the their tickets, and that the matter, which apparently remains in dispute between the two parties, has never been dealt with through a grievance. As another example, the incident of October of 31, 2004, which involved a claim for a Federal Railway Administration inspection while in the U.S. was work in fact done by the grievor and apparently supported as a claimable item under Section "C" in an e-mail communicated to a Union officer by Manager Dennis Fournier on January 10, 2005. I am similarly satisfied that the incidents of November 16 and November 18, 2004 do not involve any wrongdoing by the grievor, and did not justify the assessment of any discipline.

The Company submits that the fact that the grievor withdrew certain claims after he received notice of his disciplinary investigation following the two-week suspension is evidence of the grievor's attempt to commit a fraud. Counsel for the Union stresses that his withdrawal of those claims was equally consistent with an intention to simply avoid the risk of further discipline, even though he may have felt that they were entirely appropriate. The Arbitrator is more persuaded by the Union's argument. Having been

given the serious sanction of a two-week suspension it would not be unreasonable for an employee to wish to avoid any further controversy with respect to wage claims in the light of the possibility of further discipline in the future. The withdrawal of his claims, standing alone, does not support an inference of guilt, particularly in the context of a relatively complex computerized wage claim system.

With respect to the discharge, therefore, the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with no discipline on his record with respect to the four incidents which were the subject of his termination, without loss of seniority and with compensation for all wages and benefits lost.

April 18, 2005

(signed) MICHEL G. PICHER
ARBITRATOR