CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3511

Heard in Montreal, Wednesday 14 September 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Concerning the dismissal of Mr. A. Derose.

UNION'S STATEMENT OF ISSUE:

On March 23, 2005, Mr. A. Derose was dismissed from the Company for alleged "abusive language and behaviour, and insubordination". It is the Union's position that the grievor was not insubordinate and that his words were the never directed at a supervisor but were expletives used in his frustration to understand a change in work procedures. Furthermore, the Union argues that the investigation was not fair and impartial.

In the alternative, should the arbitrator find cause for discipline, it is the Union's position that the discipline is extreme under the circumstances and does not justify dismissal. The Union also argues that the Company has reverted to its desired form of discipline and is ignoring the provisions of Appendix C signed during the most recent round of collective bargaining.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

R. Campbell	– Manager, Labour Relations, Winnipeg
A. De Montigny	– Sr. Manager, Labour Relations, Montreal
R. Shumsky	– Supervisor, Transcona Shops, Winnipeg
L. Kociuk	– Supervisor, Transcona Shops, Winnipeg

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
A. Derose	– Grievor

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection. It submits that the Union has improperly expanded the grievance by the introduction of a new issue as expressed in its *ex parte* statement of issue. In particular, the Company maintains that there was no discussion during the grievance procedure of any allegation that the grievor was denied a fair and impartial investigation. That issue is first raised in the Union's statement, filed with this Office.

The Arbitrator is compelled to sustain the objection. Being in relation to a discharge, the grievance was first dealt with at Step 3 of the grievance procedure established under article 24 of the collective agreement. Under the terms of article 24.5 at Step 3 the Union is required to identify the provisions of the collective agreement it alleges were violated. The article reads, in part, as follows:

> **Step 3**
> …
> A decision will be rendered within forty-five (45) calendar days of receiving the appeal. The appeal shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the collective agreement, the statement shall identify the article and paragraph of the article involved.

In the instant case the grievance takes the form of a letter provided to the Company, dated March 28, 2005. While the grievance clearly takes issue with the just cause of the discipline assessed against Mr. Derose, it raises no other provision of the collective agreement.

The memorandum of agreement establishing the CROA&DR contains the following provisions:

> 6. The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
>
> (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
>
> …
>
> 9. No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date decision was rendered in the last step of the grievance procedure.

It may be that the Union raises the issue of the alleged failure of a fair and impartial investigation as a means to succeed in the original grievance respecting just cause. However, the Arbitrator cannot ignore the fact that the Union's *ex parte* statement of issue effectively raises, for the first time, a new provision of the collective agreement said to have been violated. That provision has not been the proper subject of discussion through the grievance procedure and is therefore not ripe for consideration before this Office. Indeed, the allegation made by the Union is one which the Company did not have an opportunity to discuss or resolve within the framework of the grievance procedure as contemplated in the collective agreement.

This Office has had previous occasion to comment on the intent and operation of article 24.5 of the collective agreement. In **CROA 3265**, a dispute between these same parties, the following comments appear:

> It seems evident to the Arbitrator that the parties thereby intended to ensure that, at the final step of the grievance process, both parties would be on the same page with respect to any issue which might ultimately be pleaded at arbitration, in

> the event that they remained at impasse with respect to the merits of their dispute. In the instant case, where paragraph 5 of article 11 is first raised at the filing of the Union's statement of issue, there is an obvious departure from the requirement of article 24.5, to the extent that the article raised constitutes a separate and independent allegation which, standing alone, would arguably cause the grievance to succeed. In other words, what is raised in that circumstance is a different grievance. In the circumstances I am satisfied that the Company is correct in its assertion that to allow the Union to proceed with its claim under article 11.5 would be an improper expansion or amendment of the grievance beyond the intention of article 24.5. On that basis the Arbitrator sustains the preliminary objection of the Company and strikes from consideration the alleged application of article 11.5 in the circumstances of this case.

For the foregoing reasons the Arbitrator sustains the Company's objection to the expansion of the grievance to include the separate violation of article 24.1 of the collective agreement, dealing with the right to a fair and impartial investigation.

The Arbitrator cannot sustain the second half of the Company's preliminary objection. It submits that the grievance limits the ability of the Union to object to the Company's right to assess some discipline against the grievor. Its representative stresses that the grievance refers to the discipline as "excessive". On that basis he submits that the Union cannot now, as indicated in its *ex parte* statement of issue, argue that the grievor was not insubordinate and therefore not liable to any discipline.

The Arbitrator finds this argument unduly technical. As has been long noted by the Courts, grievance and reply pleadings in industrial relations are generally drafted by laymen and not intended to be construed narrowly as legal documents. Arbitrators have therefore been directed to deal with the real substance of the dispute and not to limit the rights of either party by reason of undue technicality. (See **Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486** (1975), 8 O.R. (2d) 103 (Ont. C.A.) and **CROA 3360**.)

Moreover, in the case at hand the grievance itself states that the grievor should be reinstated and made whole from the standpoint of compensation and benefits. At a minimum, that position of the Union can fairly be construed as reserving its right to argue that no discipline was warranted in the circumstances. For these reasons the second preliminary objection raised by the Company cannot be sustained.

The facts pertinent to the merits of the grievance are not in dispute. The record discloses that on March 17, 2005 the grievor worked an overtime evening shift. During the course of that tour of duty his immediate supervisor approached Mr. Derose to inform him that he had improperly driven his forklift underneath an overhead monorail lift and had parked his forklift in an improper location. It appears that on some occasions employees are permitted to move under the overhead lift system to work in an adjacent area, but are not to do so otherwise. The evidence discloses that the grievor "lost it" with his immediate supervisor, essentially questioning how it could be that he could properly go under the lift at one location only a few feet away, yet be prohibited from doing so as he had done on that occasion. The report of Supervisor Larry Kociuk states, in part:

> Mr. Derose immediately "snapped", seemed to lose control and began to yell and scream at me, he was walking back and forth in a very animated way, waving his arms: "What the fuck's the difference, here or three feet from here". … Mr. Derose continued to yell at me and kept getting more upset, asking "What the fuck's the difference", "I'm challenging you – I'm challenging you". I tried to calm him down. I've been with the railway for more than thirty years on both sides and I've never seen anything like this before.

The evidence confirms that Mr. Kociuk requested that the grievor accompany him to the office of his own superior, Supervisor Don Shumsky. The grievor declined to go, whereupon Mr. Kociuk advised Mr. Shumsky what was happening. The evidence confirms that Mr. Shumsky was met with a similar verbal outburst when he attended at the location along with Mr. Salo, an

employee who is the Union's Health & Safety representative. When Mr. Shumsky attempted to explain the rule to Mr Derose his outburst of anger seems to have become yet more intense, and he shouted at both Supervisor Shumsky and Mr. Salo. As related in Mr. Shumsky's report:

> I again asked Mr. Derose to calm down and Mr. Salo also asked him to calm down and stop swearing. Mr. Derose became more upset, started to wave his arms, began swearing at Mr. Salo and myself saying "This is bullshit, you're not going to tell me not to swear, I'll swear if I want to, explain the fucking difference, it's fucking safe here but not fucking safe there, I'm fucking challenging you."

Mr. Shumsky then asked the grievor to accompany him to the office of System Manager, Wheels, Bruce Dolphin. In Mr. Dolphin's office the grievor continued with his loud outburst, at which point Mr. Dolphin immediately instructed him that he was relieved from service and that he should leave the workplace. In fact, it appears that Mr. Dolphin's concerns prompted him to contact CN Police to see that the grievor left safely, although in fact Mr. Derose did depart the workplace before the police attended, escorted by Supervisor Shumsky.

A review of the grievor's statement at the Company's investigation indicates that he effectively denied being loud and disrespectful towards his supervisors. Among other things, he stresses that he never received a proper answer to his challenge with respect to the safety of the situation. The record reflects no real recognition on the grievor's part as to any wrongdoing, much less any remorse for his actions.

The disciplinary record of Mr. Derose was clear at the time of the incident. But there is much more in the larger record. Hired in 1980, the grievor has a relatively extensive record of questionable conduct. In September of 1993 he was assessed thirty demerits and a one month suspension for conduct unbecoming an employee. He was discharged in December of 1994 for an accumulation of demerits following on the assessment of discipline for insubordination and

poor work performance. That discharge resulted in a grievance and the grievor's reinstatement by this Arbitrator in January of 1997 (**CROA 2821**). In reinstating the grievor into his employment, without compensation, the Arbitrator commented, in part:

> … Mr. DeRose must appreciate, however, that any future infractions on his part involving disrespect towards his supervisors, poor timekeeping and absenteeism, or poor work performance may have the most serious of disciplinary consequences.

A few years following his reinstatement, in November of 2001 the grievor again was involved in addressing derogatory remarks toward a supervisor, threatening a supervisor and refusing his instructions. That resulted in the assessment of twenty demerits. Notwithstanding that background, the grievor again allowed himself to engage in an unjustified verbal outburst aimed at three separate supervisors, extending over a period of twenty-five minutes, on March 17, 2005. The Company viewed that as a culminating incident which justified the grievor's discharge.

Regrettably, the Arbitrator is compelled to sustain the Company's view. While it may be that the grievor has a relatively good work record, and received commendations for the quality and productivity of his efforts as an employee, the long-term record discloses an individual who, notwithstanding prior discipline, including dismissal, operates in the workplace as an unpredictable temper time-bomb. The fact that there may be extensive periods of quiet between his outbursts at supervisors does not change the seriousness of what the Company understandably views as unacceptable recidivism in this area of his behaviour. Notwithstanding the prior measures of discipline assessed against him and notwithstanding the cautionary comments of the award of this Office, the grievor plainly engaged in a degree of verbal abuse and disrespect towards his supervisors which is unacceptable and deserving of a serious measure of discipline. I am satisfied that in this circumstance, notwithstanding certain mitigating

factors and the grievor's prior service, the Company was properly entitled to view the events of March 17, 2005 as a culminating incident which justified discharge.

For all of the foregoing reasons the grievance must be dismissed.

September 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR