CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3567

Heard in Montreal, Thursday, June 15, 2006

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Involves the Company's refusal to reinstate Conductor J.V. Seberras of Toronto, Ontario back into Company service.

JOINT STATEMENT OF ISSUE:

On December 4, 2004, Mr. Seberras received a CP Rail form 104 stating: "Please be advised that you have been dismissed from Company service for the following reason(s): for accumulation of demerits in excess of 60, under the Brown System of Discipline."

The Union appealed the decision of the Company requesting that Mr. Seberras be reinstated back into Company service with full compensation and full seniority.

With letter dated April 26, 2005 the Company declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. GÉNÉREUX	(SGD.) D. E. FREEBORN
GENERAL CHAIRMAN	FOR: DISTRICT GENERAL MANAGER

There appeared on behalf of the Company:

A. Azim	– Labour Relations Officer, Calgary
J. Romaine	– Labour Relations Officer, Calgary
D. Freeborn	– Labour Relations Officer, Calgary
N. Richards	– Yard Manager, Toronto
D. Purdon	– Road Manager, Toronto
D. Duquette	– Yard Manager, Oshawa
D. Hoppenreys	– Service Area Manager
I. Galioto	– Yard Manager, Toronto

And on behalf of the Union:

D. Genereux	– General Chairman, Oka
B. Hiller	– Vice-General Chairman,

R. Gallop – Local Chairman, Toronto
T. Beaver – General Chairman, Oshawa
J. V. Seberras – Grievor

AWARD OF THE ARBITRATOR

This award deals with three separate allegations brought by the Employer against the grievor, Mr. Joe Seberras, as well as his discharge. The discharge results directly from his accumulating in excess of 60 demerit points based on his previous disciplinary record plus the demerit points assessed by Employer following its investigation of the three allegations which are the subject of this award.

Although each incident must, of course, be determined based on the facts of the case, the hearing of the three cases together have allowed the Arbitrator to formulate a general view of the grievor and, in particular, how to assess his credibility. With respect to the latter point, in particular, the Arbitrator notes that there were numerous witnesses to the events, each of whom gave evidence contradictory to that of the grievor. There was no reasonable explanation why the evidence of these witnesses should not be preferred to that of the grievor. After considering all of the evidence, in each of the incidents, the Arbitrator has determined that where there is contradictory evidence, the evidence of witnesses other than the grievor is to be accepted.

The Arbitrator also notes that, at no time during the Investigations, or at the hearing when making a statement to the Arbitrator, did the grievor ever admit to the

possibility that he was responsible, even in some small way, for any of the incidents. The grievor steadfastly continues to take the position that he bears no responsibility and that it is the Employer, and their employees/witnesses who are to blame for his misfortune.

INCIDENT I – THE OIL INCIDENT

The grievor was assessed 25 demerit points for attempting to remove motor oil without permission from Company vehicles for his own personal use. It is not important to lay out all the facts of the incident. What is important is that there were three other employees involved. Two were crew bus drivers and the third was a yard manager. An analysis of the evidence discloses three important points. First, the Investigations of the crew drivers and the yard manager were consistent. The three all gave, essentially, the same story. Second, on material points their evidence was not the same as the grievor's. Third, the story the grievor gave during the course of the Investigations held into this matter constantly morphed. In fact, the version presented at arbitration contained elements either not earlier disclosed by the grievor and was another variation on earlier themes.

The result, therefore, is that the Arbitrator rejects the various versions given by the grievor and prefers the more consistent version of facts given by the Employer's witnesses to the incident. On that basis, there is no reason to conclude that the findings of the Employer were in error and the Arbitrator, too, reaches the conclusion that the

grievor attempted to take possession, without permission, of Company property for his personal use.

For this incident, the grievor was assessed, as mentioned above, twenty-five demerit points. The Union submits that, in the circumstances, including the fact that the value of the oil was about $2.50, the 25 demerit points was excessive. The Employer argues that there are no mitigating factors to provide a reason to reduce the number of demerits points assessed.

It is trite law, both generally and with the CROA&DR, that theft, or attempted theft is not to be treated lightly. Few acts can more seriously harm the employment relationship and duty of trust than a removal or attempted removal of Company property. The grievor was aware that he needed a manager's permission to "borrow" Company property: he acknowledged this at the hearing. "But," he stated, "why bother a manager for a matter so trivial." The answer of course is self-evident.

Given all of the circumstances, the Arbitrator does not view the assessment of 25 demerit points as excessive. The grievance is dismissed.

NOTE: 1. This brought the record of the grievor to 35 demerit points.

2. The grievor was assessed a further 15 demerit points on May 27, for an incident not grieved, bringing his demerit points to 50 at the time of the second incident.

INCIDENT II – PANT SOILING INCIDENT

The grievor soiled his pants (urinating) during an investigation. The Employer alleges it was deliberate and an attempt to frustrate the Investigation. It considers the grievor's conduct at the time to have been gross insubordination. The Union submits that the grievor can not be disciplined because there was no evidence his act was voluntary and therefore there was no evidence of gross insubordination.

On the day in question, the grievor attended, along with his Union representative Mr. Ray Gallop, at a continuing Investigation into the oil incident. Because of the configuration of the room, the grievor and Union representative were seated at the same side of the table and slightly behind the investigating officer, Mr. Norm Richards. At the beginning of the day the grievor had requested a more formal approach of communicating during the Investigation; namely, raising his hand when he wanted to gain Mr. Richard's attention. Mr. Richards acquiesced to the request.

The Investigation commenced at 08:50, and there was a 15 minute recess at 10:10 and a 12 minute recess at 10:57. Both were requested by Mr. Richards. It is not known whether the grievor left the room during either recess although he clearly had the opportunity to do so. At 12:00 the grievor apparently raised his hand to get Mr. Richards' attention. Neither Mr. Richard nor Mr. Gallop have any recollection of this. At one point the grievor tapped Mr. Gallop on the shoulder. Mr. Gallop saw the grievor's raised hand and called out to Mr. Richards who asked him to wait one minute because he was just finishing typing. At no time did the grievor tell either Mr. Gallop or Mr. Richards that he

was in distress. At 12:10 Mr. Gallop was informed the grievor had soiled himself and the Investigation was adjourned.

Shortly after, the grievor was asked if he had a bladder problem or some other type of medical condition that would account for the incident. The grievor responded no. At the hearing the Union, on behalf of the grievor, alleged a medical condition but provided no factual basis for this allegation.

The grievor had been the object of investigations on numerous occasions prior to this date. The process was neither new nor foreign to him. He had, on at least one previous occasion, simply excused himself and left the investigation room when he had to go the bathroom.

On the one hand it defies logic and common sense that an adult would deliberately soil himself. On the other hand, it also defies logic that an adult, *in extremis*, as the grievor claims he was, would sit mute, like a child, with hand upraised, waiting to get the attention of Mr. Richards. It further defies logic and common sense that the grievor would simply tap Mr. Gallop on the shoulder without communicating any particular need, particularly if the need was urgent.

It is also worth recalling that it was the grievor himself who imposed the hand-raising method of communication. The Employer simply acquiesced to the grievor's

request. Given that the process was one not demanded by the Employer, there is no reason why the grievor could not simply have called out.

The Arbitrator also points out at that even if the grievor had called out, as he alleged, there was nothing stopping him from calling out a second time, more loudly. Finally, there was absolutely nothing to stop the grievor from simply standing up and excusing himself. He had done so before without any negative repercussions and there was nothing to suggest that he would be punished for it during the course of this Investigation.

Based on the evidence, the Arbitrator must conclude that the grievor had the opportunity to avoid soiling himself and the end result, in large measure, if not totally, was of his own doing. The Arbitrator also concludes that the grievor's actions amounted to gross insubordination and were designed to frustrate the investigation process

Discipline was warranted and the grievance is dismissed. Whether 45 demerits was appropriate becomes moot given the determination of Incident 3 discussed below.

INCIDENT III – THE SARS INCIDENT

The grievor attended the Toronto area SARS benefit concert on July 20, 2003. He was, at the time, on modified duties, the result of an injury. No seating was provided at the concert. The grievor was seen by Yard Manager Mr. Ian Galioto, who was also attending the concert. Mr. Galioto, who had known the grievor since 1990, and was

aware that he was on modified duties, observed that the grievor did not appear to limp or walk in pain. He called out to the grievor and alleged that the grievor responded:

> You didn't see me here, you better not fucking tell anyone you saw me here. I have enough on all of you, that I'll fry all your asses. You didn't fucking seem me here.

The grievor acknowledges being at the concert but denies uttering the words attributed to him.

The Employer submits that the threats and verbal abuse, as alleged can not be tolerated and that the 45 demerit points assessed was not unreasonable, as shown in previous awards of this Office (**CROA 3451**) and arbitral jurisprudence generally.

The Union argues that with the level of noise at the concert Mr. Galioto's perceptions may have been affected, there was no known reason why the grievor would have said what he was alleged to have said, neither was on duty and no witness confirmed Mr. Galioto's evidence.

First, as indicated at the outset of these reasons, and for the rationale expressed, the Arbitrator has some difficulty with the credibility of the grievor. In the instant incident, in particular, there is absolutely no reason for Mr. Galioto to have made up what he claims the grievor said. There is no evidence of any animus that would demonstrate that Mr. Galioto had any reason to "get" the grievor.

This is to be contrasted with the situation of the grievor. He was on modified duties. Showing himself to be able-bodied was problematic for him, especially given the number of demerit points he had accumulated to that point.

Second, that this incident did not take place on Company property is irrelevant. It was a threat uttered to a Company employee resulting, as a determined above, out of a concern of the grievor directly related to the workplace and his employment status.

Third, the lack of a witness to substantiate Mr. Galioto's evidence is of no moment. Decisions are made all the time based on circumstantial evidence. There was equally no witness to substantiate the grievor's version of events even though he was not alone at the concert. And, as indicated above the credibility of the grievor is suspect.

For the above reasons, the Arbitrator find the incident transpired as alleged and the grievance is dismissed.

It is to be recalled that to this point (without even considering the number of demerits warranted in Incident 2) the grievor's record stood at 50 demerits. Only 10 more demerits were required for the Employer to terminate his employment. Even if it could somehow be argued that 45 demerit points are excessive for uttering a threat as was done in the instant case (the Arbitrator hastens to point out that in the context of all the incidents he does not believe it was excessive), the Arbitrator would not reduce the

total number of demerits assessed such that the total number of demerits on the grievor's record would be below 60.

In view of the above, there is no need to determine what would be the appropriate level of demerits for Incident 2, except to indicate that there would have been no particular predisposition, given the context, to vary the number of demerits assessed by the Employer.

The Arbitrator finds that at the time of his discharge, the grievor had accumulated in excess of 60 demerit points. The Employer's decision to discharge is upheld and the grievance contesting the discharge is dismissed.

June 16, 2006

(signed) M. BRIAN KELLER
ARBITRATOR