CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3568

Heard in Edmonton, Tuesday, 11 July 2006

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Assessment of a sixty (60) day suspension to Tom Schollie of Vancouver, B.C., for delay to assignment and insubordination towards a Company officer.

JOINT STATEMENT OF ISSUE:

Following a shift as Yard Conductor on May 7, 2003, Yard Conductor Schollie was required to provide an employee statement with respect to alleged delay during the May 7 assignment.

Following the investigation, Yard Conductor Schollie was assessed a sixty day suspension for "delay to assignment 23:00 East Lead on May 7th, 2003, at Thornton Yard and for your insubordination towards a Company Officer during your shift on the 23:00 East Lead on May 7, 2003."

The Union submits that there was no unnecessary delay to the assignment and any delay incurred was adequately explained and justified through the interrogative statement. As such, any discipline assessed as a result of delay was unwarranted or, if warranted, excessive.

The Union further submits there were no questions asked or complaints raised with respect to insubordination during the employee investigation. As such, any discipline based on the Company determination that Yard Conductor Schollie was insubordinate is improper and should be expunged from his record.

The Union requests that the discipline assessed to Yard Conductor Schollie be expunged or, if discipline for delay is warranted, should be substantially reduced.

FOR THE UNION:

(SGD.) R. A. HACKL
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) K. MORRIS
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg
P. Payne	– Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Toronto
Wm. McGillivray	– Trainmaster, Vancouver

And on behalf of the Union:

R. A. Hackl	– Vice-General Chairperson, Edmonton
M. A. Church	– Counsel, Toronto
R. Thompson	– Local Chairperson, Jasper
B. Larsom	– Vice-Local Chairperson, Edmonton

AWARD OF THE ARBITRATOR

The grievor was assessed a sixty day suspension for the delay of his assignment and for insubordination towards a Company officer, arising out of events during his yard assignment at Thornton Yard on May 7, 2003. Some three years later, shortly prior to the hearing, the Company amended the discipline, reducing it to a fourteen day suspension.

The Union objects, in a preliminary way, to any part of the discipline against the grievor being based on the allegation of insubordination. It submits that the grievor was given notice of a disciplinary investigation to deal only with the issue of whether his crew had worked too slowly during the course of their tour of duty which had commenced at 23:00 on May 7, 2003. The record discloses that the notice to appear for investigation, dated May 14, 2003, advised the grievor, in part, as follows:

> You are required to provide a formal employee statement in connection with the alleged delay to assignment while working as Foreman on the 2300 East Lead Belt Pack assignment on May 7, 2003.

There is no other charge or allegation contained in the notice provided to Mr. Schollie.

It appears that the investigation was prompted by a report filed by Transportation Supervisor Bill McGillivray, a memorandum dated May 20, 2003. That memorandum, provided to the grievor at his disciplinary investigation, relates Mr. McGillivray's observations that on the night in question the grievor's yard movement seemed to be moving too slowly. During the crew's lunch break he spoke with the grievor about the pace of the work they were performing, suggesting that they should have been travelling at the full operating speed of 15 m.p.h., rather than at the speeds of 4 m.p.h. to 10 m.p.h. which were later downloaded from the event recorder in his locomotive. Mr. McGillivray's report concludes with the following comment, after indicating that the grievor gave some explanation as to the speed he thought was appropriate: "At this point Tom seemed to become a little defensive and then told me that if I didn't like it I could bring him in. Tom then left the east shack and Rob followed not far behind him."

The Arbitrator must agree with the Union. While there may be what the Company sees as evidence of a dismissive or disrespectful attitude towards his supervisor reflected in the report filed by Mr. McGillivray, the grievor was never placed on notice that he was being investigated for insubordination or lack of respect towards his supervisor. On the contrary, he had notice only of the fact that the Company wished to

investigate the pace at which he and his crew accomplished their work on the tour in question.

Article 117.1 of the collective agreement provides as follows:

> **117.1** No employee will be disciplined or dismissed until the charges have been investigated; the investigation to be presided over by the employee's superior officer. The employee may, however, be held off for investigation not exceeding 3 days, **and will be properly notified, in writing and at least 48 hours in advance, of the charges against the employee**.
>
> [emphasis added]

It is well established that it is the most fundamental right of an employee to know the nature of the charge against him, to be able to bring an appropriate defence during the course of a disciplinary investigation. Failure to give such proper notice may vitiate the discipline brought against an employee, by reason of the failure to conduct a fair and impartial investigation (see, **CROA 1858, 2073** and **2576**). For these reasons the Arbitrator must sustain the Union's objection with respect to insubordination forming any part of the conduct for which Mr. Schollie was disciplined. He did, however, receive proper notice and a fair investigation with respect to the allegation of working too slowly.

What remains, then, is whether the Company discharged its burden of proof of establishing that the grievor worked at an unduly slow rate of speed. I am satisfied that it has, albeit not to the degree that it maintains. The Arbitrator accepts the submissions of the Company that the normal rate of speed expected of employees working in switching operations is the full application of speed available through the use of the

beltpack device. It does not appear disputed that beltpack controls are essentially regulated to permit a maximum speed of 15 m.p.h. in yard switching operations, a speed which corresponds to the maximum permissible speed in the yard. The event recorder download indicates that that speed was reached by the grievor during the course of his entire tour of duty only very rarely, and that extremely slow speeds were used through the better part of the work which he performed. On the other hand, the grievor did provide partial explanations, which the Arbitrator accepts as plausible, for certain of the slow movements observed by Mr. McGillivray. Among them, is the fact that on one occasion he was switching out two bad order cars, without any precise knowledge as to the nature of the defects of those cars, which caused him to move more slowly. On the other hand, the grievor's explanations as to the delay of twenty-three minutes after the start of his shift before actually starting switching activities, as well as his relatively vague answer as to who, if anyone, authorized his crew to tie up some nineteen minutes prior to the completion of the shift, are less than compelling. The Arbitrator is satisfied that the Company's concerns were not groundless, and that the pace of the grievor's work did leave something to be desired, thereby establishing just cause for the assessment of some discipline.

The grievor is a long service employee, hired December 19, 1973. He will be eligible to retire in less than a year. However, his record is unfortunately tainted by at least three prior incidents of discipline for his having failed to complete the work assigned to him, the most recent being in November of 2000. In these circumstances the Arbitrator cannot conclude that it was not appropriate for the Company to assess a

more severe level of discipline, including a suspension. Given the length of the grievor's service, and the fact that he did not have an extensive record of demerits outstanding at the time of the incident, a fourteen day suspension is an excessive penalty in all of the circumstances. That is particularly so when the grievor's workmate received only a reprimand for his involvement in the slow production on the shift in question. In the circumstances I am satisfied that a two day suspension would have been sufficient to bring home to the grievor the importance of being more efficient and productive during his tour of duty.

The grievance is therefore allowed, in part. The Arbitrator directs that the discipline assessed against Yard Conductor Schollie be reduced to a two day suspension, with compensation to be paid for the difference in wages and benefits lost.

July 14, 2006

(signed) MICHEL G. PICHER
ARBITRATOR