CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3666

Heard in Montreal, Wednesday, 9 April 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The discharge of Conductor Jim Ellis for "conduct unbecoming an employee: violation of CN's harassment free work place policy and uttering threats to another individual."

JOINT STATEMENT OF ISSUE:

On June 23rd the grievor, Jim Ellis, was working as Conductor on M 30251 21. The grievor was performing switching in Saskatoon Yard. While performing his work, the grievor encountered Mr. B. Winkel, a retired railroader who was called by the Company to work as a conductor in Saskatoon Yard. The Company attributes certain remarks to the grievor. The grievor denies certain of these remarks.

An investigation was conducted. Following this investigation the grievor whose discipline record was clear at the time, was dismissed for "conduct unbecoming an employee: violation of CN's harassment free work place policy and uttering threats to another individual."

The Union contends that the Company, through the investigation process, has failed to substantiate all the allegations against the grievor and that, as such, while some level of discipline may be appropriate, discharge was excessive in all of the circumstances.

The Union requests that the dismissal be expunged from the grievor's record and be replaced with a more appropriate level of discipline; that he be reinstated without loss of seniority or benefits, and that he be made whole for all losses. Alternatively, the Union requests that the grievor be reinstated on terms the Arbitrator deems appropriate.

The Company disagrees with the Union and has denied the request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. S. THOMPSON	(SGD.) K. MORRIS
GENERAL CHAIRPERSON	MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

D. VanCauwenbergh	– Director, Labour Relations, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Manager, Labour Relations, Winnipeg
J. Newton	– Superintendent, Saskatoon
B. Winkel	– Witness

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
R. S. Thompson	– General Chairperson, Edmonton
R. Hackl	– Advisor
L. Gordon	– Witness

J. Ellis – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that Conductor Jim Ellis did engage in unacceptable behaviour. By his own admission, on June 23, 2007, the grievor voiced insulting and provocative remarks to another person working for the Company at Saskatoon. As a result of that incident, the Company investigated and terminated his employment.

In June of 2007 the Company, which was experiencing a manpower shortage, employed retired conductors to cover work which was surplus to the capacity of the members of the bargaining unit. Referred to as "surge" employees, those individuals negotiated their own terms of employment with the Company, effectively functioning outside the Union structure and outside the collective agreement. (See **CROA&DR 3647**)

On June 23, 2007, while working on train M30251, setting off and picking up units at Saskatoon, the grievor found himself on the point of a movement which passed by the 14:30 Yard Assignment which was stopped on the North Lead by the Yard Office. A surge employee, Mr. B. Winkel, who was working with the yard assignment, was then standing on the ground close to the yard office. While passing the yard engine, in clear reference to Mr. Winkel, Conductor Ellis called out in a loud voice to Locomotive Engineer Lloyd Gordon, in charge of the yard engine, asking him in a forceful voice how he could work with a "scab". By the grievor's own admission, he did call Mr. Winkel a scab, obviously within the hearing of both the road and yard crews.

While there is some difference in the account of events as between Mr. Winkel's recollection and the grievor's, it is not disputed that as the road assignment moved past the yard assignment, as the grievor was moving away from Mr. Winkel, the two got involved in a further trade of insults, and that Mr. Winkel, by his own admission, gave the finger to Mr. Ellis and Mr. Ellis loudly called him a "fucking scab". In the Arbitrator's view the grievor's conduct is neither mitigated nor aggravated by a close determination of whether he spoke first or whether Mr. Winkel first gave him the finger. On either basis, he knew, or reasonably should have known, that he was engaging in communication and disrespect for fellow employees which is plainly unacceptable in the workplace.

According to Mr. Winkel's account, as Mr. Ellis was moving still further away he made some reference to calling Mr. Winkel's home. Additionally, within a period of perhaps one minute, a radio message was received over the yard channel. The person on the radio stated "I hope your marriage will withstand your wife being called … about various unspecified past happenings". Mr. Ellis denies having made any radio transmission addressed to Mr. Winkel, and denies having uttered any words to the effect that he would call his home. The evidence of Mr. Winkel with respect to the grievor having threatened to call his home is unsustained by any other witness to the exchange. Additionally, doubts are raised in the evidence before the Arbitrator with respect to the radio transmission. It would appear from the investigation that the grievor was not, in fact, aware of the channel on which radio transmission for the 14:30 Yard Assignment was to be communicated. As his road assignment was on a different channel, the grievor maintains not only that he did not make the radio call, but that he could not have done so by reason of his ignorance of the proper channels, as evidenced in his own investigation where he mistakenly assumed that the yard movement was on radio channel 5 when, it appears, it was on radio channel 34.

What, then, does the evidence disclose? Firstly, it must be recognized that the allegation made against the grievor, to the extent that the Company believes that he was the author of the radio communication which was plainly in the nature of harassment and threats of a serious nature, requires a standard of proof commensurate with the seriousness of the allegation. The proof is simply not conclusive, as regards the evidence before the Arbitrator. While the Company may well surmise that Mr. Ellis must be the person who spoke on the radio in a threatening way to Mr. Winkel, there is simply no direct evidence nor any corroboration of that assertion in the evidence. The words communicated to Mr. Winkel over the radio could have originated with any of a number of people. In the result, the Arbitrator must find that aspect of the grievor's misconduct is simply not made out. Nor am I satisfied that the evidence is sufficient to conclude, on the balance of probabilities, that the grievor uttered any comment about calling the surge employee at his home, an allegation unsupported by any evidence other than the testimony of Mr. Winkel.

Having regard to the whole of the facts reviewed above, and to the mitigating factor of the grievor's prior service, the Arbitrator cannot sustain the position of the Company that discharge was appropriate in all of the circumstances. Mr. Ellis is an employee of some twenty years' service who has never once been disciplined in all of that time, for any reason. That is not to say that the incident, even disregarding the radio transmission, was not extremely serious. Mr. Ellis knew, or reasonably should have known, that his provocative and insulting remarks towards Mr. Winkel were, very simply, totally unacceptable in the workplace and would be deserving of a high

degree of discipline. And even if one accepts that the radio transmission was the contribution of another employee, at a minimum it is not inappropriate to suggest that the grievor may well have provoked or prompted another employee to join in the insults and harassment.

The Arbitrator is therefore satisfied that this is an appropriate case for reinstatement, albeit without compensation, given the seriousness of the grievor's actions. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. His time out of service shall be recorded as a suspension for conduct unbecoming on June 23, 2007 at Saskatoon.

April 12, 2008

(signed) MICHEL G. PICHER
ARBITRATOR