CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3694

Heard in Montreal, Thursday 11 September 2008
Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The assessment of 15 demerits to the Mr. K. King for his alleged "violation of the BIT productivity Standards between January 10 arid 11, 2008 while employed as Equipment Operator at BIT."

The assessment of 15 demerits for his alleged "failure to complete your circle check book on January 11, 2008 while in control of shunt tractor CN 45023 while working as an Equipment Operator at BIT."

UNION'S STATEMENT OF ISSUE:

The Union contends that Mr. King was held out of service during the recording of these formal investigations, which according to the Union was tantamount to discipline without due process and as such, was in violation of Article 23.1 of the collective agreement. The Union further suggests that the investigations were therefore, not fair and impartial.

In the matter of the productivity standard violations, the Union contends the Company has not discharged its burden of proof to show that the grievor had been simply caught up in the normal fluctuations outside of the OASIS system. The Union also suggests that the OASIS system was identified as a tracking tool for Equipment status/location and was not designed as a timekeeping tool.

In the matter of the safety violation on the grievor's failure to complete his circle check, the Union contends that the assessment of discipline for the grievor's "failure to perform a circle check", was simply not a clear understanding by the grievor as to the process for which mi employee should use when they are not the initial user of a piece of equipment.

The Union seeks reinstatement with full compensation for all lost wages and benefits.

COMPANY'S STATEMENT OF ISSUE:

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The Company disagrees with the Union's contentions and has declined the Union's grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. OLSHEWSKI	**(SGD.) F. O'NEILL**
NATIONAL REPRESENTATIVE	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

F. O'Neill	– Manager, Labour Relations, Toronto
S. Grou	– Manager, Labour Relations, Montreal
C. Mackay	– Sr. Terminal Coordinator, B.I.T.
M. Carrier	– Garage Supervisor, B.I.T.

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
G. Green	– Local Chairman,
K. King	– Grievor

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection with respect to the *ex parte* statement of issue. It submits that it is improper for the Union to seek compensation for the grievor in the event of his reinstatement. It takes that position based on the fact that the original grievance document did not make that specific request. On that basis the Company submits that the Union's *ex parte* statement of issue constitutes an improper enlargement of the grievance.

The Arbitrator cannot sustain the Company's position. There is a difference between the substantive allegation of a violation of a collective agreement, as expressed in a grievance, on the one hand and the statement of the relief sought on the other hand. Generally speaking, boards of arbitration do not allow an expansion of a grievance at the threshold of arbitration, beyond the grievance as it was formulated at the outset, in the sense that the Union seeks to add an additional allegation of a new and different violation of the collective agreement. To that end collective agreements commonly require the grievance to identify those parts of the collective agreement which are alleged to have been violated.

In the instant case the collective agreement reflects the above general approach. Article 5.7, which deals with the initial presentation of grievances, reads as follows:

> **5.7** Within twenty-one (21) calendar days of receiving the terminal manager's decision under step 1, the designated representative of the Union may present the grievance to the General Manager of terminal operations. The grievance shall consist of a written statement outlining the Union's contentions and identify the specific provision or provisions of the collective agreement, which the grievance concerns.

It is noteworthy that the foregoing provision makes no specific reference as to the requirement for the Union to articulate the precise remedy it seeks within the four corners of the original grievance document. That should not be viewed as surprising, as it may well occur that the Union may only be able to formulate its eventual position on remedy after the exhaustion of the grievance procedure, exchanges with the Company and a deeper appreciation of the facts and issues surrounding the case to be heard.

It **CROA 3511** this Office was faced with an argument made by an employer to the effect that because the grievance document indicated that the discipline was "excessive", according to the company the union could not maintain that no discipline was warranted. The Arbitrator rejected that preliminary objection commenting, in part, as follows:

> 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**.)

For all of the foregoing reasons the Arbitrator rejects the preliminary objection raised by the Company concerning the scope of remedy in the case at hand.

I turn to consider the merits of this grievance. The record demonstrates that the grievor is not a long service employee. Before the investigation and assessment of two measures of fifteen demerits each against his record, his disciplinary record stood at fifty demerits.

The first head of discipline against the grievor, being the assessment of fifteen demerits, is for his failing to maintain sufficient productivity standards on January 10 and 11, 2008. Having reviewed the evidence, the Arbitrator is compelled to the reluctant conclusion that the position of the Company is correct. It appears that at approximately 15:30 on January 10 the grievor was observed by his supervisor with his tractor

stopped, engaged in conversation with a fellow employee. When the supervisor gestured to the employees to get on with their business Mr. King made a hand gesture which caused his supervisor to inquire as to what he meant. The grievor then indicated to his supervisor that he simply felt that he was being picked on.

The following day, January 11, 2008, two other supervisors performing efficiency tests noted two tractors, one being the grievor's, parked and turned off. The evidence also indicates that on January 10 Mr. King did not make his first productive move until 08:29, as reflected in the OASIS computer records which track yard movements. That effectively constituted a delay of fourteen minutes beyond the time he would have been expected to be in productive work following his morning job briefing.

Additionally, on January 11 he logged out of his machine at 17:37. As is assignment finished at 18:00 he would normally have been expected and log off considerably closer to his finishing time of 18:00. When asked to explain that discrepancy, during the course of his disciplinary investigation, Mr. King replied "I was taking the remainder of my lunch break." However, as reflected in the record, on both January 10 and 11 Mr. King appears to have shut down his machine and taken the full hour allowed for his lunch.

The second assessment of fifteen demerits was for the grievor's admitted failure to have done a circle inspection of his equipment at the commencement of his day's work on January 11, 2008. During the investigation into that incident he responded that

he believed that a person who had used his tractor earlier that same day had done a circle check. There is no indication in the material before the Arbitrator that that is a permissible assumption or an acceptable practice.

Unfortunately, the grievor has an extremely negative disciplinary record. At the time of the discipline assessed against him his record stood at fifty demerits. He was previously subjected to a seven day suspension in 2005 for failing to meet productivity expectations and reporting late. On three other occasions he was disciplined for poor time keeping or attendance management and on six occasions was disciplined for failing to protect his assignment. He was also assessed fifteen demerits for sleeping on the job on one occasion.

The record discloses that the Company has been patient with the grievor and has, over a period of ten years, attempted by means of progressive discipline to convey to Mr. King the importance of being productive and assiduous in his attendance at work. His conduct led him to a situation in which the assessment of five demerits for each of these infractions would have placed him in a dismissible position. On what responsible basis can the Arbitrator reduce the penalty in the case at hand? I can see none. Regrettably I must find that the grievor did fail to meet the productivity standards expected of him on January 10 and 11, 2008, and that he did fail to perform the circle check of his vehicle as required on the second of those days. For these infractions he was liable to discipline and there are no mitigating factors that would suggest that that discipline should not be at the level that would lead to the termination of his employment.

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

September 15, 2008

(signed) MICHEL G. PICHER
ARBITRATOR