CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3706

Heard in Calgary, Tuesday, 11 November 2008

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of thirty (30) demerits and subsequent dismissal for accumulation of demerits of Irene Victor of Edmonton, for "violation of CROR rule 429 on December 17, 2004".

UNION'S STATEMENT OF ISSUE:

The grievor, Irene Victor, was working in a hump foreman only position in Walker Yard in Edmonton on December 17, 2004. During this tour of duty the movement being controlled by the grievor passed eastward by CTC signal 06 which was displaying stop. An investigation was held following which the grievor was assessed thirty demerits and dismissed for accumulating demerits in excess of sixty.

The Union contends there are several mitigating factors which must be considered including but not limited to the Company's failure to install certain safety features agreed upon between the parties to allow this assignment to work as a one person crew. The Union further contends that the Company has refused to consider other factors raised in a Human Rights complaint filed by the grievor as relevant.

The Company has advised the Union the issues raised in the Human Rights complaint cannot be considered as relevant but have advised the Human Rights Commission that the concerns by the grievor in her complaint are being addressed via the instant grievance.

The Union requests that while some discipline may be appropriate the Company must consider the mitigating factors in the assessment of discipline and a lesser degree of discipline should be substituted, the grievor be reinstated and made whole without loss of seniority or benefits. In the alternative the Union requests that the assessment of thirty demerits and ultimate penalty of discharge be mitigated on such terms as the Arbitrator sees fit.

The Company disagrees.

FOR THE UNION:

(SGD.) R. S. THOMPSON
GENERAL CHAIRMAN, UNITED TRANSPORTATION UNION

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
J. Torchia	– Sr. Manager, Labour Relations, Edmonton
J. Cavé	– Counsel, Montreal
J. Orr	– General Manager, Prairie Sub-Region, Edmonton

B. Halabuer – Trainmaster, Edmonton
D. Crossan – Manager, Labour Relations, Prince George

And on behalf of the Union:
M. Church – Counsel
B. Boechler – General Chairman, Edmonton
R. Hackl – Vice General Chairman, Saskatoon
R. Donegan – Local Chair, Biggar
I. Victor – Grievor

AWARD OF THE ARBITRATOR

The grievor began her service with the Company as a brakeman in Winnipeg on July 8, 1990. She transferred to Jasper 1995 and subsequently to Edmonton in 2003.

The Company issued a notice to the Union on June 1, 1999 that it was abolishing four helper positions at the Walker Hump Yard as a result of the Company implementing a one person crew consist on the hump. On April 12, 2000, the parties agreed on the issues associated with the implementation of the new one-person crew policy. One of the agreed points was that the Company would install a tether switch to ensure safe stopping procedures. The tether strap is a mechanical device installed at a certain point on the track that, if passed, activates an emergency brake application on the locomotive.

The installation of the tether strap became the subject of numerous meetings subsequent to the implementation of the new policy. According to the Company, it was sincere in its belief, when the agreement was reached in 2000, that the technology existed to install the tether switch as a safe stopping procedure. However, when the Company asked an external company to provide the technology and install the

equipment, it was determined that it was unfeasible to do so. According to the Company, the technology surrounding the tether strap was not as readily available as had been believed when the agreement was signed and the cost of production was prohibitive. The Company advised the Union at a Health and Safety Committee in November 2001 that the technology was not available to implement the tether strap and it would not be installed. The Union wrote to the Company on February 12, 2002 advising that it would be seeking a direction from the Canada Industrial Relations Board (CIRB) to implement the tether strap requirement. The Union did not take any further steps afterwards to advance the matter to the CIRB nor did the Union file a grievance over the lack of implementation of the tether strap.

The Company's position is that the one-person hump conductor has functioned successfully for over seven years, without a tether strap, in an area that operates 24 hours per day, seven days per week. The Company therefore maintains that the tether strap issue is irrelevant to the discipline imposed on the grievor. In the Company's view, there were mandatory safety rules in place which have been consistently followed over the years by other employees working on the one-person hump. The grievor, in the Company's view, simply failed to pay attention to her duties and was otherwise preoccupied when the incident occurred.

The Union's position with respect to the tether strap is straightforward: this incident would never have happened if the tether strap device had been installed, as the Company committed itself to do in the agreement. In the Union's view, the

Company has totally abdicated their contractual responsibility to install a tether strap – which was the Company's suggestion in the first place – and instead has laid the blame on the grievor.

The Union also submits that the grievor was not provided with a fair and impartial investigation as evidenced by the predetermined views of Mr. Huard set out in his "close out" report of December 14, 2004. The Union alleges that the report was not disclosed to the Union at the time of the investigation. The Union was therefore unable to respond and raise an objection concerning the Company's failure to hold a fair and impartial investigation. Further, the Union alleges that the basis for the discipline – that the grievor was attempting to operate her movement while walking up to the hump cabin to gather her belongings – was never put to the grievor at the time of her statement.

The Union also alleges that the grievor suffered harassment and discrimination and was required to endure a poisoned work environment at the time of the incident. On January 25, 2005, the grievor filed a complaint with the Canadian Human Rights Commission alleging discrimination by the Company over incidents which predate the December 17, 2004 incident. The grievor did not advise the Union at the time of her complaint to the Commission. The Company, for its part, was first notified of the complaint on March 1, 2005 in a letter addressed to the Company's chief executive officer, Mr. Harrison. Manager, Human Resources Mary Jane Morrison, responded on behalf of the Company to the Commission on March 21, 2005. In that correspondence,

Ms. Morrison advised the Commission that a grievance dated March 18, 2005 had been received in connection with the matters raised in the complaint and requested that the Commission not deal with the complaint given the concurrent grievance proceedings. The Commission, relying on the provisions of the **Canadian Human Rights Act**, agreed with the Company's request. The human rights complaint is currently being held in abeyance pending the outcome of this grievance. It is also important to note that Ms. Morrison conducted an internal investigation of the issues raised in the human rights complaint. She reported her findings to Manager, Labour Relations, Mr. Morris, on June 13, 2007. Those findings were later released to the Union who now take the position that the investigation conducted by Ms. Morrison cannot in any way represent a fair, complete or substantive reply to the grievor's allegations.

Dealing first with the Union's submission that the Union was not made aware of the Mr. Huard's close-out report, it is clear from the report that it was prepared on December 21, 2004, subsequent to the grievor's formal statement of December 17, 2004. The report summarizes the events, the grievor's discipline record, her work history and sets out a recommendation for discipline of 30 demerits. This is not a document which the Company had in hand at the time of the investigation. It is simply an internal document which summarizes the investigative proceedings and makes a recommendation for disciplinary action. The Union's submission that the investigation was not fair and impartial, therefore fails. I would add that the objection itself was untimely given that it was not raised in the Union's *ex parte* statement of issue. (See, e.g., **CROA 2891, 3265, 3511** and **3547**.) The Union's allegation that the Company did

not properly put the version of events at the investigation that it subsequently relied on for the discipline; namely that the grievor was preoccupied with gathering her personal items, was similarly never raised in the Union's *ex parte* statement of issue. In any event, the comments are again contained in the close-out report of Mr. Huard. These are his own conclusions based on the questions and answers obtained during the interview and his own earlier investigation.

As to the harassment allegation, the evidence is clear that the grievor did not raise the issue of discrimination or harassment at the time of her employee statement on December 21, 2004. The grievance of March 18, 2005 also does not refer to any prior incidents of discrimination or harassment. Indeed the Union itself was unaware of the human rights complaint during the grievance settlement discussions which took place on November 2, 2005. Mr. Morris, who represented the Company during the grievance settlement discussions, was also unaware of the human rights complaint because all issues relating to the human rights complaint were being handled through Ms. Morrison in the Human Resources office.

It is difficult to place any weight on the Union's allegation that the grievor was working in a poisoned work environment at the time of the incident when the incidents of discrimination and harassment set out in the grievor's human rights complaint were never raised in either the investigation or the grievance. The grievor has a responsibility to advise her Union of any ongoing workplace issues that may affect her ability to perform her duties so the Union can, in turn, include any allegations of this nature in the

initial grievance documents as part of its response to the Company's disciplinary action. Her failure to advise the Union of these issues in this case prior to the filing of the grievance, and for several months afterwards, leads to the inference that she did not do so because those allegations were irrelevant to the incident under investigation. There is no reliable evidentiary basis before the Arbitrator which supports the Union's allegations that the Company failed to address the grievor's allegations of harassment/discrimination or endured a poisoned work environment in relation to the incident of December 17, 2004.

Turning to the merits, I accept the uncontradicted evidence that the Locomotive Control System download indicated that the grievor initiated a reverse movement eastward to clear the opposing yard movement and maintained a speed of 4 MPH for over five minutes from 07:12:26 to 07:17:36. The grievor failed to stop the movement prior to passing the signal displaying Stop at 07:15:32.

The grievor maintained that she was unaware that she had passed the "Stop" signal until she was on her way home, when she was advised that her movement had passed the "Stop" signal. The grievor offered the explanation that her RSC alerter had never sounded as a factor. Subsequent investigations by Mr. Huard found that the Locomotive Control System box was kept in service and there were no reports of problems. Based on the evidence before me, the only reasonable explanation under the circumstances for the incident is that the grievor left her Locomotive Control System box in the Forward direction instead of Stop during her change off with the 07:00

employee, resulting in the consist moving past the red Stop signal. This movement in the consist in turn led to the damage to the single gauge rod on switch no. 7 North Edmonton. I am satisfied, based on the above assessment of the evidence before me, that the grievor is deserving of discipline for breaching the CROR rules, as alleged by the Company.

The grievor is a fourteen year employee. She therefore cannot be considered to be an employee with long service as a factor in mitigation. The thirty demerits imposed is not out of range for this type of incident, which could have resulted in further property damage or even personal injury. It is also noteworthy that the grievor had forty active demerits on file at the time of the incident, including prior incidents of safety rule violations, the most recent being just a few months prior to this incident on September 23, 2004 while working the hump assignment. This case is similar to **CROA 3000** cited by the Company where a locomotive engineer was discharged for accumulation of demerits as a result of rules violations. As the arbitrator noted:

> … While it is true that some prior cases in this Office have indicated the assessment of demerits at a somewhat lower level for similar rules infractions, those awards cannot be viewed in isolation. In each case regard must be had to the circumstances giving rise to the discipline and the work history and prior record of the employee in question. In the instant case, with sixteen years of service Mr. Stanhope cannot claim extraordinary longevity of service. Most significantly, as related above, his record of repeated rules infractions, notwithstanding the application of progressive discipline by the Company, leads to the unfortunate conclusion that his continued employment as a running trades employee is no longer viable.
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> For all of the foregoing reasons the grievance must be dismissed.

I would also add that the Union's position with respect to the absence of the tether strap is not a reason to quash the discipline or otherwise be considered as a mitigating factor in this case. The evidence indicates that the Company determined, subsequent to the implementation of the one-person hump agreement, that the tether strap was simply unfeasible to introduce at the Edmonton yard for a variety of reasons. Although in no way condoning the Company's unilateral decision subsequent to the signing of the agreement, it does appear that the matter was one of several undertakings between the parties at the time of the implementation of the new policy. Although the matter was of concern to the Union initially – to the point of threatening to bring the matter to the attention of the CLRB – there is no evidence that any proactive steps have been taken since 2002 by the Union, either by way of grievance or before the CLRB, over the lack of the implementation of the tether strap. On that basis, I believe it is fair to conclude that the responsibility for the incident falls squarely on the grievor's shoulder's for her inadvertence and not as a result of the absence of a tether strap, as alleged by the Union.

For all the above reasons, the grievance is dismissed.

November 21, 2008

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR