CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3709

Heard in Calgary, Wednesday, 12 November 2008

concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the issuance of 30 demerits to Conductor Curtis Jury and the resulting dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On June 13, 2007, Conductor Jury's employment was terminated by the Company following the assessment of 30 demerits for "failing to ensure that the Winnipeg Beach Sub Junction switch was properly lined before your movement, resulting in a run through switch and derailment of CP 1597 during your tour of duty on May 25, 2007."

The Union contends that the investigation was not conducted in a fair and impartial manner as per the requirements of the collective agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Jury be made whole.

The Union further contends that there is no cause for discipline in the circumstances, or in the alternative, that the penalty of discharge is excessive.

The Union requests that Conductor Jury be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. W. OLSON	**(SGD.) A. AZIM**
GENERAL CHAIRMAN	**FOR: ASSISTANT VICE-PRESIDENT, OPERATIONS**

There appeared on behalf of the Company:

M. Goldsmith	– Labour Research & Budgeting Specialist, Calgary
M. Thompson	– Manager, Labour Relations, Calgary
J. Bairaktaris	– Manager, Labour Relations, Calgary
A. Azim	– Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. Able	– General Chairman, Edmonton
D. Fulton	– Sr. Vice-Chairman, Calgary
D. Irwin	– Local Chairman, Calgary

C. Jury – Grievor

AWARD OF THE ARBITRATOR

The Union's argument that the investigation was not conducted in a fair and impartial manner centres around the fact that the MARVIN report was not entered into evidence. The MARVIN report appears on its face to be a document which records the details of an accident. It is a printed form containing room for describing a number of incident-related issues. The form, in that regard, includes a space to enter a detailed description of the incident, the primary cause of the incident, the preventative measures taken to address the primary cause of the incident, as well as the results of the site inspection. In this case, the report summarized the preliminary findings as a derailment occurring after the crew ran through the Winnipeg Beach junction switch and then made a reverse movement over the same switch. The report provides further particulars of the exact location where the movement ran through the junction switch and the damage which resulted from the derailment. The only subjective assessment found in the report is the coded comment that the primary cause of the accident was: "09-HUMAN FACTOR".

The report, as the Company argues, goes no further in terms of assigning responsibility for the accident. For example, there is no mention anywhere in the report of the grievor's name, or the fact that he was assigned to protect the point of the movement. Further, it does not indicate that it was the grievor's responsibility to ensure that the switches were properly lined for the movement or that Mr. Sutcliffe, the yard service employee, was unable to see the switch from his vantage point on the ground. As the Company noted in the Step 2 reply, the form itself indicates at the top that it is only to be used by the Company "… to determine FRA [Federal Rules Administration (USA)] responsibility requirements, manage compensation claims and analyze injury trends for purposes of improving CP's health and safety program".

The MARVIN report's primary purpose is evidently to provide the above-mentioned with a brief reconstruction summary of the incident with a particular focus on the results of the site inspection. It is not a document which assigns blame for the incident other than to make a general statement that the primary cause of the incident was due to a "human factor". In short, it is not a report which one would identify as falling within the scope of a typical document expected to be disclosed by the Company in the normal course of an employee investigation. I would also add that these are sophisticated parties and, given the nature of the document, the onus fell on the Union to seek disclosure in a timely manner if it thought the MARVIN report would be useful for purposes of representing the grievor at his investigation. The Union made no such request either in advance or during the course of the investigation. In this instance, the lack of early disclosure of the MARVIN report does not undermine the fairness of the investigation as alleged by the Union.

The Union also raises the point that the statement was not obtained in a fair and impartial manner because of the questions put to the grievor by the investigating officer. In particular, the Union focuses on the question 25 and the grievor's response:

> Q 25 In your answer to question #16 you stated that you were familiar with the geographical features and operating characteristics of the Winnipeg IMS Terminal. Can I draw the conclusion by your answer to this question that you were aware that the switch existed at this location?
>
> A 25 Yes

For the sake of completeness, the earlier question #16 reads:

> Q 16 Are you familiar with the geographical features and operating characteristics of the Winnipeg IMS Terminal?
>
> A 16 Yes

Although Q 25 does appear to be leading, it is important to refer to the earlier portion of question 16 for context. The grievor admitted that he was familiar with the geography of the terminal. Although the question makes a specific reference to the switch – and one would therefore argue that the grievor had words put into his mouth – it remains that the grievor did acknowledge that he was familiar with the site in the early part of the investigation. The investigating officer is not a trained police officer or professional

investigator familiar with the all the rules surrounding leading questions. The fact that he slipped into a leading question on a matter where he received an affirmative answer just a few questions earlier is no basis to say that the whole investigation has been undermined. The question was not offensive or otherwise abusive. The following comments from **CROA 2073** are noteworthy:

> As previous awards of this Office have noted (e.g. **CROA 1858**), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are **not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration**. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. (emphasis added)

The Union also submits, in the alternative, that the discipline and subsequent discharge of the grievor are excessive under the circumstances. It points to the fact the yard service employee, Mr. Sutcliffe, was only assessed a caution for his role in the incident while the grievor received thirty demerits.

It is important to note that it was the grievor, and not Mr. Sutcliffe, who was in charge of the movement. The grievor, by his own admission, stated in his investigation that Mr. Sutcliffe was on the ground and had no ability to see the front of the movement. The responsibility for the point of the movement, in my view, fell squarely and solely on the grievor's shoulders. By his own admission, he had a clear view of the route as he approached the switch. His answer that he didn't see the switch can only be reasonably attributable to the fact that he was not paying attention at the time. His failure to carry out his assignment under the circumstances is clearly cause for discipline.

The grievor entered the service on January 17, 2005 and qualified as a conductor in July 2005. He had two prior disciplinary offences for violation for violation of the same rule 104 (k) – one for an incident on November 15, 2005 and the other for an incident February 20, 2007. In both cases, the grievor failed to ensure the switches were properly lined. This third instance of a safety violation relating to the same type of incident in less than two years, despite the earlier corrective discipline, leads to the unfortunate conclusion that the grievor is unsuited to work in this safety-critical position. He simply has been unable to demonstrate that he is capable of performing his duties in a safe and responsible manner on a consistent basis during his short tenure with the Company. There are no other mitigating factors which persuade me to alter the discipline. The grievance is therefore dismissed.

November 21, 2008

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