CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3727

Heard in Montreal, Wednesday, 11 February 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 30 demerits assessed W. McPhee for his responsibility in the collision of the 1800 industrial assignment (YINS31) with VIA Rail #87 at about 22:30 hrs, April 28, 2008 and his violation of the CN Policy to Prevent Workplace Alcohol and Drug Problems at about 00:15 hrs April 29, 2008 when he refused to take a post accident drug and alcohol test.

JOINT STATEMENT OF ISSUE:

The Union maintains that the grievor was honest and forthright in all answers given in regard to the incident. The documentation that was provided in the formal investigation lacked a download of either consist which, if analyzed, may have exonerated the grievor and his crew.

The Union maintains that although there had been a job briefing between him and his mate had nodded and said "OK" to acknowledge instructions. However, the Union maintains that the helper was in control of the movement and acted on his own. It was, according to the Union, the helper's inexperience that lead to the accident and no responsibility should lay with the grievor.

The Union maintains the Mr. Grievor maintains his innocence as it pertains to any violation of the Company's Policy to Prevent Workplace Alcohol and Drug Problems and maintains there was no visible signs of impairment and felt that testing was inappropriate and discriminatory.

The Union identifies that the grievor did in fact submit to testing on his own, some 36 hours following the accident and supplied these negative test results to the investigating officer at the time of his formal investigation.

The Union contends the grievor is a long service employee and, based on the information gained through the formal investigation process, be returned to service and compensated for all loss of earnings and the discipline be removed from his record.

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

FOR THE UNION:	FOR THE COMPANY:
(SGD.) J. ROBBINS	(SGD.) F. O'NEILL
GENERAL CHAIRMAN	MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

R. A. Bowden	– Manager, Labour Relations, MacMillan Yard, Concord
F. O'Neill	– Manager, Labour Relations, MacMillan Yard, Concord
N. Chambers	– Assistant Superintendent,

And on behalf of the Union:

R. A. Beatty	– Transition Director, Sault Ste. Marie
J. Robbins	– General Chairman, Sarnia
G. Gower	– Vice-General Chairman, Belleville
P. Vickers	– General Chairman, Sarnia
R. A. Hackl	– Vice-General Chairman, Saskatoon
W. McPhee	– Grievor

AWARD OF THE ARBITRATOR

The grievor commenced an assignment as a yard foreman in the Sarnia Yard on a belt pack operation at 18:00 hours on April 28, 2008. The other member of the assigned crew was Assistant Yard Foreman Ryan McCrae. Both crew members were issued radios at the outset of the assignment. Mr. McCrae's radio malfunctioned during the tour of duty and the grievor voluntarily gave up his radio to Mr. McCrae. The grievor continued working without a radio through to the time of the incident. The grievor was then left to rely on the radio in the locomotive in order to maintain contact with Mr. McCrae.

The yard crew was assigned to spot a customer, LPG industrial plant, located on tracks JO1, JO2 and JO3, just south of the west leg of the wye on the St. Clair Industrial Spur, Sarnia Yard. The yard crew was responsible for the safety of the movement while protecting against VIA Train No. 87, whose crew was required to turn their train utilizing the wye track. Specifically, Mr. McPhee's crew, while switching, were to lock themselves into the LPG plant, thereby allowing the VIA train to pass by. Once the VIA train had completed its movement, the yard crew would then re-enter the track and continue performing its switching duties. The yard crew was going to stay clear of the VIA equipment by remaining inside the LPG plant until the VIA move was completed.

The grievor stated at his investigation that he informed Mr. McCrae during the assignment that he was going to turn and lock the switch back for the main at track JO1 once the yard engine was clear of the plant. Because he was not carrying a hand radio,

the grievor then left the Industrial spur to give verbal permission to the Roving Yardmaster and the VIA crew to make their movement on the wye track. The VIA train was at that point pushing towards the switch leading to the yard assignment without lead car protection. The yard assignment then ran through the switch and collided with the VIA train equipment.

Mr. McCrae's recollection differed from that of the grievor's about the events leading up to the collision. Mr. McCrae stated at his investigation that he was unaware that the grievor had locked in LPG (switch lined and locked for the main line) or that the grievor had earlier left the engine and walked up to the St. Andrews Road crossing to let the VIA train back up towards the LPG.

Three VIA coaches and CN Power Box 280 were damaged. The VIA crew were allowed to return to work and complete their assignment after the collision. The grievor and Mr. McCrae were taken off the yard and directed to take a drug test in accordance with the Company's Drug and Alcohol Policy. Mr. McCrae and the grievor refused to submit to testing. They were both assessed 30 demerits for the collision and derailment. They were also both removed from service and later discharged for their failure to comply with the Company Drug and Alcohol Policy.

The evidence makes it clear, in my view, that there was little or no discussion between the grievor and Mr. McCrae after the grievor left the point and walked to the wye switch. I find it difficult to understand why the grievor left the point without even

speaking to his helper, a crew member with only two years of experience and with whom the grievor had no previous crew assignments. The grievor failed in that regard to ensure that his inexperienced helper had any assistance at all when switching a plant. It fell on the grievor, as the chief foreman of the crew, to not only verify that the route was clear but also to make sure that Mr. McCrae had a clear understanding of his assignment. In that regard, the grievor provides no explanation why he did not use the engine radio to contact Mr. McCrae Instead, the grievor allowed the VIA movement to proceed without holding a proper briefing with Mr. McCrae. The grievor, in my view, totally abandoned his only crew helper and, of equal concern, subsequently refused to accept responsibility for his lack of attention to his assignment.

I agree with the Company that a proper briefing is essential when the assignment conditions change. Without a radio, there was no way for the grievor to communicate directly with his yard helper to let him know that he had left the point of the locomotive. It was up to the grievor, in my view, to hold a further briefing with Mr. McCrae – in this case immediately before he left the engine to walk up towards St. Andrews road and speak with the VIA engineer and the Yardmaster. Mr. McCrae, nevertheless, also bears responsibility as an assistant yardman for a number of cardinal rules infractions including initiating a movement without confirming contact with the lead point of the movement. These rule violations generally lead to more severe discipline than that assessed the yard foreman. The grievor's cavalier attitude and lack of attention towards his duties as yard foreman in this case, however, makes him at least equally culpable for the collision as the yard foreman, even though he was not technically in breach of any rules. A penalty of 30 demerits for both crew members is therefore not out of line

and is also consistent with similar penalties imposed for incidents of this kind by this Office.

Turning to the next question of the violation of the Company Drug & Alcohol Policy, I refer at the outset to **CROA 1703**, a decision which first discussed the principles surrounding the issue of an employee's refusal to submit to drug testing:

> The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. <u>However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril</u>. (emphasis added).

As noted above in **CROA 1703**, an employee who refuses to submit to a drug test following an incident of this kind "does so at his or her own peril". The Arbitrator in **CROA&DR 3581,** underlined that an employee has an obligation to follow the principle of "work now grieve later" in such circumstances:

> When confronted with the order to take a drug and alcohol test, whatever his own feelings, it was the grievor's obligation to "obey now – grieve later" if he felt that the directive was somehow unfair. By refusing to undergo a drug test, in the Arbitrator's view, Mr. Alexander radically changed the nature of his own infractions over the course of these events, and rendered himself liable to a more severe degree of discipline. Whatever his personal feelings, his refusal to take an alcohol and drug test in the circumstances does leave him open to the drawing of adverse inferences, and does little to bolster his credibility.

The importance of adhering to this principle cannot be emphasized enough, particularly in this industry where employees like the grievor are required to be constantly vigilant in directing the movement of train equipment. Although an individual has a right to have his or her privacy rights respected at all times, there are circumstances like the present case where it is proper for the Company to insist that employees, particularly those in the running trades, demonstrate that they are free from any substances that might inhibit their performance while on the job. This is the case here where the Company was confronted with a long service employee, with no rules' violations on his record, whose assignment was conducted in a manner that was out of the norm for him. The proper response from the grievor under the circumstances would have been to accept that the drug test was an understandable employer response due to the accident, and file a grievance afterwards if he disagreed with the process.

The remaining question is whether this is a proper case for substitution of penalty. The grievor's record stood at 30 demerits at the time of the April 28, 2008 accident as a result of an incident dating back to 2007 involving a delay in assignment. He has almost 20 years of service with the Company. The grievor, in my view, took a big risk by refusing to take the drug test and put his job in immediate jeopardy. He also displayed poor judgment when he left his post without holding a proper briefing with his yard helper. Nevertheless, after consideration of all the circumstances, and in particular the mitigating factors of his long service and no previous rules violations, an appropriate

disposition to bring home to the grievor the seriousness of his transgression is a lengthy suspension.

The grievance is therefore allowed to the extent that the Arbitrator directs that the 30 demerits and dismissal imposed for the incident of April 28, 2008 be substituted with a period of suspension. The grievor shall be reinstated into his employment, without loss of seniority and without compensation for any lost wages and benefits.

February 20, 2009

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JOHN M. MOREAU, Q.C.

ARBITRATOR