CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3887

Heard in Montreal, Wednesday, 14 April 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Assessment of 20 demerits to Conductor A Gould for his "Failure to comply with Rule 115 while shoving into track M101 while working train Q12031-21 on Friday August 22nd, 2008."

JOINT STATEMENT OF ISSUE:

On 17 September 2008, Conductor Gould was required to attend a Company investigation in connection with the circumstances surrounding "Failure to comply with Rule 115 while shoving into track M101 while working train Q12031-21 on Friday August 22nd, 2008." Conductor Gould, subsequent to the investigation, was assessed 20 demerits.

It is the Union's position that the discipline assessed, in consideration of all the factors relating to this matter is unfounded and unwarranted and should be removed in its entirety.

Given the preceding it is the Union's position that the Company has violated; the Workplace Environment provision as contained in the collective agreement; article 84 (Grievance Process) of the collective agreement; article 85 (Interpretation and Application) of the collective agreement; the Grievance Tracking System (GTS).

As a result of such violations it is the Union's position that; (1) the grievor be exonerated of any wrongdoing with all discipline removed. (2) Given the violations of the collective agreement that a remedy is applicable in the circumstances consistent with Addendum 123 of the collective agreement. That the Company and the Union agree to meet within 60 of the date of the Union's Step 3 Grievance and attempt to reach agreement on the appropriate remedy to apply. Failure as to the appropriate remedy (to be determined by either party upon written notice to the other) to be submitted to the arbitrator for resolution within 30 days of such failure.

The Company disagrees and deems that the discipline assessed was both warranted and appropriate in this instance.

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

There appeared on behalf of the Company:

F. O'Neill	– Manager, Labour Relations, Toronto
D. Gagné	– Sr. Manager, Labour Relations, Montreal
A. Daigle	– Manager, Labour Relations, Montreal

And on behalf of the Union:

J. Robbiins	– General Chairman, Sarnia
C. Little	– Local Chairwoman, Belleville
A. Gould	– Grievor

AWARD OF THE ARBITRATOR

This arbitration contains three heads of discipline in addition to the discharge of the grievor for the accumulation of a total of seventy demerits. The record discloses that the grievor was assessed twenty demerits for an alleged violation of rule 115, thirty demerits for allegedly causing a delay to his train and twenty demerits for not acknowledging or reporting what appeared to be a failed hot box.

The assessment of twenty demerits relates to the grievor's actions as conductor on train Q12031-21 on August 22, 2008. The grievor was then conductor of an intermodal train enroute from Belleville to Montreal's Taschereau Yard. Upon arrival at Taschereau he was instructed to place a cut of forty-two cars into intermodal pad track MI-01. The record discloses that the grievor rode the last car of the forty-two car movement to a location referred to as the Carman's crossing. He then disembarked and instructed the engineer with respect to shoving the forty-two cars into the track. As it happens he was then being efficiency tested by Assistant Superintendent M. Vachon who approached the grievor and advised him that he did not properly comply with CROR rule 115 in moving the equipment into pad MI-01, as he did not have a clear view

to ascertain that the track was clear to contain the forty-two cars. An investigation ensued and the grievor was assessed twenty demerits for the violation of CROR rule 115.

The Arbitrator has some difficulty with the case as presented by the Company. The Company relies in substantial part on a memorandum of Supervisor Michel Vachon. Mr. Vachon overheard the radio conversations between the grievor and his locomotive engineer as they were shoving the forty-two cars into track MI-01. During the course of his memorandum Mr. Vachon claims that the grievor conveyed to the locomotive engineer that he could only see a distance of twenty cars into the track, while in fact they were shoving a total of forty-two cars into it. His memorandum reads, in part: “Movement was going at 5 MPH and he get off the car and said to the locomotive engineer that he can continue to back up that he could see twenty cars behind.” It appears that following that communication his locomotive engineer contacted the yardmaster to verify that the track was in fact clear.

The grievor’s account, as related in his disciplinary investigation, is substantially different. He states, in part: “I rode the cars into a little bit beyond the Carman’s crossing. I could see the track was clear and informed the engineer that I was getting off and that we had approximately another twenty cars to shove in (which we did).” Subsequently, when asked how he could tell the track was clear he responded “I could clearly see that the remaining cars could be safely stored on the track and still have a portion of the track clear at the north end.”

It is trite to say that in matters of discipline the burden of proof is upon the Company. The Arbitrator cannot find that in the instant case the Company has discharged that burden. It appears to me that Mr. Vachon made certain assumptions based on what he overheard on the radio. Most significantly, he obviously made the assumption that the grievor was advising his locomotive engineer that he could only see a distance of twenty cars. That is clearly not the grievor's evidence. Mr. Gould states that he could see virtually the entire track, and plainly could see that, having placed twenty-two cars already into the track when he spoke to the locomotive engineer, there was more than sufficient room for an additional twenty cars. Mr. Vachon may have concluded from the locomotive engineer's inquiry to the yardmaster, and what I take to be his own misinterpretation of what the grievor said to the locomotive engineer, that the grievor did not have clear vision into the track. However, I am satisfied based on the evidence of Mr. Gould, supported by the sightlines that would appear to have been available to him based on a map of the area, that he did properly comply with CROR 115.

Consequently, the grievance must be allowed. The Arbitrator directs that the twenty demerits assessed against the grievor for the incident of August 22, 2008 be removed from his record.

The second incident concerns the alleged delay to train M37121-18 on September 19, 2008. Having reviewed the facts in relation to that incident, the Arbitrator

is satisfied that the Company did have grounds to assess discipline against Mr. Gould. The evidence discloses that when his train was some three miles from its destination it became stalled on a grade near what is referred to as the Doncaster diamond. Being instructed to cut off the first twenty-three cars of his train and bring them into Macmillan Yard, the grievor then questioned the dispatcher as to how the remaining segment of the train would be secured. It does not appear disputed that the grievor could have himself applied handbrakes to the first fifteen cars on that segment of the train to secure it. However he indicated in his communications to the RTC that he was close to the commencement of his entitlement to rest and questioned whether the work could be completed in time.

There ensued several exchanges between the grievor and the dispatcher, and ultimately instructions obtained from the Chief Dispatcher by which the grievor was ultimately instructed to leave the balance of the train on the main line secured by an application of its emergency brakes. The grievor nevertheless continued to question that alternative for some time, before he ultimately agreed to do it.

While the Union challenges the Company's decision as to the routing of the grievor's train which caused the movement to stall on a relatively steep grade, the Arbitrator is nevertheless left with some doubt as to the grievor's overall conduct. A review of his communications at the time would suggest that he was being non-responsive to the instructions of the Company and unduly technical and recalcitrant in the face of the directions that were being given to him. If it were necessary to determine

the question, I am satisfied that the circumstance which presented itself was sufficiently "unforeseen" that the grievor could not simply claim strict adherence to his entitlement to rest. The delay to operations of a train of that magnitude standing and blocking the main line for an indefinite period of time is a matter of some seriousness, as the grievor should reasonably have appreciated. While it is true that operating rules give him the right to consult with higher supervision if he is in any doubt about the application of rules, the Arbitrator is satisfied that the grievor could, without consulting with anyone, have placed handbrakes upon the balance of his movement, and taken the segment of twenty-three cars into Macmillan Yard, as directed. While that might have caused him to go beyond his expected rest period, in the Arbitrator's view that was a reasonable outcome in the extraordinary circumstance which presented itself.

The real question in the case at hand is the appropriate measure of discipline. In the Arbitrator's view the assessment of thirty demerits is relatively high given all of the circumstances. In that regard I do accept that the grievor had some legitimate concern for the safety of leaving his train on the main track, and the method by which it would be secured. Nevertheless, as noted above, he was unduly recalcitrant in failing to carry out operations in accordance with the rules which he was responsible for knowing and applying. In the result, I am satisfied that the assessment of twenty demerits would have been appropriate in the circumstances, and his record shall be amended accordingly.

The third incident under consideration involves the assessment of twenty demerits for the grievor's failure to have reported a hot box which apparently failed to

communicate with his train on January 14, 2009. In fact, the volume control on the hot box had been turned down by a supervisor who was performing an efficiency test of the grievor and his crew on that day. The only explanation that the grievor was able to give was that he was too busy at the time and simply did not notice that the hot box, of which he was aware, had not made a report. It was obviously his duty then to acknowledge and report what appeared to be a hot box failure, and to take whatever steps might be necessary to ensure the integrity of his own train.

In the Arbitrator's view the assessment of twenty demerits was not unreasonable in the circumstances, and this aspect of the grievance must be dismissed.

While the Union claimed that the Company failed to observe the requirements of a fair and impartial investigation during the course of the discipline assessed against the grievor, that issue is raised in none of the related statements of issue filed before the Arbitrator. The only reference to article 82 of the collective agreement appears in the fourth statement of issue, which relates to the accumulation of demerits and discharge of Mr. Gould. It is common ground, however, that there was no investigation conducted in respect of that question, nor should there have been. Bearing in mind that the Arbitrator can only deal with questions which appear within the joint statement of issue, I cannot find that that issue is properly before me. That objection must therefore be dismissed.

For all of the foregoing reasons the grievances are allowed, but only in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with his record to reflect twenty demerits for the incident involving a delay to his train and a further twenty demerits for the failure to acknowledge and report the deficient hot box. The reinstatement of Mr. Gould shall be with compensation for his wages and benefits lost, and he shall be reinstated to his full seniority.

April 19, 2010

(signed) MICHEL G. PICHER
ARBITRATOR