CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3903

Heard in Montreal Wednesday, 12 May 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal of the assessment of a discharge to Conductor S. Cahoon of Winnipeg, Manitoba, assessed for "your act of insubordination towards a Company officer on October 9, 2009."

COMPANY'S STATEMENT OF ISSUE:

On October 9, 2009, Conductor Cahoon was instructed by the Traffic Coordinator to pull three cars having been released from bad order status form the Mechanical Department shop track. Conductor Cahoon refused to comply with these instructions and the Traffic Coordinator contacted Trainmaster John Bennett to inform him of Conductor Cajon's refusal to perform the work as instructed. Conductor Cahoon was contacted by Trainmaster Bennett and was twice instructed to perform the work. Conductor Cahoon refused to comply with these instructions.

The Company conducted an investigation of the incident and determined that Conductor Cahoon had been insubordinate towards a Company officer and subsequently discharged him.

The Union contended that the facts of the incident did not support discharge and that he ought to be reinstated and made whole. The Union further contended that this was another example of the Company's agenda to purge those who choose to become Union representatives thereby becoming "focus" employees.

The Company disagrees with the Union's contentions.

FOR THE COMPANY:

(SGD.) D. BRODIE
FOR: VICE-PRESIDENT, HUMAN RESOURCES

There appeared on behalf of the Company:

D. Brodie – Manager, Labour Relations, Edmonton
D. VanCauwenbergh – Director, Labour Relations. Toronto

D. Gagné	– Sr. Manager, Labour Relations, Montreal
J. Bennett	– Trainmaster, Winnipeg

And on behalf of the Union:

M. Church	– Counsel, Toronto
B. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
K. Ilchyna	– Vice-Local Chairman, Winnipeg
J. Holliday	– General Chairman, Vancouver
D. Joannette	– General Chairman, Quebec City
J. Robbins	– General Chairman, Sarnia
S. Cahoon	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor was working as hump foreman in Symington Yard on October 9, 2009. He then was the lone employee performing all operations in relation to a locomotive consist utilizing what is commonly referred to as a belt pack. While the bulk of his work was in the hump area, he was dispatched to the car shop tracks, located adjacent to the Car Shop, to remove a certain number of cars from that location. It does not appear disputed that the grievor had performed the same assignment on several prior occasions.

Upon arriving at the scene the grievor developed a concern. The cars in the tracks which he was responsible for coupling onto had active derails stationed between them and the Car Shop. The obvious purpose of the derail was to protect the Car Shop in the event of any movement of the cars in question. However, when he previously encountered that situation the grievor had secured the arrangement of car Shop employees to remove the derails. His concern was that if the derails were not removed or deactivated any backward movement of the cars caused by the process of coupling to the locomotive consist might cause the cars to derail. As noted above, he had

avoided that problem in the past by having the derails deactivated, allowing a certain length of track for the cars to move without risking derailment during the coupling process.

It does not appear disputed that, it being the Sunday of the Thanksgiving weekend, there were no staff available to assist the grievor. Upon arrival at the scene the grievor contacted Yard Master Don Chisolm. According to Mr. Chisolm's account, given at the Company's disciplinary investigation, the grievor expressed concern to him about the derails, and the fact that there was no help from the shop staff that day to remove them. He did not have a key that would have allowed him to remove the derails. The Arbitrator is satisfied that the grievor's concern was that the cars would risk derailing, particularly if the derails were in close proximity to the cars, given the sluggish nature of coupling with a locomotive using belt pack controls.

The record discloses that Mr. Chisolm referred the question to Production Coordinator John Bennett. There ensued an exchange between the grievor and Mr. Bennett which led to Mr. Cahoon's termination. In a memorandum describing the event, Mr. Bennett states that he called Mr. Cahoon on the radio at Mr. Chisolm's request and instructed him to lift the traffic at the Car Shop as directed. He relates that he explained to Mr. Cahoon that the derail protection was there to protect the Car Department employees and the Car Shop. Mr. Bennett then relates: "At this point Mr. Cahoon stated to me that this was not his zone, nor was he required to lift traffic out of these tracks while blue flag derails were in place." When Mr. Bennett then instructed the grievor to

make the move and he declined, for the same reason, Mr. Bennett instructed him to take his power to the top of the A side and to wait for the trainmaster. Subsequently, having obeyed that instruction, Mr. Cahoon was relieved of duty and given notice of the ensuing disciplinary investigation.

It is clear to the Arbitrator that Mr. Bennett formed the opinion that Mr. Cahoon's refusal to carry out the order given to him was related to Union concerns about the assignment of work in various sections of the yard. However, the Arbitrator has some difficulty in understanding how the company can give no weight or value to the very different explanation given by Mr. Cahoon during the course of his disciplinary investigation. It is clear from his answers to questions put to him by the Company that his concern was that given the short distance between the cars and the active derails in the Car Shop track, there was a serious risk of derailment if he attempted to couple his locomotive consist onto them using the belt pack equipment. He wanted to allow himself more room for the cars to move, by deactivating the derails so as to avoid that risk. As he stated in answer no. 11 of his interview: "I have done the work numerous times before and would have performed the work as requested had the derails been placed in the non-derailing position. At that point in time I felt it was unsafe to pull the shop with the derails in derailing position." While Mr. Cahoon admits that he did not expressly raise the safety issue with Mr. Bennett, he recalls having explained it to Yard Master Chisolm. That is to some extent confirmed in Yard Master Chisolm's recollection that "there was issues with the derails …" in the communication which Mr. Cahoon made to him, which caused him to refer the matter on to Mr. Bennett.

There is material before the Arbitrator to confirm that the grievor's concerns were more than academic. It appears that a safety assessment pursuant to section 127 of the **Canada Labour Code** was being carried out at the time of the events in question. In fact, on October 9, 2009 Union Health and Safety Representative D.J. Brown wrote a letter the Company's General Superintendent, Mr. Andrew Martin, alleging a violation of section 127.1(1) of the **Canada Labour Code**. That letter reads, in part, as follows:

> On 09 October 2009 at approximately 10:30, Mr. Cahoon advised the Company, including Traffic Coordinator D. Chisolm, Production Coordinator J. Bennett and the on duty supervisor D. Broesky that he has reasonable grounds to believe that it was unsafe to couple to tracks where there were derails in the derailing position without first setting the derails to the non-derailing position. Mr. Cahoon verifiably believed that with the insufficient and/or inconsistent stopping ability of the hump locomotives, he could not ensure the movement's protection form rolling out and fouling the derail when coupling to the cars. The simple solution was to set the derails to the non-derailing position prior to coupling. Mr. Cahoon's request to first set the derails was denied.
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> Mr. Cahoon specifically identified to all concerned that it was unsafe and by definition initiated an "Internal Complaint Resolution Process" as defined by Section 127.1(1) of the *Canada Labour Code*. Mr. Cahoon's complaint was ignored and he was removed from service by the senior officer on duty, James Thompson. The actions of the Company clearly reflect a violation of the *Code* and a disregard for safety.
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> Section 127.1 and the Internal Complaint Resolution reads:
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>> Complaint to supervisor. 127.1(1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring ion the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.
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> Mr. Cahoon identified a safety concern and he was removed from service and in doing so was not afforded his right to escalate the safety concern for resolution. The actions of the Company clearly demonstrate an intentional disregard for safety. …

Additionally, minutes of the Joint Health & Safety Committee for October 14, 2009 note as pending "A job task analysis and a Risk Assessment is to be conducted by Car Shop, Transportation and Management to develop a procedure for the Transportation to pull cars out of the live Car shop tracks safely." Additionally, in a memorandum dated October 17, 2009 the Joint Health & Safety Committee issued a report finding that the complaint of Mr. Brown is justified and recommending that the process of utilizing a single belt pack operator to switch out the Car Shop tracks be suspended until the risk assessment process is completed.

On a review of the facts related above, can it be concluded, on the balance of probabilities, that Mr. Cahoon was disrespectful or insubordinate in advising Mr. Bennett that he would not switch out the cars from the Car Shop tracks unless the derails were removed? Secondly, was the grievor in violation of the "work now – grieve later" rule? I think the answer to both questions is in the negative. Firstly, it is well established that the work now – grieve later rule does not apply in circumstances where an employee *bona fide* believes that to obey a given directive will cause a situation of imminent danger or a significant safety risk. The rule was summarized in the following terms in **CROA 3228**:

> Arbitral jurisprudence has long established that the work place is not conceived as a debating society. While an employee may object to a specific instruction, and communicate that objection to the supervisor who gives it, when the employer insists on the instruction being carried out the employee is then under an obligation to do so, in keeping with the "obey now – grieve later" rule. The only exceptions in that regard arise when to carry out the order might involve engaging in unlawful or unsafe conduct. …

I am satisfied that the grievor did have legitimate safety concerns which caused him to advise Mr. Bennett that he would not, working alone and using belt pack equipment, switch out the Car Shop tracks while the derails remained in place. He believed, in good faith, that there was a genuine risk of derailment if he proceeded to carry out the orders given to him by Mr. Bennett. I am satisfied that that belief was not unreasonable, and might have well have been held by any employee of similar experience and knowledge in the workplace. That, at a minimum, is supported by the complaint of Mr. Brown and its acceptance by the Joint Health & Safety Committee, as noted above.

I must agree with the Company's representatives that the grievor was not categorical with respect to the issue of safety in his communication with Mr. Bennett. Regrettably, Mr. Bennett appears to have jumped to the conclusion that the grievor was asserting a work jurisdiction concern, a factor which would plainly not justify his refusal to perform the work as directed. However I am not persuaded that that failure of communication on the part of the grievor should be fatal to his grievance or that it should be viewed as a mitigating factor in these proceedings. Firstly, as confirmed by the Company's own investigation, Yard Master Chisolm did recall that the grievor contacted him expressing concerns about the derails. Blue flag derails obviously were mentioned in Mr. Cahoon's conversation with Mr. Bennett. Most importantly, if there was any doubt in the Company's mind as to the grievor's motives, I am satisfied that it should have learned from its own disciplinary investigation that he did have legitimate safety concerns and it was those concerns which motivated his refusal to carry out the

order as directed by Mr. Bennett. He was, very simply, convinced that a derailment would be the likely result of doing what he was told, a belief that was not unreasonable.

For the foregoing reasons I am satisfied that the Company did not have just cause for any discipline against Mr. Cahoon, as he did not engage in insubordination or disrespectful conduct. While he did refuse to carry out a clear direction, his refusal was motivated by a good faith concern about the safety of what was being asked of him, an exceptional circumstance in which the "work now – grieve later" principle does not apply.

The grievance is therefore allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost.

May 17, 2010

(SIGNED) MICHEL G. PICHER
ARBITRATOR