CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 4156

Heard in Calgary, Wednesday, 14 November 2012

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAILWAY CONFERENCE

EX PARTE

DISPUTE:

Appeal the assessment of a ninety-day suspension to Conductor Love for a violation of CROR rule 439 and CROR Rule 34, on March 23, 2012, while working as conductor on Train L501510-23.

COMPANY'S STATEMENT OF ISSUE:

On March 23, 2012, Mr. Love was assigned as the conductor on train L505110-23 when it failed to stop prior to passing a stop signal at Dunn West on the Wainwright Subdivision.

The Company conducted an investigation of the incident and determined that Conductor Love had violated CROR Rule 439 and Rule 34 and subsequently assessed him a ninety-day suspension.

The Union contended that there were alleged procedural flaws which resulted in the investigation not being conducted in a fair or impartial manner. The Union also contended that the discipline of a ninety-day suspension was far in excess of what was warranted under the circumstances and requested that the discipline be mitigated to a far lesser degree and that Mr. Love ought to be made whole

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:

K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton
R. Bateman	– Director, Labour Relations, Toronto
P. Payne	– Manager, Labour Relations, Edmonton

D. Crossan – Manager, Labour Relations, Prince George
J. Boychuk – General Manager, WR-Alberta, Edmonton
R. Cruy – Supervisor, Signals & Communications,

There appeared on behalf of the Union:
M. S. Church – Counsel, Toronto
R. A. Hackl – General Chairman, Saskatoon
R. Thompson – Vice-General Chairman, Saskatoon
B. R. Boechler – General Chairman, Ret'd, Edmonton
R. Donegan – Vice-General Chairman, Saskatoon
J. R. Robbins – General Chairman, CN Lines Central, Sarnia
J. Larlham – Witness
G. Love – Grievor

AWARD OF THE ARBITRATOR

On March 23, 2012 the grievor was assigned as conductor on train L50151-23. His crew in respect of that train included Locomotive Engineer G. Besse and Assistant Conductor J. Larlham.

While proceeding westerly on the Wainwright Subdivision the grievor's train was required to enter a siding at Dunn Station to allow for a meet with an opposing movement, train 112. As train 112 proceeded on the main line the grievor's train was not required to stop, and continued to operate westward through the siding in anticipation of returning to the main line at the western switch of Dunn Station. It does not appear disputed that the grievor's train was proceeding at a speed of approximately 18 mph.

The train's access beyond the exit switch at the west end of the siding was governed by a dwarf signal, signal 1175D. All three employees give the same account of events. They state that as they proceeded through the siding, and train 112 cleared the location of the western switch, all three of them saw a green indication on signal

1175D. They also saw that the switch had lined itself so that they could access the main line. The unchallenged evidence before me, as related in the disciplinary investigation of all three employees, is that they verbally called the permissive green indication on the signal at the west end of the siding. They relate that their train therefore kept moving, in anticipation of returning to the main line at the western extremity of the Dunn Station siding.

As related by Conductor Love, at a point when their head end was quite close to the dwarf signal, he observed that it had changed to a red signal. He immediately called in a loud voice to the crew that it the signal had changed to a stop indication, causing Locomotive Engineer Besse to place the train into emergency. Their train proceeded a short distance past the red signal and onto the mainline, a distance of some four to five rail car lengths.

Before the crew had an opportunity to issue an emergency radio broadcast, they were immediately contacted by the Rail Traffic Controller who inquired as to whether there was a problem. When the locomotive engineer responded that the crew had a problem as "… the signal had dropped." The RTC's response was "Oh, it did drop." Shortly thereafter the crew were advised to back their train into the siding and they were relieved from service. Following a subsequent disciplinary investigation the grievor, as well as his locomotive engineer, were assessed a ninety day suspension for having violated CROR rule 439 and CROR rule 34. The Company concluded that in addition to violating the stop signal, the crew had failed to observe the signal as required by CROR

34 which states, in part: "… crew members must watch for and properly communicate and act on any change of indication which may occur." The Company's conclusion is that that crew did not in fact properly follow the status of signal 1175D. The assistant conductor, Ms. Larlham, who is substantially more junior in service, was discharged.

In fact the fundamental position of the Company is that at all material times the signal in question displayed a red light stop indication. That, it submits, is the result of the signal system download which was subsequently done with respect to the signal in question. That download, the Company relates, confirms that the signal at the west end of Dunn Station consistently displayed a red stop indication at all material times, and did not display a permissive green signal.

The material before the Arbitrator further confirms that, in keeping with normal practice, the Company dispatched an S&C Technician to examine the switch and verify its proper functioning. The technician apparently found no irregularity with the switch and communicated as much verbally to Company supervisors. The technician's verification of the switch was carried out while the crew were still aboard their train in the siding. Mr. Love relates that after the signal maintainer had completed his tests, as he and his crew were waiting he saw that signal 1175D suddenly became extremely bright for a short time, something which he confirmed having also been seen by Engineer Besse. It appears that Engineer Besse related that event to the signal maintainer who subsequently rechecked the signal and indicated to them that there

might have been a slight change in amperage or voltage, but that ultimately he had no explanation as to how the change in the brightness of the light could have occurred.

As a preliminary matter the Union alleges that the Company violated article 117.2 in the conduct of the disciplinary investigation. Specifically, it objects to the fact that the investigating officer refused the request of the Union's representative to have the S&C maintainer brought to the investigation to be questioned by the Union. It is common ground that the investigating officer was in possession of no report from the S&C maintainer. The Union submits that the Company was in violation of article 117.2 of the collective agreement which reads as follows:

> **117.2** Employees may have an accredited representative appear with them at investigations, they will also have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation. Employees under Company investigation and/or his/her accredited representative shall have the right to attend any Company investigation, which may have a bearing on the employee's responsibilities. The employee and/or their accredited representative shall have the right to ask questions of any witness/employee during such investigation relating to the employee's responsibility.

The Arbitrator cannot agree with the Union's contention. While the Union focuses on the first sentence of the above article, arguing that the Union had the right to demand an opportunity to ask questions of the S&C maintainer who should have been brought as a witness, I cannot agree that the article is intended to be so broad. That sentence, in my view, must be read in conjunction with the final sentence of the article which clearly indicates that the employee and/or their union representative has the right to ask questions of witnesses or employees who participate in the investigation. It does not

extend, as the Union would have it, to a right to demand that certain witnesses who may not be part of the investigation be produced for questioning. It should be stressed that the procedure contemplated under article 117 of the collective agreement is the Company's investigation which, subject to the requirement of fairness and impartiality, is an expeditious process to assist in fact finding.by the employer. The scope of the disciplinary investigation was described as follows in **CROA 2073**:

> 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. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.

In **CROA 2920, 2934, 3461** and **3740**, the Union's objection to a Company failure or refusal to call a witness was dismissed by this Office. It is, of course, open to the Union to compel the testimony of any potential witness at the arbitration stage of any ensuing grievance, by reason of the arbitrator's subpoena power. However I can find nothing within the language of article 117.2, or the overall jurisprudence of this Office relating to disciplinary investigations conducted under similar provisions, to suggest that the Union's right to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility extends to demanding that the employer produce for interrogation witnesses who are identified by the Union and are not brought into the investigation by the employer itself. On the whole, therefore, I am satisfied that there

was no violation of the standard of a fair and impartial investigation in the case at hand, and the Union's preliminary objection must therefore be dismissed.

It is, of course, true that an employer's refusal to examine a particular individual may work against it, as was recognized in CROA 2934:

> Concern also arises with respect to the refusal to allow the Council to call Locomotive Engineer Murphy to testify. As is evident from the discussion above, the issue of the sight line from the conductor's seat in the locomotive has an important bearing on the merits of the case against Mr. Lorman. Mr. Edgar was advised that the purpose of Mr. Murphy's testimony would be to support the grievor's position that his view of the switch would have been obstructed because of the configuration of the locomotive. While the Arbitrator is of the view that article 117 did not obligate the Company to call the witness requested by the grievor and his union representative, the failure to do so could put the Company's position in peril, with respect to the merits of any eventual grievance. …

Turning to the merits of the grievance, I have more substantial difficulty with the position of the Company. The Company bears the burden of proof in these proceedings. Among the evidence tabled before me are unchallenged statements relating to other occasions, involving different signals, where a permissive signal has unexpectedly dropped to being a red stop signal without any warning and, it appears, where the Rail Traffic Controller could give no explanation for what occurred. In the instant case, extraordinary as it may be, three employees testified independently that they all saw a green permissive indication being displayed by Signal 1175D as they proceeded through the siding. The grievor, who has thirty-four years of service and an exemplary disciplinary record, as well as his locomotive engineer who had thirty-nine years of service and retired immediately thereafter, stated consistently during their respective investigations, as did the more junior assistant conductor, that all of them saw the green indication and that they verbally called it among themselves as required by the

operating rules. I find their evidence to be credible. I also accept the account of Conductor Love who relates that the stop indication of the dwarf signal at the west end of the siding was seen only at the very last moment, when it was obviously too late for their train to stop to avoid going past it. While technically, in these circumstances, it is clear that the grievor and his crew did operate their train past a stop signal, these are not facts which, in my view, would justify the assessment of any discipline for violations of either CROR 439 or CROR 34. While I appreciate that the Company must rely upon the integrity of its equipment, including the result of the signal download which it conducted, in the unique circumstances of this case, I am prepared to conclude, on the balance of probabilities, that the accounts of all three employees are to be believed.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the grievor be compensated for all wages and benefits lost by reason of his suspension, and that the suspension be removed from his record.

November 19, 2012

signed
MICHEL G. PICHER
ARBITRATOR