CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4179

Heard in Montreal, February 12, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAILWAY CONFERENCE

DISPUTE:

Appeal of suspension of Conductor A. Wilkinson.

JOINT STATEMENT OF ISSUE:

On November 11, 2007, Conductor Wilkinson was issued 20 demerits for "failure to comply with Eastern Division Notice No. 19 dated November 13th, 2007 for booking sick October 26th and November 4th, 2007" resulting in discharge for accumulation. This discharge was amended to suspension (441 days) through agreement at Joint Conference.

The Union contends that Mr. Wilkinson cannot be disciplined for being unavailable due to *bona fide* illness and that by assessing the discipline, the Company has violated the Workplace Environment provisions of the Collective Agreement and the *Canada Labour Code* and should be expunged, or in the alternative, the discipline should be significantly reduced. Mr. Wilkinson should be compensated for all loss of wages or benefits.

The Company disagrees with the Union's position.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) S. Fusco**
General Chairperson	**Manager Labour Relations**

There appeared on behalf of the Company:

D. Larouche	– Labour Relations Manager, Montreal
V. Paques	– Labour Relations, Toronto
M. Marshall	– Senior Labour Relations, Toronto
D. VanCauwenbergh	– Director Labour Relations, Toronto
S. Fusco	– Labour Relations Manager, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson
E. Page	– Local Chairman, Toronto
A. Wilkinson	– Grievor, Capreol

AWARD OF THE ARBITRATOR

The Company raises a preliminary issue with respect to the arbitrability of the grievance. It submits that the grievance is in fact untimely.

It is common ground the discipline was assessed against Mr. Wilkinson on January 8, 2008. While the initial assessment of twenty demerits resulted in his termination for the accumulation of demerits to a point in excess of sixty demerits, on March 24, 2009 the Company decided to reinstate the grievor with the time between his termination and reinstatement to be registered as a suspension of 414 days. The Union grieves the suspension.

Sometime after the grievor's reinstatement on March 24, 2009, the Union sent a Step Three grievance to the Company with respect to the suspension. It did so on August 19, 2009. The Company heard nothing further from the Union for more than three and half years after that point. On December 21, 2012, close to four years after the grievor's reinstatement, the purposed joint statement of issue drafted by the Union was signed and the matter proceeded to this office.

Article Eighty-four of the Collective agreement deals with the timely filing of disputes. It provides, in part, as follows:

> **Final Settlement of Disputes:**
> **84.3** A grievance which is not settled at the Vice-President's Step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.

84.4 A request for arbitration shall be made within 60 calendar days from the date decision is rendered in writing by the Vice-President by filing written notice thereof with the Canadian Railway Office of Arbitration and on the same date a copy of such filed notice will be transmitted to the other party to the grievance.

Note: In the application of this paragraph upon receipt of a request for arbitration, the Company will meet with the General Chairperson, within 30 calendar days from receipt of such request, to finalize the required Joint Statement of Issue. Failure to comply with the provisions of this paragraph will permit either party to the dispute to progress the dispute to the Canadian Railway Office of Arbitration on an "ex parte basis" pursuant to the provisions of the Memorandum of Agreement governing the Canadian Railway Office of Arbitration.

Grievances Not Timely

84.5 Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case of in respect of other similar claims. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 84.6 be progressed to the next step in the grievance procedure.

From the standpoint of prejudice in the case at hand the Company stresses that it is placed at a substantial disadvantage to deal with an incident which occurred more than five years ago. It notes that the labour relations managers involved have either left the Company or have been on extended sick leave.

The Union raises its own objection with respect to timeliness, arguing that the Company exceeded by one day the twenty-eight day period which it had to reply to the grievance, dealing with the lapse of time between December 11, 2007 and January 8, 2008. However the record before me reveals that while that alleged failure of time limits occurred some five years ago, the ground of automatic exoneration now pleaded by the Union under the provisions of Article 82.3 of the Collective agreement was never previously raised. The Union draws the Arbitrator's attention to no correspondence which would have alerted the Company to the position which it now takes. In the circumstances I am satisfied that the Union must be taken to have waived any possible

objection to the one day delay which it now asserts under the provisions of Article 82.3 of the Collective agreement.

Time delays are negotiated within the terms of a Collective agreement for a purpose. The parties must be taken to view the delays which they establish as being agreed upon for valid practical purposes. While it is true that the Arbitrator can exercise a discretion under Section 60 of the **Canada Labour Code,** to extend time limits in an appropriate circumstance, on what basis can it be said that the time limits should be extended in the instant case? Firstly, this is not a case of discharge where an employee's job security is in the balance. Nor has the Union pointed to any significant event or circumstance which would justify what is effectively a delay of in excess of four years in progressing the instant grievance. In exercising a possible discretion under Section 60 of the Canada Labour Relations Code an Arbitrator must be wary of simply excusing laxity on the part of one of the parties without a compelling basis for doing so. I can see no such compelling basis in the case at hand. I must agree that the time delay in the instant case, and the loss to the Company of immediate access to supervisors who were involved at the time, does establish a meaningful prejudice to the employer. This is not, therefore, in my view an appropriate case for an extension of time limits and the grievance must be dismissed on the basis that it is not arbitrable.

In the alternative, if the matter were to be determined on the merits, I would not be inclined to alter the outcome. The record discloses that the grievor did make a false claim for an absence which he claimed was due to illness, when in fact it was due to

entirely different circumstances. Faced with an issue of fundamental trust the Company was justified in taking a strong disciplinary measure. In the circumstances I would not be inclined to interfere with its decision to initially terminate the grievor and thereafter return him to work following a lengthy suspension.

For all of the foregoing reasons the grievance must be dismissed.

February 18, 2013

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MICHEL G. PICHER

ARBITRATOR