CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4237

Heard in Montreal, September 10, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW – CANADA)

DISPUTE:

The assessment of 40 demerits to Intermodal Helper B. Vestrocy, for violation of CN's Safe Work Practice, specifically, sleeping while on duty during his shift of November 22, 2012 and his subsequent discharge for accumulation of demerit marks in excess of 60.

The assessment of 20 demerits, for his alleged failure to maintain 3-point contact during his shift as an Intermodal helper on December 4, 2012, and his subsequent discharge for accumulation of demerits.

UNION'S STATEMENT OF ISSUE:

On November 28, 2012, a formal employee statement was conducted with Intermodal Helper B. Vestrocy for sleeping while on duty during his shift of November 22, 2012. Mr. Vestrocy was notified on December 13, 2012 that he would be held out of service without pay pending a supplemental statement that was conducted on December 17, 2012. Following the investigations, the grievor was assessed 40 demerits, of which placed his total active discipline at 75 demerits that culminated in his discharge for accumulation of demerits in excess of 60.

The Union contends that the assessment of discipline was excessive and asks that the grievor be reinstated to service without loss of seniority, and that he be made whole for all lost earnings and benefits.

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

On December 9, 2012, a formal employee statement was conducted with Intermodal Helper B. Vestrocy for his alleged failure to maintain 3-point contact during his shift of December 4, 2012.

Following the investigation, the grievor was assessed 20 demerits, of which placed his total active discipline at 75 demerits that culminated in his discharge for accumulation of demerits in excess of 60.

The Union contends that this is a case, given the width of the catwalk on the Intermodal railcar, where it was not practicable to make 3-point contact, which, in the instant case, the Company asserts the grievor was to touch the side of the Intermodal container that sat in the railcar while walking with his head tilted slightly. The Union further contends that the discipline was unwarranted and excessive given the circumstances. The Union seeks resolution of the matter that the discipline be removed from the grievor's disciplinary record and that he be made whole for all lost earnings and benefits.

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

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) B. Kennedy **(SGD.)**
President

There appeared on behalf of the Company:

J. Darby	– Labour Relations Associate, Toronto
S. Blackmore	– Senior Manager, Labour Relations, Edmonton
G. Robson	– Intermodal Terminal Manager, Brampton
S. Saleem	– Mechanical Supervisor, Oshawa

There appeared on behalf of the Union:

B. Kennedy	– President, Edmonton
J. White	– Regional Representative, Hamilton
B. Vestrocy	– Grievor, Hamilton

AWARD OF THE ARBITRATOR

This award involves two heads of discipline. The grievor, Intermodal Helper B. Vestrocy, was assessed 40 demerits for sleeping while on duty on November 22, 2012. Shortly thereafter, he was assessed a further 20 demerits for failing to maintain three-point contact during the course of his work on December 4, 2012. As the grievor's disciplinary record stood at 45 demerits prior to either of these alleged infractions, he was terminated for the accumulation of demerits.

I deal firstly with the 40 demerit penalty for the alleged sleeping on the job. Having reviewed the material presented by the Company, I am satisfied that the in fact

the grievor was found to be asleep along with another employee, on November 22, 2012 in the Brampton Intermodal terminal. I am satisfied that mechanical supervisor Sameeh Saleem and supervisor Mike Carter both observed the grievor and his work companion Mr. A. Cislo parked in their company vehicle in an area adjacent to pad five in the yard. The supervisors parked their own vehicle close by, and walked to the grievor's truck, which was idling. They found the driver's side window to be rolled partially down and observed both employees seated inside, to all appearances asleep. They observed the employees for some five or six minutes, confirming to their satisfaction that in fact they were asleep, following which they knocked on the door and awoke them. The grievor and Mr. Cislo then explained that they were waiting for track five to be locked up, and Mr. Vestrocy expressly denied having been asleep. While they claimed to have been there for some ten minutes, a subsequent verification of their vehicles GPS apparently confirmed that it had been idling for some twenty-four minutes.

Upon a review of the materials before me, I am satisfied that the Company's evidence is to be preferred, and that the grievor was in fact observed to be asleep at the time in question, near the conclusion of an overnight shift. In considering the incident of November 22, 2012, the Company took into account that the grievor was previously assessed twenty demerits for sleeping on duty in March of 2009 in relatively similar circumstances. Following an investigation the Company assessed 40 demerits against the grievor which, coupled with the 45 demerits then outstanding on his record, rendered him liable to dismissal for the accumulation of demerits.

I am satisfied that the grievor did render himself liable to discipline. Given that this matter was presented in tandem with the second head of discipline for an alleged safety violation, I shall deal with the appropriate quantum of penalty below.

On December 4, 2012 at approximately 06:40 am the grievor was observed by supervisors Kilwinder Thandi and Michael Kelly while he was in the process of locking railcar units. According to reports prepared by both supervisors, while working on a fifty-three foot car with two stacked fifty-three foot containers the grievor moved across the railcar without making three-point contact, in other words without resting his hand on the adjacent container.

It appears that the supervisors did not communicate this infraction to the grievor immediately, as they apparently could have done by radio. Rather, some minutes later, when he had moved on to work on other cars, they approached him and then advised that they had observed him failing to observe the three-point contact rule, and that as a result he had failed an efficiency test. When the grievor asked for more detail they indicated to him that the car in question was some three car lengths away. In fact the specific number of the car on which the grievor allegedly committed his infraction was never identified.

Subsequently, the Company conducted a disciplinary investigation and assessed 20 demerits against the grievor for “failure to maintain three-point contact during your shift on December 4, 2012”.

The Arbitrator has some difficulty sustaining the position of the Company in relation to this infraction. It is common ground that although the supervisors could have used radio contact to immediately tell the grievor that he was violating a rule, for reasons they best appreciate they did not do so. They approached him only sometime later, when he was working on another car at some distance to inform him of what they had observed. When confronted by his supervisors the most the grievor could say was that it was entirely possible that he had failed to use three-point stance protection adding, “if I did then I am sorry”. During the course of the disciplinary investigation conducted by the Company, when asked to comment on his failure to maintain three-point contact the grievor responded “I wish I could, I don’t know what car it is exactly, I am up and down constantly on over 200 rail cars a night on average”.

Bearing in mind that the Company bears the burden of proof, and that discipline should be assessed based on a fair and reasonable process, there are fundamental concerns with the manner in which the Company’s allegation was processed against the grievor. As noted above, he was not immediately notified of his alleged infraction, was approached only sometime later by the two supervisors who pointed vaguely in the direction of another car where they maintained the infraction had occurred. The Arbitrator appreciates the importance of efficiency testing, but in my view fairness would have required that the grievor be notified of his alleged rule violation with reasonable dispatch, being given an opportunity to understand precisely what it is that was being alleged against him. There is nothing in the material before me to suggest that the

supervisors could not have radioed the grievor immediately when they observed him failing to maintain three point protection as he worked on the unidentified railcar. In fact, given their method of proceeding, the grievor could ultimately have no certainty as to the railcar on which he was alleged to have violated the rule, much less the precise circumstances in which he found himself. That is particularly critical to the extent that the rule, as expressed in the Memorandum of March 10, 2010, directs employees to maintain three-point contact “at all times where practical”. In that context, the specific facts around which an alleged infraction of the rule was committed become obviously important.

On the whole, however, the Arbitrator accepts the reports of the two supervisors as being reliable concerning their observation of the grievor having failed to observe three-point contact. In that context he obviously failed an efficiency test and did make himself liable to discipline. That is particularly so where the grievor had previously been disciplined in 2009 for failing to maintain three-point contact. I am satisfied that the grievor did render himself liable to discipline for the incident of December 4, 2012.

What, then, is the appropriate disciplinary outcome in relation to the events reviewed above? In my view, considering the eight years of service of the grievor, and the nature of the infractions reviewed, it is not inappropriate to allow him a last chance to demonstrate that he can be a safe and efficient employee. The grievance therefore is allowed, in part. The Arbitrator directs that the 40 demerits assessed against the grievor in relation to the incident of November 22, 2012 be removed from his record, and that

the 20 demerits assessed against him for the incident on December 4, 2012 also be removed. The grievor shall be reinstated into his employment forthwith, without any compensation or wages benefits lost, with the period from his termination to his reinstatement to be recorded as a suspension for both of the infractions reviewed in this award. His disciplinary record shall therefore continue to stand at 45 demerits. Needless to say, Mr. Vestrocy must appreciate the importance of avoiding any similar discipline in the future.

September 13, 2013

_____

MICHEL G. PICHER
ARBITRATOR