CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4389

Heard in Calgary, May 12, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The termination of Conductor S. Tracey-Boggess' employment on October 16th, 2014.

JOINT STATEMENT OF ISSUE:

On October 16, 2014, Conductor Tracey-Boggess was advised of the Company's decision to terminate her employment during what the Company contends was her probationary period.

The Union's position that the discipline/termination of Conductor S. Tracey-Boggess is unjustified, unwarranted, discriminatory and in any case excessive. The Union further asserts that the Company is in violation of Articles 58.1, 65.7A, and the Note contained therein and 85.

It is also the Union's position that the Company violated section 239 of the *Canada Labour Code.*

The Union's position is that Conductor Tracey-Boggess had completed all the 90 required tours of duty to become a seniority employee. The Union asserts that since Ms. Tracey-Boggess had obtained the necessary 90 tours of duty she could not be discharged as the Company did under Article 58.1. The Union is seeking to have Ms. S. Tracey-Boggess reinstated to her employment.

The Company disagrees with the Union's contentions and declines the Union's request.

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

There appeared on behalf of the Company:

V. Paquet	– Labour Relations Manager, Toronto
M. Marshall	– Senior Labour Relations Manager, Toronto
R. Helmle	– Regional Manager CMC, Toronto
A. Blokzyl	– Assistant Superintendent, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia

J. Lennie – Vice General Chairman, Port Robinson
R. Donegan – General Chairman, Saskatoon
R. Thompson – Vice General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

This case involves the termination of the Grievor for unsuitability. The Company contends that the grievor was a probationary employee; the Union disputes that. The Union further argues that even if the grievor is found to be a probationary employee her termination is discriminatory and arbitrary.

New employees are considered on probation until they have completed ninety tours of service. The first issue in this case is whether time spent in training is included in the Grievor's tours of service.

Article 58.1 of the Collective Agreement provides:

> An employee will be considered as on probation until he has completed 90 tours of service under the Agreement. If found unsuitable prior to the completion of 90 such tours, an employee will not be retained in service and such action will not be construed as discipline or dismissal, but may be subject to appeal by the General Chairperson on behalf of such employee.

It is further explained in Article 65A.1(a) of the Conductor Training Course Road/Yard New Employees:

> During the period of time an employee is assigned to the Company's Conductor Training Course, Trainees will be paid at the all-inclusive rate per 40-hour week: Classroom and Familiarization Rate of Pay - $800.00/week.

The other relevant provision is found in the note to 65A.7(a).

> Following the classroom training program, the Trainee(s) will be provided with training tours in switching and road/yard operations, the mixture of which shall be locally determined by the appropriate officer of the Company and the Designated Trainer(s). The shifts or tours of duty to be worked shall be mutually agreed by the Local Company Officer and Designated Trainer(s) taking into consideration the purpose of maximizing the experience gained by the trainee. Any dispute in the number of shifts or tours of duty to be worked shall not prevent the commencement of the training tours, and the issue shall be brought to the immediate attention of the Joint Review Committee for resolution. Trainee(s) shall also be provided experience tours at locations to which they would be assigned or in other services, such as, but not limited to passenger service, which shall consist of:
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> i. A minimum of 45 trial tours of duty as locally arranged, followed by;
> ii. Certification as Conductor/Yard Conductor, followed by;
> iii. Successful completion of the Belt Pack and CLO training courses, followed by;
> iv. Collective Agreement probationary period.
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> Note: Notwithstanding the forgoing provisions, in the event a trainee who has been certified as a Conductor/Yard Conductor and is required to perform service in Road or Yard operations prior to the completion of Belt Pack and/or CLO training, the Collective Agreement probationary period will commence from the date the employee performs such service.

The Company says that the purpose of the note is so that employees can begin their probationary period once qualified to perform “service” at the terminal to which they are assigned. This may not always require Belt Pack or CLO training courses. The Company’s position is that the training required to obtain the CLO qualification that occurred AFTER the Grievor performed some tours of service is excluded from the calculation of her probationary tours of service. It says those periods of training are

“tours of duty” but not “tours of service” and as such not properly part of the calculation towards completion of probation.

The Union position is that, having completed ninety-nine tours (including those for CLO training), the grievor was no longer probationary and her termination is subject to the just cause standard. It asserts that since the Company did not provide the CLO training before the commencement of the probationary period, then in accordance with the Note to Article 65A.7, the periods of that training must be considered as tours of service for calculation of her probationary period. It relies too on the fact that she was paid full conductor rates for the CLO tours. In response the Company relies on the fact that the locomotive engineer and conductor on the grievor’s CLO tours are paid training bonuses.

The Company distinguishes tours of duty from tours of service and asserts a purposive approach to the interpretation – to allow the Company a sufficient period of time to assess an individual. In this case the probationary period was interrupted by the training.

I find that the training in this case, before the probationary period has been completed, is not included in the ninety tours of service contemplated by Article 58.1. The probationary period does not begin again, which would be a loss of the tours of service already accumulated. But in this case the training period is not included as “tours of service”. Such an interpretation is consistent with the language of Article 58.1

which requires completion of ninety tours of service. This interpretation also recognizes a difference attributed to the use of different phrases in the language of the Collective Agreement. In this instant case then the grievor had not yet completed the ninety tours of service by the time she was terminated, and the Arbitrator finds that she was in her probationary period.

The grievor was terminated for unsuitability. The material discloses that the grievor sustained an injury between September 7 and 8, 2014. She explained that the injury arose because she was sitting cross legged to create a writing surface and later noticed stiffness. The grievor said that she was stiff while exiting the train but it wasn't until the next morning, September 9, that she realized she had pain. She did not report it that day, although she called in sick. She said that she thought a day of rest would assist her. The grievor reported the injury on September 10.

There is no dispute that the Company's General Operating Instruction require the immediate reporting of injuries.

The Grievor had ten demerit points on her record for running through a switch on September 1, 2014. At the investigation meeting into that infraction the grievor mentioned that she had sustained an injury some three days before the switch infraction. She was reminded at that time, with the Union present, of the requirement to report injuries in a timely manner.

The Union suggests that it is quite reasonable for the grievor to have not reported her injury at the first sign but rather waited until the pain signified a real injury. The injury was not immediately evident. It says that there was no prejudice to the Company.

The Union relies on the decisions in **CROA&DR 3308, 3543,** and **3774** for the proposition that in certain circumstances a failure to report a minor or developing injury immediately is not cause for discipline or is only worthy of minor discipline. The Union submits in this case the grievor reported her injury in a reasonable and timely manner, when it developed. The Union submits further that the Company's unwarranted response to the injury was a breach of the *Canada Labour Code* as a disciplinary response by the Company to an injury.

It is well established that the standard for the termination of a probationary employee is a less than applied to an employee who has completed probation. As was stated in **CROA&DR 1568:**

> It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of suitability obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status.
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> It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.

The grievor called in sick on September 9 and said she realized she had pain, but decided that she would not advise the Company of the reason for her absence on September 9 – namely an injury she sustained on September 7 or 8. This is compounded by the grievor's failure to report this injury until September 10, even after being informed shortly prior to these events of the importance of timely reporting. Some discipline was merited. Having regard to the applicable standard applied to the decision not to retain a probationary employee and the particular facts of this case, the grievance is dismissed.

June 8, 2015

MARILYN SILVERMAN
ARBITRATOR