CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4509

Heard in Calgary, November 8, 2016

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's outright discharge assessed to Conductor Gesner following a minor derailment on February 19, 2016 at the Halifax Autoport.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On February 19, 2016 Conductor Gesner was assigned to train Y505 and was switching at the Autoport yard (HIT) in Halifax. During this tour of duty Conductor Gesner and his locomotive engineer ran through a switch and resulting in the derailment of locomotive CN 4787.

The Company issued a notice to appear for a formal investigation stating "You are required to attend an investigation in order to provide a Formal Employee Statement in connection with Derailment on CN 4787 on February 19th, 2016."

Following the investigation, the Company, on March 10, 2016 issued a CN form 780 assessing discharge to Conductor Gesner for "Discharge for your involvement in the derailment of CN 4787 on February 19, 2016 and related attempt to cover it up by trying to re-rail the locomotive."

The Union submits the Company is in violation of Articles 65A, 82 and 85 along with Addendum 124 of the 4.16 Collective Agreement when the Company assessed discharge to Mr. Gesner as a result of a derailment. The Union further submits that the Company is violation of the Brown System of Discipline and arbitral jurisprudence.

It is the Union's position that Conductor Gesner was not provided with a fair and impartial hearing as set out in Article 82 of the 4.16 nor was he provided the proper training as required in Article 65A of the 4.16 Collective Agreement.

The Union seeks to have the discipline assessed to Conductor Gesner declared *"void ab initio"* given the violations of the Collective Agreement. In the alternative, it is the Union's position that discipline is unwarranted unjustified and excessive, especially in light of the mitigating circumstances and seeks the for arbitrator to exercise their discretion and substitute a penalty, if warranted, more in keeping with the Brown System of Discipline.

The Union contends that when the Company discharged Conductor Gesner for "your involvement in the derailment of CN 4787 on February 19, 2016 and related attempt to cover it

up by trying to re-rail the locomotive" this was something that the grievor was not aware of until the outset of the investigation.

The Union further seeks to have Conductor Gesner made whole and reinstated to his employment with compensation for all lost wages and benefits and without the loss of seniority.

Additionally, given the blatant and repeated violations of the Collective Agreement, that a significant Remedy, under the provisions of Addendum 123, be applied.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The discharge of Conductor Gesner effective March 10, 2016, for his involvement in the derailment of a locomotive on February 19, 2016 at the Halifax Autoport and attempt to cover up the incident by trying to re-rail the engine.

On February 19, 2016 Conductor Gesner was assigned to train Y505. While switching at the Autoport (HIT) in Halifax, the crew's locomotive ran through a switch not properly lined for its itinerary and derailed.

Mr. Gesner was issued a notice to appear for a formal investigation stating "You are required to attend an investigation in order to provide a Formal Employee Statement in connection with Derailment on CN 4787 on February 19th, 2016."

Following the investigation, Conductor Gesner was discharged effective March 10, 2016, for his *"[…] involvement in the derailment of CN 4787 on February 19, 2016 and related attempt to cover it up by trying to re-rail the locomotive."*

Conductor Gesner was provided a fair and impartial investigation and was properly trained with respect to his position.

At the time a Notice to Appear is prepared, not all the facts have been verified, hence the need for a Formal Statement. Therefore, facts which have not surfaced cannot be included in the Notice to Appear.

The decision to terminate the grievor was based on the outcome of the investigation. The investigation confirmed that the crew failed to immediately advise the Company about the derailment. The 22 minutes that elapsed before the crew contacted the Company, coupled with locomotive moves recorded after the derailment and all of the information gathered during the statement demonstrate that, on the balance of probabilities, the crew attempted to re-rail their engine.

Contrary to Union's allegations, there are no mitigating factors in the case at hand. Under the circumstances, it is the Company's position that discharge was warranted.

It is also the Company's position that the circumstances do not justify a Remedy.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) A. Daigle**
General Chairman	**Manager Labour Relations**

There appeared on behalf of the Company:

V. Paquet	– Labour Relations Manager, Toronto
K. Morris	– Senior Manager Labour Relations, Edmonton
A. Daigle	– Labour Relations Manager, Montreal
J. Boychuk	– General Manager Operations,
M. Galan	– Labour Relations Manager, Edmonton
D. Houle	– Human Resources, Edmonton
D. Crossan	– Labour Relations Manager, Prince George
E. Watt	– Trainmaster, Prince George

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto

J. Robbins	– General Chairman, Sarnia
J. Lennie	– Local Chairman, Port Robinson
C. Gesner	– Grievor, Halifax
R. Donegan	– General Chairman, Saskatoon
J. Thorbjonsen	– Vice General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

The grievor, who started working for the Company as a conductor on May 26, 2014, had less than two years of service at the time of his termination.

The grievor was working on assignment in the Halifax terminal at 06:00 on February 16, 2016. The grievor was assigned to train Y505. While switching at the auto port in Halifax the crew's locomotive ran through a switch not properly lined up for its itinerary and derailed blocking the crossing. The train crew had proceeded towards what they believed were the "low side" tracks, when in fact their movement was lined up for the "high side" tracks. Since the "high side" was not meant to be used, the derail was on the "ON" position and the crew was unable to stop their locomotive before it went over the derail.

The derailment occurred at 07:39 but the crew waited for 22 minutes until 08:01 before notifying the Company. During that 22 minute period, the consist was moved 95 feet west of where the derailment occurred. The crew used wooden planks to keep the wheels rolling while the engineer slowly moved the locomotive westward from the derailment site in order to free up the crossing.

The Company maintains that while the rule violations and the resulting derailment warranted discipline on their own, the delayed reporting of the incident along with the crew's attempt to re-rail their engine was deemed as the most aggravating factors. The fact the crew took it upon themselves to move a derailed engine without permission also weighed heavily in the Company's decision to terminate the grievor.

The Notice to Appear in the case of the grievor states as follows: *"You are required to attend an investigation in order to provide a formal employee statement in connection with derailment on CN 4787 on February 19th, 2016."* The grievor, as the Union pointed out, attended the investigative interview on February 23, 2016 and answered all the questions put to him with respect to the derailment. The locomotive engineer, Mr. Gilby, attended an interview with respect to the same incident a day earlier on February 22, 2016.

All the questions asked at Mr. Gilby's interview related to the derailment on February 19, 2016. No questions were put to Mr. Gilby with respect to any attempt by himself or the other crew members to re-rail the locomotive. Mr. Gilby did mention the re-railing issue peripherally at the conclusion of his long answer describing the circumstances leading up to the derailment of the locomotive. In that regard, Mr. Gilby stated *"Not at any time were we attempting to re-rail a locomotive which I would think is near impossible with my training."* No further follow-up questions were asked of Mr. Gilby with respect to the re-railing of the locomotive at his interview including any

questions about the Trainmaster putting to the crew at the time of the incident that they were in fact not attempting to free the crossing but rather re-rail the locomotive.

When the grievor was interviewed on February 23, 2016, he did have before him the evidence that the Company was relying on to support its allegations with respect to the derailment, including the formal statement provided by Mr. Gilby the previous day. Again, similar to Mr. Gilby's interview, no questions were put to the grievor about an attempt by the crew to re-rail the locomotive. All the questions pertained to the allegations set out in the Notice to Appear which was *"… To provide a formal employee statement in connection with derailment on CN 4787 on February 19, 2016."*

On March 9, 2016, the grievor received a CN Form 780 terminating his employment. The reasons for his discharge were set out as follows: *"Discharge for your involvement in the derailment of the CN 4787 on February 19, 2016 and related attempt to cover it up by trying to re-rail the locomotive".*

The arbitrator finds that the grievor was unequivocal at his interview with respect to the reasons behind the decision to move the locomotive after its derailment. His answer, consistent with the reply of Mr. Gilby, was that he did it to try and clear the crossing. If the Company was concerned that the grievor was being untruthful about his reasons for moving the locomotive, the investigating officer should have asked questions of the grievor specific to the Company's view that the crew was attempting to re-rail the locomotive and not just trying to clear the crossing.

A one-line reference to re-railing in Mr. Gilby's statement, which Mr. Gilby himself referred to as *"...near impossible with my training",* at the conclusion of a long answer about the incident, is no basis to support the Company's assertion that the grievor should have dealt with the same issue the following day in his own interview. That is a completely unrealistic expectation given that the grievor was steadfast during the course of his interview about having moved the locomotive in order to clear the crossing for public vehicular traffic and for no other reason.

There was nothing put to the grievor during his interview about the Trainmaster's accusations or theories about the derailment nor was the grievor given an opportunity to rebut any such accusations. There is not even a hint in any of the questions asked of Mr. Gilby or the grievor that there was a cover-up concern. Further, there is no evidence whatsoever put to the grievor during the investigation that discipline for covering up the derailment was even being considered by the Company.

As noted in **CROA&DR 2073**, provisions such as article 82 of Agreement 4.16 contemplate:

> "...an informal and expeditious process by which an opportunity is afforded to the employee to know the accusations against him, the identity of his accusers as well as the content of their evidence or statements, and a full opportunity to provide rebuttal evidence in his own defense. Those requirements, coupled with the requirements of 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.

Further, as noted in **CROA&DR 3322**, the remedy for a breach of a substantive provision like article 82.2 is that the discipline be declared void *ab initio*. The rationale behind this remedy is set out below beginning at p. 5 of the Award:

> This Office has had a number of prior occasions to consider the principles which govern the application of provisions such as article 82.2 of the instant collective agreement. It is well settled that a violation of these provisions amounts to the denial of a substantial right, the consequence of which is to render any discipline void *ab initio*, regardless of the merits of the case. The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian railway office of arbitration. That reality is well reflected in the decision of this office in CROA 1704, a case involving the instant company and the Brotherhood of Maintenance of Way Employees:
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> > .... In the arbitrator's view this case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation of the Canadian Railway Office of Arbitration. By long-established practice, this office relies on written briefs, including the transcript of investigations conducted by the Company the content of which forms the basis of the decision to assess discipline against an employee. If the credibility of the expedited hearing process in this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties of placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases. Needless to say, irregularities at the investigation stage, particularly those which depart from the standard of full and fair disclosure reflected in Article 18.2(d) have the inevitable effect of undermining the integrity of the entire grievance and arbitration process so vital to the interests of both parties.

The accusations of a cover-up were never set out in either the Notice to Appear or at any time were references made to a cover-up of the derailment during the grievor's investigative hearing. The absence of any reference to a charge as serious as a cover-up, except at the time of discharge, breaches the spirit and intent of a fair and impartial investigation. The integrity of the CROA process depends on timely disclosure of a

pending charge in order that the employee being investigated has the opportunity to give a full and frank answer to the charge. That did not occur in this case.

For all the above reasons, the arbitrator finds that the Company breached article 82 of the collective agreement by not providing the grievor with a fair and impartial investigation. The discipline, following the practice of this Office, is declared to be void *ab initio*. The arbitrator directs that the grievor be reinstated into his employment without loss of seniority and with compensation for all wages and benefits lost.

Having made this finding it is unnecessary for me to delve into the merits.

December 5, 2016

JOHN MOREAU
ARBITRATOR