CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2668

Heard in Calgary, Wednesday, 15 November 1995

concerning

Canadian National Railway Company

and

Canadian Council of Railway Operating Unions (United Transportation Union)

DISPUTE:

Appeal of discipline assessed to Conductor T. Lucki of Winnipeg, Manitoba who was assessed thirty (30) demerits for conduct unbecoming a CN Employee while employed as conductor on November 19, 1993.

JOINT STATEMENT OF ISSUE:

At approximately 2145 on November 19, 1993 an altercation took place between the grievor, Conductor T. Lucki and Locomotive Engineer G. McConnell in the conductors' booking in room at the Symington Yard Office. The Company obtained formal statements from the grievor, Trainperson G. Dielschneider and Locomotive Engineer McConnell on November 24, 1993. In addition statements were obtained from Conductor J.W. Naworynski and Train Movement Clerk C.T. Vance on November 23, 1993.

As a result of this incident the grievor and Locomotive Engineer McConnell were assessed 30 demerits. Conductor Lucki was held out of service from November 22 to November 25, 1993 inclusive resulting in a loss of earnings of approximately 768 miles and $92.00 in premiums under Agreement 4.3.

The grievance was submitted to the Company at Step II of the grievance procedure on December 13, 1993 and declined on March 07, 1994. The grievance was submitted to the Company at Step 3 of the grievance procedure on April 14, 1994, however the Company has declined the Union's grievance.

The Union requests that the discipline assessed to the grievor be expunged and that he receive full compensation for all lost earnings from November 22 to November 25, 1993 inclusive and that his record be made whole.

The Company maintains that the grievor was justly disciplined and has declined the Union's request.

FOR THE Council: FOR THE Company:

(SGD.) J. W. Armstrong **(SGD.) R. Rennie**

General Chairperson **for: Senior Vice-President, CN West**

There appeared on behalf of the Company:

S. Blackmore – Labour Relations Assistant, Edmonton

J. Torcia – Manager, Labour Relations, Edmonton

J. Dixon – Assistant Manager, Labour Relations, Edmonton

B. Barber – Labour Relations Officer, Edmonton

S. Michaud – Labour Relations Officer, Edmonton

And on behalf of the Council:

J. W. Armstrong – General Chairman, Edmonton

M. Eldridge – Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

It is common ground that a physical altercation did occur between Conductor Lucki and Locomotive Engineer McConnell in the conductors' booking in room at the Symington yard office on the evening of November 19, 1993. The position of the Union is that the grievor was the victim, and not the aggressor, and that no discipline should be assessed against him. Alternatively, it submits that the thirty demerits assessed are excessive.

As a preliminary issue the Company submits that the issue of the reduction of penalty, assuming that there was some wrong committed by the grievor, is not properly before the Arbitrator as it does not specifically appear as an issue in dispute within the text of the Joint Statement of Issue. With that submission the Arbitrator cannot agree. This question was dealt with at some length in **CROA 1665** where a similar position was advanced on behalf of the employer in that case, Canadian Pacific Ltd., in a grievance dealing with the assessment of demerits against an employee for alleged insubordination. There the issue was discussed and disposed of in the following terms:

> The Company raised a preliminary objection with respect to the scope of the Arbitrator's remedial authority. It submits that because the joint statement of issue reflects the Union's position that no discipline should have been imposed in the circumstances of this case, and does not recite the alternative position that if discipline is justified, a lesser penalty should be substituted, the Arbitrator's jurisdiction to reduce the penalty is ousted. In this regard the Company relied on Section 12 of the Rules governing the Canadian Railway Office of Arbitration which is as follows:
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> > 12. The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions.
> >
> > His decision shall be rendered, in writing together with his written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
> >
> > The decision of the Arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.
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> This Office has grave difficulty with the position advanced by the Company. Given the history of the arbitration of industrial relations disputes in Canada, it is a startling proposition to suggest that the request by a Union, through a grievance, for the full exoneration of an employee be construed to exclude the alternative of a reduction in discipline unless that possibility is specifically pleaded. The all or nothing approach that that suggests has no foundation in law or convention. The jurisdiction of arbitrators to substitute a lesser degree of discipline has long been established in arbitral jurisprudence, in the decisions

of the courts, and in statute laws in Canada. (See, generally, Brown & Beatty, *Canadian Labour Arbitration*, 2nd Edition, (1984, Aurora) at pp 77-78.)

Since the *Port Arthur Shipbuilding case* ((1968) 70 D.L.R. (2d) 693 (SCC)) there has been a recognition by the Courts that in assessing the issue of just cause for discipline, the notions of cause and penalty are intertwined and, that in the words of Brown and Beatty at n.766, pp 461, "... as a matter of both institutional competence and sound industrial relations policy, arbitrators ought to have jurisdiction over both." (*See Dairy Products Cooperative Limited v. Lyons et al*. (1982), 132 D.L.R. (3d) 616, 77 CLLC 14, 085 (SCC). See also *Air Canada* (1978), 18 L.A.C. (2d) 400 (Swan).)

While the express rules governing the Canadian Railway Office of Arbitration are significant, they must be construed in light of the conventions, practices and expectations that have evolved in the operation of this Office over many years. It is common ground that the objection raised by the Company has, apparently, never before been made in any of the sixteen hundred cases and more that have been heard by this Office. It can safely be said that through many years of practice the parties have demonstrated their understanding that when a union challenges the discipline imposed against an employee in its entirety, it implicitly seeks a reduction of discipline if that is all that it can justify on the merits of the case. If the remedial whole is the sum of its parts, it inevitably follows that a request for the whole implies a request for whatever part of the whole can be obtained, if the complete success of the grievance is not possible.

It would, in my view, be unduly technical, and inconsistent with the Memorandum of Agreement which governs this Office, to require a union to plead in all discipline cases specifically each and every alternative remedy, short of full exoneration, which it seeks to obtain. I am satisfied that by submitting for arbitration a grievance that claims that the Company did not have just cause for the discipline imposed on an employee, through the joint statement, the parties must be taken to have submitted to this Office the question of whether there was just cause for the discipline imposed and, by necessary implication, whether just cause is established for some lesser penalty. To that extent 'cause' and 'penalty' are inevitably related. To approach this matter differently would, in my view, import a degree of technicality, rigidity, and inefficiency to the resolution of grievances which the signatories to the memorandum establishing this Office never intended. For these reasons the preliminary objection of the Company is dismissed.

For the reasons related in the above award, the Arbitrator cannot sustain the suggestion advanced by the Company with respect to the Arbitrator's jurisdiction to reduce the penalty assessed against the grievor, should it be appropriate to do so.

I turn to consider the merits of the grievance. Upon a review of the incident in question, it is less than clear to the Arbitrator that the grievor can be fairly characterized as less responsible for the incident than Locomotive Engineer McConnell. The evidence of a number of witnesses appears to confirm that Mr. McConnell was, to some extent, provoked by both the conduct and the words of Mr. Lucki. It would seem that at the time the locomotive engineer became impatient to get under way, urging Conductor Lucki to move more quickly in making his preparations for departure. According to the evidence before the Arbitrator Conductor Lucki's response to the locomotive engineer was sarcastic and disrespectful, provoking Locomotive Engineer McConnell to step forward and push the grievor in the chest. This prompted the grievor to push back, and the two men grabbed each other until they separated of their own accord.

When consideration is given to reducing the penalty assessed Mr. Lucki, the Arbitrator has some concern with the degree of candour reflected in his account of the incident. It would appear that he is more zealous to ascribe greater blame to Mr. McConnell than the facts would sustain. According to his account of the incident Mr. McConnell initially took a swing at the grievor's head with his right hand. The evidence of several other witnesses, however, does not sustain that statement. Further, Mr. Lucki suggests that a third party had to break up the two employees. This contrasts with Mr. McConnell's evidence that he voluntarily let go of Mr. Lucki when he realized that the situation had escalated to a dangerous point. The evidence of the other witnesses also confirms that Mr. McConnell's account is to be preferred in this regard.

Upon a review of the whole of the evidence the Arbitrator is satisfied that the grievor did provoke the actions of Mr. McConnell and can, to that extent, be characterized as bearing an equal share of the responsibility for the altercation which took place. Further, given the lack of candour which appears to have tainted his later account of what transpired, the Arbitrator is not persuaded that this is an appropriate case for a substitution or reduction of penalty.

For the foregoing reasons the grievance is dismissed.

November 20, 1995 **(signed) MICHEL G. PICHER**

ARBITRATOR