CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2934

Heard in Montreal, Thursday, 12 February 1998

concerning

Canadian National Railway Company

and

Canadian Council of Railway Operating Unions [United Transportation Union]

DISPUTE:

Appeal the Company's decision to assess Yard Conductor A. Lorman of Saskatoon, Saskatchewan, forty (40) demerits for violation of CROR Rule 104(K) and 114(A) resulting in side collision of CN 7251 and CN 7206, Saskatoon Yard, East End Crossover CX04 on January 23, 1997. This resulted in the discharge of Mr. Lorman due to accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On January 23, 1997, a side collision occurred at a crossover switch at the East End of the Saskatoon Yard. On February 07, 1997 the Company conducted an investigation. Subsequently, the Company assessed forty (40) demerits to Mr. Lorman's record which resulted in discharge from Company service for accumulation of demerits (70) effective February 20, 1997.

The Union contends that the investigation held on February 07, 1997 was not conducted in a fair and impartial manner and article 117 of agreement 4.3 was not complied with, also, the discipline assessed to Mr. Lorman be removed and that he be reinstated with full compensation and his record made whole.

FOR THE COUNCIL: **FOR THE COMPANY:**

(SGD.) M. G. ELDRIDGE **(SGD.) J. B. DIXON**

for: GENERAL CHAIRMAN **for: SENIOR VICE-PRESIDENT, CN RAIL**

There appeared on behalf of the Company:

K. Morris – Labour Relations Officer, Edmonton

J. B. dixon – Assistant Manager, Labour Relations, Edmonton

J. S. Edgar – Assistant Superintendent, Transportation, Melville

And on behalf of the Council:

D. Ellickson – Counsel, Toronto

M. G. Eldridge – Vice-General Chairman, Edmonton

R. S. Donegan – Local Chairman, Saskatoon

A. Lorman – Grievor

-

AWARD OF THE ARBITRATOR

The evidence discloses that the grievor was involved in a side collision in the Saskatoon Yard on January 23, 1997. The collision occurred at a crossover switch which, unbeknownst to the grievor, was lined in such a way as to carry his movement southward off the north lead, onto the centre lead, which was occupied by another movement, train 114.

The facts bearing on the grievance are not in substantial dispute. The grievor, working with Assistant Conductor T. Pastl, was utilising belt pack technology to transfer a consist of twenty-four hopper cars powered by a robot engine and a single lead locomotive. It appears that the consist was stopped on the centre lead, opposite the yard office in the Saskatoon Yard shortly before the collision. At that point the grievor detrained to line a crossover switch to allow his movement to go from the centre lead to the north lead. Assistant Conductor Pastl was then in the yard office. According to the grievor's testimony he would, from that position, have normally had a clear view towards the visual target of crossover switch CX04, which lies further east and controls a crossover movement from the north lead back to the centre lead. It does not appear disputed that at the time in question the target of the switch showed a yellow indication, meaning that it was lined for a crossover, and against the intended movement of the grievor's train. According to Mr. Lorman he did not see the yellow aspect of the target, as his view was obstructed by Assistant Conductor Pastl who returned from the yard office towards the head end locomotive, in such a way as to obstruct his line of vision.

According to Mr. Lorman's further account, when both crew members were aboard the head end locomotive, he assumed the conductor's seat, on the south side of the unit. He states that because of the configuration of the locomotive, his view of the north side of the track which lay ahead was obstructed by the hood of the locomotive unit. According to the grievor's account, only Assistant Conductor Pastl had a full

and unobstructed view of the north side of the north lead, and was therefore the only person in a position to see the yellow aspect of the crossover switch target. It is not disputed that Assistant Conductor Pastl was apparently slow in communicating the state of the switch to the grievor. When she did so verbally Conductor's Lorman's full brake application came too late, and his movement crossed back towards the centre lead, colliding with the head end locomotive of train 114.

A substantial part of the Council's position in this grievance is that the disciplinary investigation conducted by the Company was in violation of the obligations contained in article 117 of the collective agreement. That article provides, in part, as follows:

> **117.1** No employee will be disciplined or dismissed until the charges against him have been investigated: the investigation to be presided over by the man's superior officer. He may, however, be held off for investigation not exceeding three days, and will be properly notified, in writing and at least 48 hours in advance, of the charges against him.
>
> **117.2** Employees may have an accredited representative appear with them at investigations, will have the right to hear all the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a copy of the statement taken at the investigation.

The record reflects that the Company did not assign the grievor's own superior officer to preside at the investigation. Although that individual, Assistant Superintendent B.J. Pellerin, did conduct the investigation of Assistant Conductor Pastl, the investigation of the grievor was assigned to Mr. J.S. Edgar, an assistant superintendent from Melville.

It is not disputed that during the course of the investigation, held on February 7, 1997, the grievor, his union representative, Mr. R.S. Donegan, and Mr. Edgar attended at the site of the collision to get an appreciation of the sight lines. The evidence of Mr. Lorman, corroborated by Mr. Donegan, is that upon resuming the investigation Mr. Edgar commented to the grievor that if he was maintaining that he could not possibly see the switch target, he was a liar. According to the grievor's account Mr. Edgar rose from his seat and stood over him on some three occasions during the course of the investigation, accusing him of being a liar. It further appears that on one occasion Mr. Edgar made a comment to the effect that the investigation could continue until midnight if that's what it took to obtain the answers that he wanted. Mr. Edgar does not deny that he accused Mr. Lorman of lying, on one occasion, and that he did make the statement about continuing the investigation until midnight, although he states that he would not have done so.

The evidence further discloses, without contradiction, that Mr. Edgar declined the Union's request to call some three persons as witnesses. One of the individuals the Union sought to call is Locomotive Engineer Tom Murphy. During the course of his statement to Assistant Superintendent Edgar, Mr. Lorman indicated that he wished Mr. Murphy to give corroborative evidence with respect to the obstructed view from the conductor's seat of the locomotive. At question and answer 14 the following response from Mr. Lorman appears:

> **A. 14** ... Due to the design of the 7200 series locomotives, this is of the utmost importance. When using these locomotives as a train or transfer, due to the fact, that from the seats on these units, one cannot see the entire view of the movement area, even more so than on almost any other locomotives. I have a letter here from ... Tom Murphy to substantiate this.

Mr. Edgar refused to allow Mr. Murphy to be called as a witness. In the result, Mr. Lorman was deprived of the ability to obtain independent corroboration of his own account of the obstructed sight line which he experienced in the locomotive. At the arbitration hearing Mr. Edgar testified before the Arbitrator that in his opinion there was no problem whatsoever with the sight line from the seat which was occupied by Mr. Lorman at the time in question.

Upon a review of the foregoing evidence the Arbitrator is compelled to conclude that the objection of the Council with respect to the conduct of the disciplinary investigation in this particular case is well founded. It is well settled in the jurisprudence of this Office that the conditions of a fair and impartial investigation, as reflected in article 117, are mandatory, and that a failure to respect them will result in discipline being found to be void, *ab initio*. In the case at hand there is no explanation provided to the Arbitrator as to why the disciplinary investigation was not conducted by the grievor's own superior officer, Mr. Pellerin, or any other superior officer in the chain of command at Saskatoon. The Arbitrator is not persuaded by the representations of the Company's representatives to the effect that Mr. Edgar would qualify as "the man's superior officer" in the sense contemplated by article 117.1 of the collective agreement. It is not disputed that he is of equal rank with Mr. Pellerin, occupying the same position at the separate terminal of Melville.

From a purposive standpoint, it appears to the Arbitrator that the object of the obligation to conduct the investigation by the employee's superior officer is to ensure a minimum degree of familiarity with the location, equipment, personnel or other general circumstances which might surround a disciplinary incident. It is not, in the Arbitrator's view, a phrase intended to include any member of management who is superior to the employee, regardless of location. While it is not disputed that there may be circumstances where an immediate superior's involvement in the actual facts of an incident would justify the substitution of an outside officer, that circumstance

does not arise in the case at hand. In the result, the Arbitrator must find a violation of the requirement that the grievor be investigated by his own superior officer.

Secondly, it is difficult to view the comments made by the investigating officer, who by his own account on at least one occasion accused the grievor of lying, and threatened to continue the investigation until midnight if necessary, to get the facts, as complying with the standards of a fair and impartial investigation. Obviously, an investigating officer may well have an opinion about the answers provided by an employee, and should be given some latitude to probe unclear answers. However, as a general rule the process of questions and answers must be open-minded and conducted in such a manner as to reflect general impartiality and a withholding of judgement. Unfortunately that did not occur in the case at hand. The Arbitrator accepts the evidence of Mr. Lorman that Mr. Edgar's accusations and threat caused him considerable discomfort and uncertainty.

Concern also arises with respect to the refusal to allow the Council to call Locomotive Engineer Murphy to testify. As is evident from the discussion above, the issue of the sight line from the conductor's seat in the locomotive has an important bearing on the merits of the case against Mr. Lorman. Mr. Edgar was advised that the purpose of Mr. Murphy's testimony would be to support the grievor's position that his view of the switch would have been obstructed because of the configuration of the locomotive. While the Arbitrator is of the view that article 117 did not obligate the Company to call the witness requested by the grievor and his union representative, the failure to do so could put the Company's position in peril, with respect to the merits of any eventual grievance. That issue was touched upon recently in the following terms in **CROA 2920**:

> Counsel for the Brotherhood asserts that the officer conducting the disciplinary investigation violated the standards of a fair and impartial investigation, and the obligation to give the Brotherhood an opportunity to ask questions of witnesses, by refusing to call as witnesses certain persons named by the Brotherhood. The Arbitrator cannot agree that the circumstances disclose a violation of article 73.2. The cases relied upon by the Brotherhood, and the interpretation of article 73.2 and similar provisions in other collective agreements rendered by this Office, do not endorse the view that the Brotherhood is free to name persons it chooses as witnesses, and thereby gain the opportunity to ask questions of them in the sense contemplated within the article. Rather, the spirit and letter of the article is that when witnesses are called by the Corporation, to the extent that such persons may give evidence which has a bearing on the employee's responsibility, the Brotherhood is to have a fair opportunity to ask questions. It is of course open to the Brotherhood to suggest witnesses, and it may be that refusal to call a particular witness will be at the Corporation's peril. But that choice remains the Corporation's. …

If it were necessary to resolve this case on its merits, the refusal to allow Mr. Murphy to provide evidence could, in this case, be the basis to draw inferences adverse to the employer.

The Arbitrator appreciates that the conducting of a disciplinary investigation is not the easiest of tasks for a Company supervisor. As Mr. Edgar indicated, he felt somewhat frustrated when, on at least one occasion, the grievor's union representative refused to allow the grievor to answer a question, which in the Arbitrator's view was perfectly proper, on the grounds that the answer might incriminate him. To be sure, there must be some allowance for give and take in the conduct of such a proceeding. There is, however, a line beyond which an investigating officer cannot go, without doing violence to the concept of a fair and impartial investigation. Unfortunately, that occurred in the instant case, to the extent that Mr. Edgar repeatedly referred to the grievor as a liar during the course of his investigation, and, on one occasion, threatened to continue the investigation until midnight to obtain the answers he wanted. He clearly conveyed to the Council, and indeed to the Arbitrator, that he did not carry out the investigation with an open mind and did not exercise a fair reserve of judgement.

For the foregoing reasons the Arbitrator finds that the Company violated the requirements of article 117 of the collective agreement. As a result the discipline assessed against the grievor must be found to be null and void. The grievance is therefore allowed. The demerits assessed against the grievor shall be removed forthwith from his record, and he shall be reinstated into his employment with compensation for all wages and benefits lost.

February 16, 1998 **(signed) MICHEL G. PICHER**

ARBITRATOR