CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3102
Heard in Montreal, Tuesday, 11 April 2000
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

The appeal of discipline on behalf of F. Pietrantonio for an incident occurring on 30 October 1999.

JOINT STATEMENT OF ISSUE:

On 30 October 1999, Mr. F. Pietrantonio was discharged for "Failure to comply with instructions of a Company officer, substandard work performance and violation of CROR General Rule A para. (vi) and (vii) (sic)." Subsequently, the discipline was revised and reduced to a 33 day suspension.

The Union filed an appeal that the discipline was unjust, unwarranted, unfair and excessive.

The Company declined the Union's appeal.

FOR THE COUNCIL: **FOR THE COMPANY:**
(SGD.) **R. J. LONG** (SGD.) **R. BATEMAN**
GENERAL CHAIRPERSON FOR: **SENIOR VICE-PRESIDENT, EASTERN CANADA**

There appeared on behalf of the Company:

R. MacDougall	- Counsel, Montreal
T. Marquis	- Manager, Rail Traffic Control Centre, Toronto
G. Spaetgens	- Supervisor, Transportation, Toronto
M. C. Darby	- Director, Commuter Operations, Toronto
F. ONeill	- Labour Relations Associate, Toronto

And on behalf of the Council:

D. F. Wray	- Counsel, Toronto
R. J. Long	- General Chairperson, Brantford

AWARD OF THE ARBITRATOR

The grievor was disciplined for excessively low work productivity during the course of his tour of duty on October 30, 1999, while employed as yard foreman on the van siding assignment in the south yard of Macmillan Yard. It is further alleged that he failed to comply with the instructions of a Company officer and that he violated CROR General Rule A (vi) and (viii). Although the grievor was initially discharged, his discipline was reduced to a thirty-three day suspension, with reinstatement without compensation effective December 9, 1999.

There are a number of facts which appear uncontroverted. Firstly the initial call to work received by the grievor would have involved him in a time-sensitive intermodal assignment building train 201. When Mr. Pietrantonio indicated that he would require a pilot to assist him in the assignment, his supervisors took the indication that he would not work in an expeditious way, and removed him from that assignment and redirected him towards the assignment on the van siding in the south yard, which was work of a lesser priority.

A monitoring of the grievor's activities during the course of his tour of duty led to the disciplinary investigation giving rise to his eventual suspension. The record indicates that Mr. Pietrantonio did not commence productive work until the passage of approximately seventy minutes from the time he initially reported for his duty time. Part of that delay is attributed to the fact that his access to his locomotive and work location was blocked by a stationary train. Rather than contact the control tower to obtain protection to move through the obstructed area, the grievor simply waited, allowing a substantial delay in the commencement of his productive work.

Subsequently, at 01:20 Mr. Pietrantonio was observed sitting in the locomotive cab, not actively helping with the switching being performed by his yard helper on the ground. He was then instructed by Transportation Supervisor Spaetgens to join his helper on the ground and become active in the switching operation. In fact, the grievor did not comply with that directive until it was repeated to him at 02:00 by the same supervisor. He indicated that he viewed the first instruction as being in the nature of a suggestion or "preference" voiced by the supervisor. In the result, it does not appear disputed that, according to the record of the locomotive event recorder readings, the grievor's belt pack switcher was not put into operation until after 02:00, being some three and one-half hours from the commencement of his shift.

Supervisor Spaetgens reports that in his initial contact with the grievor at 01:20 the grievor indicated to him that he would not switch at speeds in excess of 7 mph, apparently asserting "winter conditions". That speed is clearly substantially below the maximum permissible speed of 15 mph within the yard, a rate frequently utilized in expeditious switching. In fact a subsequent review of the locomotive event recorder confirms that after 02:00 the grievor's unit, when under his control, did not travel at speeds in excess of 7 mph. Further, there is evidence that Mr. Pietrantonio's overall productivity, based on the number of cars switched in the time available, was substantially below the norm. After the grievor became active in switching, the rate of productivity was only 6.9 cars per hour. The evidence also discloses that the grievor and his crew took some forty-three minutes for their lunch break, notwithstanding that a normal period of twenty minutes is allotted for that purpose.

Upon a review of the activities of the evening, and an examination of his productivity, Mr. Pietrantonio was approached at 05:00 by Supervisor Spaetgens- At that point the grievor was again in the locomotive, although it appears that he was there legitimately to deal with a technical problem in the remote control system with respect to the forward motion of the locomotive. Mr. Spaetgens then removed Mr. Pietrantonio from service. Following a disciplinary investigation, conducted the following afternoon and evening, discipline was assessed against him for the reasons related in the joint statement of issue.

The Council takes issue with a number of aspects of the disciplinary investigation. It asserts that it was not conducted in a fair and impartial manner, firstly because the notice of investigation did not specify an alleged violation of Rule A. Secondly it maintains that the investigation was oppressive and arbitrary in that the grievor's request to adjourn the investigation for completion on a later day was denied by the investigating officer and, lastly, that questions put by the Council's representative to management witnesses were improperly ruled irrelevant by the presiding officer.

Upon a careful review of these objections, the Arbitrator cannot find that the facts disclose a violation of the standard of a fair and impartial investigation within the meaning of article 82 of the collective agreement. Article 82.2 reads as follows:

> 82.2 Employees may have an accredited representative to appear with them at investigations, will have the right to hear all of 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.

In approaching this issue it is useful to note the comments of this **Office in CROA 1858,** a case involving these same parties, and the same procedural provision which was then article 4(d) of Addendum 41 to the collective agreement:

> As this Office has noted in the past, investigation procedures such as those contemplated in Addendum 41 are intended to provide an expeditious, fair and open system of fact finding in serious disciplinary cases. The procedure is not, however, intended to take on the procedural trappings of judicial or quasi-judicial hearings. It is not disputed that the person conducting the investigation is entitled to rule upon the relevance of questions put by an employee or his representative. While the explanatory letter to Addendum 41 indicates the understanding of the parties that questions ruled irrelevant will be recorded, and that answers given are also to be recorded, that document does not expressly provide that the Union is entitled to insist upon an answer being given and recorded to a question that has been ruled irrelevant.
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> In the Arbitrator's view it is highly doubtful that the parties intended that the making of an "incorrect" ruling as to the relevance of a particular document or question must vitiate the entire proceeding and nullify any discipline which results from it. Decisions on relevance are judgement calls at the best of times, the correctness of which may well be disputed. The clear thrust of Addendum 41 is that the employees have a right to a fair and impartial investigation. Where rulings as to admissibility or relevance are so egregious as to demonstrate a departure from that minimal standard, it may well be that a violation of the requirements of Addendum 41 will be established.

Dealing with the issue of the alleged violation of CROR General Rule A, the Arbitrator can find nothing in the collective agreement which would require specific notice of a rule whose content might arise during the course of the investigation. The purpose of the provisions of article 82 of the collective

agreement is to give the employee a reasonable understanding of the events which are being investigated for disciplinary purposes. The notice document is not to be given the technical status of a summons in criminal proceedings, nor should undue technicality be brought to bear in its application for the purposes of an investigation. It is clear to the arbitrator that in the case at hand the grievor was fully placed on notice that his slow production and failure to comply with his supervisor's directives on the shift in question would be the subject of the investigation, and that he was not prejudiced in any respect by
questions concerning his understanding and application of Rule A. The case at hand is, in my view, to be distinguished from **CROA 2576, relied** upon by the Council in its submission. That case involved a notice which was so vague as to be of little or no use to the employee in attempting to understand the nature of the charge against him. That is clearly not so in the case at hand.

The Council next challenges the proceedings on the basis that the grievor's request to adjourn the investigation, made on some three occasions in the last hours of the process, were denied by the investigating officer. It appears that the investigation commenced at or about 15:00, and was terminated at 02:00 the following morning. While the eleven hour process was relatively long, it should be stressed that it also involved the examination and cross-examination of witnesses other than the grievor, as well as a number of adjournments, some of which were requested by the Council. While it may be, in a particularly egregious case, that pursuing an investigation for an unduly long period of hours might taint the process from the standpoint of fairness, that is not disclosed to the Arbitrator's satisfaction on the facts at hand. Bearing in mind that the grievor's tours of duty at the time of the investigation involved night work, and that the process was conducted largely within what would otherwise have been his working time, the investigating officer's decision to continue the investigation until its conclusion was not unreasonable or unfair in the circumstances, and did not in my view prejudice the grievor in his rights under article 82 of the collective agreement.

Finally the Arbitrator cannot sustain the argument of the Council to the effect that the investigating officer violated standards of fairness by ruling certain questions to be irrelevant. A number of those questions went, for example, to communications which might have occurred between Company officers, including consultation as to the removal of the grievor from service. Counsel does point to one question put to Mr. Spaetgens with respect to whether the grievor was properly in the locomotive at 05:00. The presiding officer ruled the

question to be irrelevant. The question would not be irrelevant if the grievor's discipline might stand or fall based on his precise activity at 05:00. The evidence of the Company, through Mr. Spaetgens who was in attendance at the arbitration hearing, is to the effect that the decision to remove the grievor from service was in fact made before he was encountered at 05: 00. While it appears true that Mr. Spaetgens' statement during the course of the investigation reflects his own view that the grievor being in the locomotive at 05:00 was in contravention of his earlier directive to him to work on the ground, it is far from clear that the discipline assessed against the grievor was based on that incident in any substantial part, even though it appears clear that the grievor's supervisor was not pleased with his presence on the locomotive when he proceeded to approach him for the purpose of removing him from service. In the result, the Arbitrator cannot find that the rulings as to relevance made by the investigating officer were such as to deny the grievor a fair and impartial investigation.

Nor can the Arbitrator sustain the Company's finding that the evidence discloses a violation of Rule A by the grievor. On its face that rule requires that when in doubt, an employee is to seek clarification as to the meaning of any rule or instruction. There is nothing in the material before me to confirm that the grievor was ever in any doubt as to his instructions, although it would appear that he was in error with respect to his understanding of them. For these reasons I am not persuaded that the allegation with respect to the violation of Rule A is made out. I am, however, satisfied that the grievor did render himself liable to discipline for failing to follow the instructions of his supervisor, and for failing to work in an efficient and productive manner during the course of the tour of duty which became the subject of the investigation. Nor can I sustain the Council's suggestion that the incident at 05:00 must be proved to be a culminating incident for just cause to be established. I accept the submission of counsel for the Company that the employer was entitled to look at the whole of the evening's performance as a basis for discipline, as indeed it did.

The grievance therefore resolves itself on the issue of just cause and the measure of discipline which is appropriate in the circumstances. The evidence discloses that on prior occasions Mr. Pietrantonio had been disciplined or counselled for poor productivity. Specifically, he was assessed twenty demerits in November of 1997 for excessively slow work and was investigated or counselled for similar problems on some three other occasions. In addition, he was assessed fifteen demerits for verbally abusing a supervisor on September 22, 1998.

It is common ground, however, that his disciplinary record stood at fifteen demerits at the time of the investigation leading to the grievor's eventual suspension for a period of thirty-three days. The Arbitrator has concerns with the severity of that penalty, even accepting that there is an element of recidivism in the grievor's conduct. Allowing for the normal overtime earnings which the grievor has a pattern of achieving, a thirty-three day suspension is tantamount to a denial of earnings in the amount of approximately $10,000. While the Arbitrator has no difficulty with the Company resorting to suspensions as a means of progressive discipline, particularly in the case of an employee who has not responded to the assessment of demerits on prior similar occasions, a thirty-three day suspension is, on its face, an arguably harsh response for what would appear to be the second occasion of formal discipline for slow productivity against the grievor. In my view the assessment of a ten day suspension would, in the circumstances, have been sufficient to bring home to Mr. Pietrantonio the necessity to work in a diligent and expeditious manner.

The grievance is therefore allowed in part, the Arbitrator directs that the grievor's record be corrected to reflect a ten day suspension for "failure to comply with instructions of a Company officer and substandard work performance." The grievor shall be compensated for the difference in wages and benefits lost.

April 14, 2000

MICHEL G. PICHER
ARBITRATOR