CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3356

Heard in Edmonton, Wednesday, July 9, 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION
EX PARTE

DISPUTE:
The violation of the **Canada Labour Code** and the collective agreement including article 117 of agreement 4.3 and discharge of Conductor D.M. Taschuk of Melville, Saskatchewan.

UNION'S STATEMENT OF ISSUE:
On January 31, 2003, D.M. Taschuk was working as conductor on train Q10251-28. During this tour of duty Conductor Taschuk received a Hot Box Detector message informing him of a hot axle. Conductor Taschuk mistakenly used the train journal to determine the appropriate car. He misidentified and checked the wrong car.

A second hot axle alarm was detected some 28 miles later. The proper car was identified and set off.

Upon arrival at Winnipeg, Conductor Taschuk was interrogated by several officers progressing in seniority up to and including CN Vice-President Keith Creel, who berated Mr. Taschuk.

Company officials then approached the Union and advised that if Mr. Taschuk admitted his responsibility and agreed not to demand an investigation and waived his rights under the collective agreement to grieve any discipline assessed he would only receive some sort of deferred suspension.

Mr. Taschuk requested that the process outlined in the collective agreement be followed. After participating in an employee investigation Mr. Taschuk was discharged.

The Union contends that the Company violated the **Canada Labour Code** and collective agreement including procedures involving a fair and impartial investigation, has interfered with the operation of the Union and has improperly disciplined Mr. Taschuk.

Further, the Union contends that, in any event, discharge is unwarranted given the circumstances.

The Union requests that the discipline be removed and the grievor be made whole or, in the alternative and without prejudice, the discipline be significantly reduced.

The Company disagrees.

FOR THE UNION:

(SGD.) R. HACKL
FOR: GENERAL CHAIRMAN
There appeared on behalf of the Company:
A. C. Giroux – Counsel, Montreal
D. VanCauwenburgh – Human Resources Manager, Winnipeg
H. P. Harapiac– Supervisor, Melville
And on behalf of the Union:
D. Ellickson – Counsel, Toronto
R. Hackl – Vice-General Chairperson, Edmonton
A. W.Franko – Vice-General Chairperson, Edmonton
D. M. Taschuk– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that Conductor D.M. Taschuk of Melville, Saskatchewan served the Company for thirty-five years without ever once incurring any discipline. Unfortunately, in the period when he was preparing to commence his retirement, he was involved in two incidents, one of which attracted discipline. The first involved a counselling for failing to comply with General Operating Instruction 5.6. The second involved a failure to comply with General Operating Instruction 5.4, in relation to the detection of a hot axle. For that error he was discharged on March 4, 2003. Thereafter, the Company reinstated him, on compassionate grounds, without pay for the thirty-nine days he was held out of service. He did not resume active service. At that point Conductor Taschuk took the vacation remaining to his credit and retired from the Company on May 31, 2003. The Union asserts that the disciplinary treatment of the grievor was grossly excessive, leaving a disgraceful blemish on an outstanding career record.

The facts in relation to the two incidents are not in substantial dispute. On January 28, 2003 train 111, under the charge of Conductor Taschuk and Locomotive Engineer C. Badowich, passed a hot box detector at mileage 20.4 of the Rivers Subdivision. Because of a test being conducted by supervisors, the train did not then receive a “talker” message from the hotbox detector. In that circumstance Conductor Taschuk should have reduced ensured that Locomotive Engineer Badowich reduced the train’s speed to 15 mph. and advised the RTC of the failure of any talker message, in accordance with item 5.6 of the General Operating Instructions (GOI). The incident did not result in a disciplinary investigation, but in a verbal and written counselling to both Conductor Taschuk and Locomotive Engineer Badowich.

The incident leading to the grievor’s discharge occurred on January 31, 2003. On that occasion his train, Q10251-28, en route from Melville to Winnipeg received a talker message indicating a defect on the 146th axle when passing the hot box detector at mileage 103.1 of the Rivers Subdivision. Contrary to the procedure contemplated in item 5.4 of the General Operating Instructions, after his train was stopped for inspection, Mr. Taschuk used his train journal to calculate the location of the 146th axle. He was unable to find anything irregular and the train proceeded onwards. Some twenty-nine miles eastward the next hotbox detector, located at mileage 74.5 of the Rivers Subdivision again signalled a hot journal on the 146th axle. Locomotive Engineer Badowich brought the train to a stop for an inspection. At that time Conductor Taschuk was advised by the rail traffic controller to inspect a particular car. When he did so it was confirmed that a journal on the car in question was extremely hot, to the point of being on fire. The car was then removed to a siding and the train proceeded. Upon going off duty at the end of that day the grievor was interviewed by Manitoba Zone Superintendent D.W.

Motluk as to the details of the incident, and was spoken to on the telephone by the Company's Prairie Division Vice-President, Mr. K. Creel, who was obviously concerned with the extremely dangerous situation which had occurred.

After the incident Company officials discussed with the Union the possibility of Conductor Taschuk being given a fourteen day suspension, to be deferred should he admit responsibility and forego the option of a formal investigation, without the possibility of grieving any discipline which might result. Conductor Taschuk declined that offer, preferring that the matter be dealt with in the normal course. Following an investigation held on February 27, 2003 Conductor Taschuk was discharged on March 4, 2003 for his failure to comply with General Operating Instruction 5.2(g) and the Note in General Operating Instruction 5.4, "… as previously instructed by a transportation supervisor."

The notation with respect to the instructions of a supervisor relate to discussions between Conductor Taschuk and Supervisor H.P. Harapiac, who rode in the cab of a train with the grievor on or about January 16, 2003, as part of an overall effort to sensitize employees to the need to respect safe operating procedures and adherence to the GOI. The evidence of Mr. Harapiac, which the Arbitrator accepts, is that during the course of his discussions with the grievor on that day he reviewed certain aspects of hot box detectors, including the need to physically count all axles back from the locomotive in the event of a positive hot box signal.

As noted above, Mr. Taschuk was thereafter reinstated and allowed to take his remaining vacation prior to commencing his retirement. The Company asserts that it made that adjustment in the grievor's record "out of pure leniency, in view of Conductor Taschuk's long service record". The Union submits, on the other hand, that the discharge an employee with an unblemished thirty-five year record should not be allowed to stand on the record, in the circumstances.

The Company was asked by the Arbitrator to explain the obviously wide discrepancy between it's initial offer of a two week suspension and it's final decision to discharge Conductor Taschuk. The explanation provided is that between the initial offer and the final decision the Company's officers became aware of the fact that Mr. Harapiac had explicitly instructed Conductor Taschuk in the need to make a specific count of axles in the event of a hot box signal, rather than rely on his train journal to calculate the location of an overheating axle. Mr. Taschuk states that he has no specific recollection of that issue being discussed by Mr. Harapiac, although he does not deny that it might have been among a number of things which were spoken about during the supervisor's ride on his train on January 16, 2003. It appears that Mr. Harapiac communicated the discussions of January 16 in a memorandum submitted to his own supervisors on February 25, 2003, some two days prior to the disciplinary investigation of Conductor Taschuk.

The Arbitrator well appreciates the reasons why the Company, and in particular it's Prairie Region Vice-President, would be extremely concerned about the incident involving train Q10251-28 on January 31, 2003. It is not an exaggeration to say that the grievor's failure to understand and apply GOI 5.4 on that occasion could have resulted in a catastrophic derailment. That said, it remains that the appropriate measure of discipline must be determined on the particular facts of each case.

In the Arbitrator's view, the grievor's error on January 31, 2003 can fairly be analogized to a cardinal rules infraction. Such infractions have typically attracted the assessment of thirty or forty demerits, sometimes coupled with an extensive suspension. However, the gravity of the

discipline assessed in the instant case is entirely without precedent, as admitted by the Company's solicitor.

It is extremely rare for this Office to encounter a running trades employee who reaches the threshold of retirement, after thirty-five years of service, without ever once having incurred so much as a single demerit mark over the employee's entire career. The Arbitrator can appreciate the remarks of counsel for the Union who states that the grievor, now retired, has pursued this matter to arbitration because of the deep personal shame which he feels the recorded discharge brings to his name after thirty-five years of exemplary service.

I am satisfied that the Union's position is compelling. It is, arguably, open to the Company to place all employees on notice that in future the failure to strictly observe GOI 5.4 will result in discharge in all cases. The treatment of Conductor Taschuk, however, represents a radical and unprecedented departure from the standards of discipline administered by the Company for similar and more grievous infractions over a long period of time. Similar rules violations, some involving derailments and collisions, have, in the past, generally been dealt with by the administration of substantial measures of demerits and suspensions (see, e.g., **CROA 2588, 2915, 3166, 3253**), well short of discharge for a single incident.

It is true that discipline can be fashioned, in part, for its deterrent effect on other employees. Nevertheless, arbitral jurisprudence and related court decisions in Canada recognize that the chief purpose of discipline in an industrial setting is rehabilitation. In the Arbitrator's view the assessment of thirty demerits in the case at hand would have been ample to communicate to Conductor Taschuk the seriousness of his error of judgement in failing to adhere to the requirements of GOI 5.4 in his attempt to locate the hot box on his train on January 31, 2003. I form that view in no small part based on the fact that the incident in question, as serious as it might be, involved the first occasion in thirty-five years of service in which the grievor was made the subject of an investigation and discipline for a rules infraction.

The Union also alleges that the Company sought to exercise an unlawful reprisal against Conductor Taschuk for his election to decline the deferred suspension, opting to exercise his collective agreement rights to an investigation, with access to the procedures of grievance and arbitration. It's counsel submits that the Company's motives and actions constitute a violation of the **Canada Labour Code** on the part of the Company. In light of the finding made on the issue of just cause, while I seriously doubt the merits of so grave an allegation, I deem it unnecessary to deal with that issue.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor's record be corrected to reflect the assessment of thirty demerits for his violation of GOI 5.4. He shall further be compensated for the wages and benefits lost by reason of the period he was held out of service.

July 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR