CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3401

Heard in Montreal, Wednesday, 14 January 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION
EX PARTE

DISPUTE:
Assessment of a 20-day suspension to J.S. Kowalchuk for failure to protect work as a Traffic Coordinator.

UNION'S STATEMENT OF ISSUE:
Mr. Kowalchuk was second available on the Vancouver Traffic Coordinators' spareboard on April 22, 2003. He had been advised by the Crew Management Centre that there were two vacancies that evening. Equipped with his cell phone, Mr. Kowalchuk went out for the evening with his wife. Mr. Kowalchuk did not respond when CMC attempted to contact him for a 2030 Yardmaster vacancy. He later discovered that his cell phone battery was dead.

Following an investigation, Mr. Kowalchuk was removed from service, and was ultimately assessed a 20 day suspension.

The Union submits that a suspension is inappropriate given the circumstances and the discipline assessed should be mitigated. The Union further submits that the Company's actions involving the assessment of discipline were inappropriate and as a result the discipline assessed to J.S. Kowalchuk ought to be declared void *ab initio*, and he be made whole.

The Company disagrees.

FOR THE UNION:
(SGD.) R. A. HACKL
FOR: GENERAL CHAIRPERSON
There appeared on behalf of the Company:
S. Zeimer – Human Resources Manager, Vancouver
R. Reny – Sr. Manager, Human Resources, Edmonton
E. Blokzyl – Superintendent, B.C. South, Vancouver
J. Coleman – Counsel, Montreal

And on behalf of the Union:
M. A. Church - Counsel, Toronto
R. A. Hackl - Vice-General Chairperson, Edmonton
B. R. Boechler - General Chairperson, Edmonton
A. Whitfield - Local Chairperson, Vancouver
J. S. Kowalchuk - Grievor

AWARD OF THE ARBITRATOR

It is common ground that on April 22, 2003 Traffic Coordinator J.S. Kowalchuk of Vancouver failed to respond to a call to work off the traffic coordinators' spareboard at Vancouver. The grievor's explanation for the failure was that his cell phone battery was dead. Mr. Kowalchuk was removed from service and following an investigation was ultimately assessed a twenty day suspension.

The material before the Arbitrator discloses that initially the Company took a more serious view of the appropriate disciplinary consequence. At a meeting held on or about May 13, 2003 GVT Superintendent Eric Blokzyl proposed to the grievor, in the presence of his Union local chairperson, that he should sign a Continuing Employment Contract. Mr. Blokzyl explains that he made that proposal in light of the grievor's prior work record, including the assessment of discipline for a prior incident which also involved the invoking of the Rule G By-Pass Agreement. It is common ground that a continuing employment contract must be signed by the Union's general chairperson, and that in fact the Union's officers objected strenuously to the proposed resolution. Mr. Blokzyl apparently left the proposal as an ultimatum to the Union on a take it or leave it basis, giving them some twenty days to consider. In fact, on May 28, 2003 he convened a meeting which he described as intended to inform the grievor and his Union representative that he was being terminated. It appears that, in an unusual step, he had previously faxed a draft discharge form to the Union's local chairperson on May 20, 2003, with an attached notation reading, in part: "Attached is Form 780 for Mr. John Kowalchuk. Regretfully the lack of response from Mr. Kowalchuk, after a week of the contract offer, would leave me to believe that he is not willing to accept our offer of a continuing employment contract. Therefore I am enclosing the paper work if that is the employee's choice."

On the face of it, the conclusion would be drawn that the grievor was to be terminated effective May 12, 2003 in

accordance with the Form 780 attached to the above message. In fact, however, it appears that discussions between the parties led the Company to accept the position of the Union to the effect that the case was not one in which it was appropriate to execute a continuing employment contract of the type which would involve terms concerning ongoing drug and alcohol monitoring. Whatever Mr. Blokzyl's actual intention, at a subsequent meeting, held on May 28, 2003 discussions occurred between Company representatives, being Mr. Blokzyl and Senior Manager, Human Resources Rob Reny, and the grievor, accompanied by his Vice-Local Chairperson, Mr. Dale Bayda. It is not disputed that Local Chairperson Whitfield was then absent on vacation, and that Mr. Bayda was there in his capacity as his replacement.

The unchallenged evidence is that the purpose of the meeting was to terminate Mr. Kowalchuk. The evidence concerning what transpired at the meeting was presented principally by witnesses for the Company. Both Mr. Blokzyl and Mr. Reny relate that at the meeting Mr. Kowalchuk expressed deep remorse and regret for what had occurred and, together with his vice-local chairperson, made a convincing case for a reduction of penalty. According to the unchallenged evidence of the Company's witnesses, based on those representations the two Company officers present caucused separately and returned to indicate their agreement to the grievor's continued employment on the basis of an agreement whereby the time he had been held out of service, totalling some twenty days, would be substituted as a suspension, rather than discharge, for the incident of April 22, 2003. The evidence indicates that the parties then reached an understanding and agreed to sign a document dated May 28, 2003, which reads as follows:

This confirms our meeting held Wednesday May 28, 2003 wherein we discussed your employment status with Canadian National.

Reference your inability to protect work in accordance with the Company's Attendance Management Standards, reference General Notice DST 020 dated May 23, 2003. Accordingly, it is agreed that the time held out of service between the dates May 09, 2003 to May 28, 2003 will be considered a suspension.

Acceptance of this discipline is without precedent and prejudice to either party's position relative to the application of Article 32 of Agreement 4.2.

Following the conclusion of the meeting, Mr. Kowalchuk will be permitted to return to the working board after 0001 hours of May 29, 2003.

Mr. Kowalchuk will not be compensated for time held out of service during this suspension period.

The Company submits that the instant grievance is not arbitrable by reason of the foregoing agreement. Its representative submits that the grievor and his Union representative knowingly accepted the assessment of a twenty-day suspension for the grievor's failure to protect work and that the matter should therefore not be permitted to proceed on its merits. Alternatively, assuming that the matter is arbitrable, the Company submits that on the merits of the dispute the suspension was, in any event, justified.

Counsel for the Union makes a number of arguments with respect to the value to be given to the letter executed May 28, 2003. Firstly he characterizes it as a continuing employment contract of a kind which must be negotiated at the level of the Union's general chairperson. In that regard he stresses that the prior discussion concerning the drug and alcohol oriented contract of continuing employment had been discussed and rejected at the level of the general chairperson, and that it was not then open to the Company to pursue a resolution of the dispute at a lower level of Union office. He further questions the motives of the Company's officers, characterizing the tentative issuing of the Form 780 notice of discharge and the convening of the grievor and his local vice-chairperson to the meeting of May 28, 2003 as tantamount to coercion. Finally, he submits that as the meeting dealt with the imposition of a suspension the matter was ostensibly above the authority level of the local chairperson. In that regard he stresses that under the provisions of article 32 of the collective agreement an appeal against discharge, suspension or demerits in excess of thirty can only be initiated at the level of the general chairperson, at step 3 of the grievance procedure. He therefore submits that in the circumstances the acceptance of a suspension, or conversely the compromising of the ability to grieve a suspension, could only be instituted at the level of the general chairperson. In other words, in counsel's submission the Company's representatives knew, or reasonably should have known, that it was not within the actual or ostensible authority of the local vice-chairperson to agree to a suspension in a manner that would foreclose the Union's general chairperson from instituting a grievance against that suspension.

The Company's representatives submit that the employer was entitled to rely on the representations made by the grievor and his Union representative, Vice-Local Chairperson Bayda, at the meeting of May 28, 2003. With respect to the ability of Union officers to make binding settlements during the course of discussions concerning discipline, the Arbitrator is addressed to a number of reported precedents including **Re ACF Flexible Inc. and G.C.I.U. Loc. 500M** (1989) 8 L.A.C. (4th) 70 (Stewart); **Re Espanola General Hospital and C.U.P.E.** (1991) 21 L.A.C. (4th) 211 (Joyce); **Re A.U.P.E. and U.S.W.A., Loc. 5885** (1991) 23 L.A.C. (4th) (T. Jolliffe); **Re Syndicat national des travailleuses et travailleurs de la Cité des Prairies (C.S.N.) et Centres jeunesse de Montréal** D.T.E. 2003t-600 (Veilleux);

After careful consideration of the facts and the applicable law, the Arbitrator has some difficulty with the positions asserted by the Union. Firstly, I cannot agree with the characterization of the letter of May 28, 2003 as a continuing employment contract, which is a type of document which would admittedly require the signature of the Union's general chairperson, to the extent that it might involve an adjustment in the interpretation of the collective agreement as contemplated under article 31.1. On its face, the letter of May 28, 2003 is substantially less than a continuing employment contract. While its result may be the continuation of the grievor in employment, its substance is his acceptance, with the concurrence of his Union representative, to be subjected to a suspension of twenty days for the incident of April 22, 2003. There are no ongoing conditions, requirements or potential adverse consequences of the kind typically found in a continuing employment contract. The letter of May 28, 2003 is a simple memorandum of settlement of a dispute concerning the appropriate discipline for the incident of April 22, 2003.

Secondly, with respect to the force of the agreement itself, I am left in some difficulty with the evidence adduced by the Union. Firstly, Mr. Bayda was not called as a witness and there is no basis upon which to evaluate his understanding of his authority at the meeting in question, or any communication which may have gone between himself and higher Union officers. The unchallenged submission of the Company is that it is not uncommon for local chairpersons to make settlements of the kind reflected in the letter of May 28, 2003. It is also evident that although Union officers of higher rank learned of the settlement, apparently within a day of its being executed, no steps were taken to object to it until only after the grievor

had been terminated later for a separate allegation of misconduct.

As noted in the award of Arbitrator Stewart in **ACF Flexible Inc.**, the burden is upon the party asserting that there was no proper authority in its representative who purportedly made a settlement. In the case at hand the evidence would indicate, on the balance of probabilities, that Vice-Local Chairperson Bayda, who attended at the meeting in the stead of Local Chairperson Whitfield who was then on vacation, acted with the full normal authority of any local chairperson. The subsequent failure of any higher ranked Union officer to object to the settlement in a timely fashion is significant, given that the day after the settlement was signed the Union's officers admittedly knew that the Company was going forward in reliance upon the settlement document. In that circumstance, even if it should be concluded that Mr. Bayda did not have authority at the time he made the settlement, the failure of higher Union officers to object after the fact must be taken as *ex post facto* acceptance or ratification on their part of the authority in fact exercised by the vice-local chairperson. In summary, Mr. Bayda appeared at the meeting with the ostensible authority of a local chairperson, gave no indication that he lacked the authority to make a settlement, and subsequently the settlement which he made was to all appearances accepted without objection by higher Union officers. In that circumstance, quite apart from any principles of agency, I am satisfied that the Union must be estopped from now raising any objection as to the sufficiency of the settlement document of May 28, 2003. The document clearly purports to settle the dispute concerning the discipline to be given. I am satisfied that it represents an implicit undertaking on the part of the Union not to grieve the suspension. On that basis the Arbitrator must sustain the position of the Company and conclude that the grievance is not arbitrale.

In the alternative, if the matter were arbitrable on its merits, the Arbitrator is far from convinced that the assessment of twenty demerits would not have been appropriate in all of the circumstances. Mr. Kowalchuk has a number of notations on his prior disciplinary record for failure to work as called or scheduled, including the assessment of 15 demerits for such an infraction in January 2001. At the time of the incident in question the grievor's record stood at forty-five demerits. Even if one accepts that Mr. Blokzyl's concerns about the Rule G By-Pass Agreement were misplaced, the fact remains that Mr. Kowalchuk put himself in a position where the assessment of another fifteen demerits would have resulted in his dismissal.

Given that his discipline record contained four prior notations which involved some dimension of lateness, non-attendance or abandonment of his assignment, the case does not reflect a mere isolated case of missing a call, but rather a serious degree of recidivism in time keeping and attendance at work. In these circumstances the Arbitrator would not be disposed, on the merits, to substitute another penalty for the suspension given to the grievor, who might otherwise have faced discharge for the assessment of as few as fifteen demerits, a penalty identical to the fifteen demerits he received in January of 2001 for failing to report for his assignment.

In the result, the grievance is not arbitrable. Alternatively, the suspension which the grievor accepted was reasonable in the circumstances and should not be altered by a board of arbitration. For these reasons the grievance must be dismissed.

January 21, 2004 (signed) MICHEL G. PICHER
ARBITRATOR