CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4083

Heard in Montreal, Thursday, 12 January 2012

Concerning

BOMBARDIER TRANSPORTATION CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

3-day suspension assessed to K. Skeene.

JOINT STATEMENT OF ISSUE:

On July 27, 2011, the grievor, K. Skeene, was involved in an incident involving the operation of a Company vehicle while at work.

Following an investigation and statement held on August 4, 2011, the Company issued a letter of discipline dated August 16, 2011.

It is the Union's position that the investigation in this matter was not conducted in a fair and impartial manner as per the requirements of the collective agreement. For this reason the Union contends that the discipline is null and void and the discipline should be removed from the grievor's record and he be made whole.

The Union further contends that there is no cause for discipline in the circumstances or, in the alternative, that the penalty is excessive.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) G. MACPHERSON
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) A. BROWN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

M. Horvat – Counsel, Toronto
A. Brown – Manager, Human Resources, Toronto
D. Mitchell – General Manager Operations, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
G. MacPherson	– General Chairman, Toronto

AWARD OF THE ARBITRATOR

On the merits of the grievance the Arbitrator is satisfied that the grievor did engage in negligence, and in all likelihood an excess of speed, while driving a Kubota all-terrain vehicle while on duty on July 27, 2011. It is not disputed that the vehicle in question rolled over and suffered some $2,000 in damages.

Notwithstanding the merits of the dispute, the Arbitrator is compelled to give consideration to a procedural objection raised by the Union. Its counsel alleges that the grievor was denied a fair and impartial investigation in accordance with the requirements of article 9 of the collective agreement. In dealing with the issue of notice to an employee of a disciplinary investigation article 9.1(e) of the collective agreement provides as follows:

> 9.1 (e) The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility.

It is common ground that the rolling of the vehicle by the grievor was recorded on the video camera taping system of GO Transit. That video tape, it appears, was viewed by the investigating officer who conducted the statement taken from the grievor. At question 12 the investigating officer states: "The video footage clearly indicates you were in excess of the posted speed limit, how would you explain that?" The Union

representative then objected stating that the Union had not received any high-mast camera evidence, specifically citing article 9.1(e) of the collective agreement. The investigating officer apparently did nothing with respect to that objection and simply continued.

It has long been established that the purpose of a provision such as sub-paragraph (e) of article 9.1 of the collective agreement is to ensure a minimum form of due process. An employee who is accused of misconduct is entitled to know the evidence in the possession of the employer which bears on that accusation. How is that standard met when the investigating officer states to the employee, in effect: “I have viewed a video that shows that you were speeding. You must trust me about that as the video will not be provided to you.”?

In fact the video, which was presented at the arbitration hearing, is far from clear with respect to the speed at which the grievor was travelling, as it is in fact what appears to be a series of still photographs taken at very short intervals. More importantly, it is clearly in violation of the most fundamental notions of due process for the investigating officer to have taken a view of a video which he pronounced as inculpating the grievor without making that video available to the employee and his union or at least arranging for a viewing of it. That is clearly in violation of the minimal standards of article 9.1 of the collective agreement. On that basis alone the grievance must be allowed, and the Arbitrator is compelled to declare that the grievor was denied

a fair and impartial investigation, rendering the discipline against him null and void, *ab initio*.

Secondly, the same conclusion would be sustained with respect to the apparent withholding by the Company of the statement of another employee, Mr. Michael Colangelo. The accident/incident report provided to the Union expressly lists Mr. Colangelo as an employee from whom a statement was taken. At the investigation the Union's representative specifically objected to not having received a copy of Mr. Colangelo's statement, an objection which was effectively ignored by the investigating officer. That error on the part of the investigating officer would also be fatal to the discipline assessed.

While it is not necessary to rule on it, the Arbitrator must also indicate a degree of sympathy for the submission of counsel for the Union to the effect that the investigating officer did not conduct himself in a fair and impartial manner, assuming the role of a prosecutor more than that of a hearing officer. That is reflected, in part, by question 18 which he put to the grievor respecting his explanation that he had been distracted by a wasp in his vehicle. Unfortunately, the question is phrased as follows: "Do you wish to continue using that as an excuse for the event that took place?" Additionally, at question 23 the investigating officer states: "We have already established that you were in excess of the speed limit and NOT driving defensively, were you at least wearing your seat belt?" That was asserted despite the grievor's denial that he was speeding.

Regrettably, I am compelled to agree with counsel for the Union that the tone of these questions, coupled with the withholding of evidence by the investigating officer amply demonstrate that this Company officer simply did not appreciate the standards of due process which he was bound to respect in accordance with article 9.1 of the collective agreement.

For all of these reasons the grievance must be allowed. The Arbitrator finds and declares that the discipline assessed against the grievor is void *ab initio* for the denial of a fair and impartial investigation. The Arbitrator directs that the three day suspension registered against the grievor be stricken from his record and that he be compensated for all wages and benefits, accordingly.

January 16, 2012

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MICHEL G. PICHER
ARBITRATOR