

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2385

Heard at Montreal, Tuesday, 14 September 1993

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Appeal of the discharge of Locomotive Engineer P.C. Hebert, effective 11 March 1992, for violation of CROR Rule 429 at Signal 2153, St. Basile West, Mile 215.3, Napodogan Subdivision, on Wednesday, 24 February 1993, while employed as locomotive engineer on Extra 9671 West.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Brotherhood contends that the grievor was improperly denied access to the Root Cause Analysis Policy implemented by the Company in August 1992 for a two-year period.

The Brotherhood contends that the Company has a contractual obligation to follow the Root Cause Policy in the case of cardinal rule violations.

Application of the policy would have involved the grievor in an analysis of the root causes of the incident, and would have required his participation in an effective problem solving process, with the end product being an action plan and implementation of that plan by the grievor. Proper application of the policy would also have permitted a follow-up to ensure the effectiveness of the action plan.

The Brotherhood submits that the Company is estopped from discharging the grievor. The grievor permitted himself to be subjected to a preliminary interview by the Company, without having authorized representative from the Brotherhood present. The grievor permitted the interview to proceed in this fashion, having regard for and in reliance upon the established practice of the Company conducting a Root Cause Analysis rather than imposing a suspension or discharge for cardinal rule violations.

In addition, the Brotherhood contends that the signal system on the Napodogan Subdivision does not operate with one hundred percent (100%) efficiency. A properly conducted Root Cause Analysis might have revealed certain operational problems with the signal in question.

The Brotherhood submits that the grievor has been subjected to unequal treatment in respect of the penalty imposed. The conductor involved in the same incident received only a ninety (90) day suspension.

The Brotherhood requests that Locomotive Engineer Pierre C. Hebert be reinstated with no loss of seniority, wages or benefits and that the Company conduct the agreed upon Root Cause Analysis in order to ensure a positive and constructive response to the incident.

Alternatively, the Brotherhood submits that, apart from whether or not the Root Cause Analysis policy is found to be applicable, there are mitigating factors which warrant the substitution of a penalty less than discharge.

The Company's position is that Mr. Hebert was properly subjected to a formal investigation and that there was no contractual obligation in regard to the Root Cause Analysis Policy, and that Mr. Hebert warranted discharge based upon the cardinal rule violation and his previous work and discipline record.

FOR THE BROTHERHOOD:**(SGD.) B. E. WOOD****GENERAL CHAIRMAN**

There appeared on behalf of the Company:

W. D. Agnew	- Manager, Labour Relations, Moncton
B. O. Steeves	- Transportation Officer, Moncton
D. W. Coughlin	- Manager, Labour Relations, Montreal
A. J. Lin	- Personnel Officer, Montreal

And on behalf of the Brotherhood:

B. E. Wood	- General Chairman, Halifax
R. Lebel	- General Chairperson, UTU, Quebec
S. Rider	- Witness
S. Shalala	- Witness
P. Hebert	- Grievor

AWARD OF THE ARBITRATOR

At the outset of the hearing the Company raised a preliminary objection with respect to the admissibility of any evidence relating to the Root Cause Analysis Policy applied to cases of cardinal rule violations. It submits that the policy is not part of the collective agreement and cannot be entertained for any purpose in an arbitration in this Office. The Brotherhood's representative submits that the policy was in fact negotiated and finally communicated to the Brotherhood at the national bargaining table, and that it is an implied part of the collective agreement. Alternatively, he submits that the Company should be estopped from denying its application in light of its prior representations to the Brotherhood.

The Arbitrator reserved on the preliminary objection. Upon a review of the material I am satisfied that the Company is correct in its position that the Root Cause Analysis Policy cannot be asserted as though it were a term of the collective agreement between the parties. As its name implies, it is a Company policy, instituted following lengthy discussions with the Brotherhood, the terms of which have not been incorporated into the collective agreement, for reasons which the parties best appreciate. That finding does not, however, preclude the Brotherhood from arguing the discriminatory treatment of employees who are precluded from access to the Root Cause Analysis Policy in cases of cardinal rule infractions, where the facts would justify such an argument.

The Arbitrator is satisfied that this is not a case where the Company has been arbitrary or discriminatory in its decision to proceed by way of discipline against the grievor, rather than by an application of the Root Cause Analysis Policy. The evidence establishes, beyond controversy, that Locomotive Engineer Hebert has two prior cardinal rules infractions on his disciplinary record, one of which led to his discharge in 1987 and his reinstatement, without compensation by an order of this Office (**CROA 1778**). The Arbitrator cannot take exception to the assertion of the Company that it retains the right to proceed to the discipline and, in appropriate cases the discharge, of employees who repeatedly violate cardinal operating rules.

For reasons related in a number of prior arbitration awards in Canada, I am satisfied that the results of a polygraph test taken by the grievor, which the Brotherhood sought to tender in evidence through a polygraph operator, is not admissible. Such tests are not free of error and their results risk great prejudice to the fact-finding process in an arbitration. The use of polygraphs, whether by unions or employers, obviously has further broad ramifications for labour relations generally. Absent more compelling authority than was advanced in this case, their results should not be entertained in this Office. (*Hyatt-Regency Vancouver (1991)*, 23 LAC (4th) 119 (McPhillips); *Brewers' Warehousing Co. Ltd. (1988)* 1 LAC (4th) 110 (Palmer); *Kingsway Transport Ltd. (1983)* 10 LAC (3d) 440 (Brandt); *Canada Post Corporation (1982)* 8 LAC (3d) 60 (Burkett))

On the basis of the evidence before me I am satisfied that the Company has discharged the burden of establishing, on the balance of probabilities, that Mr. Hebert did violate Rule 429 as alleged at signal 2153, St. Basile West on the Napadogan Subdivision. The suggestion raised by the Brotherhood that the signal in question may have been faulty is speculative, and is not consistent with the tests of the equipment made shortly after the

incident by the Company. While it may well be that the grievor's infraction was inadvertent, rather than deliberate, the fact remains that his inattention led to a most serious rules infraction. In light of his prior record, the Arbitrator cannot find mitigating factors which would justify a reduction of the penalty assessed.

For the foregoing reasons the grievance must be dismissed.

17 September 1993

(sgd.) MICHEL G. PICHER
ARBITRATOR