

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3472

Heard in Calgary, Wednesday, 9 March 2005

concerning

VIA RAIL CANADA INC.

and

**TEAMSTERS CANADA RAIL CONFERENCE
(LOCOMOTIVE ENGINEERS DIVISION)**

EX PARTE

DISPUTE:

The appeal of discipline assessed Locomotive Engineer D. Brown of Biggar, Saskatchewan "for violation of CROR Rule 42 while operating as a locomotive engineer on VIA Train No. 1 at mileage 96 of the CN Wainwright Sub on 21st June 2004."

UNION'S STATEMENT OF ISSUE:

Locomotive Engineers D. Brown and D. Gibson were engaged in activities associated with the operation of VIA Train No. 1 on June 21, 2004, being ordered at Biggar for 02:20 on the day in question. The train and engine consist was made up of two (2) locomotives and twenty (20) coaches, en route to Edmonton, AB. At the material time of the alleged incident, Locomotive Engineer Brown was at the controls of the leading locomotive.

The engine crew had in their possession General Bulletin Order 8300, issued to Train No. 1, which included a CROR Rule 42 restriction, beginning at mile post 96 and ending at mile post 101, on the Wainwright Subdivision, with an effective time of 05:30.

Upon the train's arrival approach to the CROR Rule 42 outer limits at mile post 96, the crew engaged in conversation relative to proceeding through same. Both locomotive engineers decided that enough time remained that would have safely allowed them to proceed through the working limits of the CN foreman without the need to contact him via the designated road channel.

The Corporation is of the opinion that Train No. 1 did pass through the working limits without the proper authorization after the CROR Rule 42 took effect and therefore the locomotive engineers were in violation of the rule.

It is the Union's position that the discipline assessed in the instant case is unwarranted when reviewing all the evidence as a whole. Therefore, the Union requests that the forty-five demerits assessed the personal record of Locomotive Engineer Brown be expunged.

In the event that a case of discipline is made out, the Union contends that the assessment of forty-five (45) demerits is excessive and should, moreover, be reduced to reflect the mitigating factors that are present in the instant matter.

The Corporation has declined the Union's grievance.

FOR THE UNION:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

L. Laplante – Sr. Officer, Labour Relations, Montreal
G. Benn – Officer, Labour Relations, Montreal
P. McCarron – Officer – Operations, Edmonton

And on behalf of the Union:

D. E. Brummund – Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

On June 21, 2004, the grievor and fellow Locomotive Engineer Dave Gibson were ordered in straightaway service from Biggar to Edmonton, on duty at 02:20. They received TGBO 8300 setting out that there was a Rule 42 track protection in effect between mileage 96 and mileage 101 of the Wainwright Subdivision, in effect from 05:30 to 15:00.

The evidence discloses that there was no yellow over red restrictive approach signal but that there was, contrary to the contention of the grievor, a red flag. The grievor claimed that according to his watch they entered the limits at 05:26 and, based on their 80 mph speed, had enough time to clear the limits by 05:30. Contrary to that assertion, the employer took statements from five witnesses each of whom stated that the train entered the limits after 05:30, although it must be said that none of the five witnesses gave the identical time. Additionally, two electronic sensors indicated that the locomotive consist entered the limits at 05:36.

The grievor set his watch to the same time as the watch of Mr. Gibson. Mr. Gibson set his watch according to his e-mail. This is not one of the ways listed as a railway approved time source. While the grievor was entitled to set his watch from Mr. Gibson's watch, he could only do so if he had assured himself that Mr. Gibson had obtained the correct time.

In his Q&A, the grievor initially stated that no attempt was made to contact the foreman as they had adequate time to proceed through the limits before the track protection took effect. When advised that the OS log showed the train entering the limits at 05:35 the grievor altered his story to say that the foreman had given them authority to enter the limits before 05:30. This was contradicted by the foreman and a witness who was with the foreman at the time. The evidence indicates that the foreman did give permission to the grievor to continue through the limits but only after the train was already within the limits.

On the basis of the evidence I find that the grievor's train did enter the limits after 05:30 and notwithstanding the presence of a red flag. The grievor claims that according to his watch, set according to the watch of Mr. Gibson, he entered the track limits prior to 05:30 and should not, therefore, be disciplined. While I might consider that a valid reason in some instances, I cannot so find in the instant case. The lack of candour of the grievor regarding the red flag, and his statement that the foreman had given them authorization to pass through the limits, which is problematic given the statements of the foreman and a witness to the radio communications between the foreman and the grievor, cause me to conclude that I cannot trust his statement that the train entered the limits at 05:26. Consequently, discipline is warranted.

The grievor was imposed 45 demerits which the employer acknowledges is at the high end of the scale for a violation of CROR Rule 42. The grievor (since retired) was a long service employee at the time of the incident. He had been free of discipline for some twelve years prior to the incident. As the Union points out, these are mitigating circumstances that should be considered and could result in a reduction of the 45 demerits. However, in the instant case they do not. Rule 42 is a cardinal rule. Violations of this rule can result in significant danger not only to the train crew but to those working within the limits. That there were none at this time does not exclude the possibility. As well, in the instant case, the situation caused a potentially serious hazard to the passengers aboard the train. The above, coupled with the lack of candour of the grievor

and his failure to accept responsibility for the situation causes me to reject the argument that the penalty should be mitigated.

For the foregoing reasons the grievance is dismissed.

March 14, 2005

(signed) M. BRIAN KELLER
ARBITRATOR