

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

CASE NO. 3520

Heard in Calgary, Tuesday, 8 November 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Discipline of 40 demerits issued to Mr. Greg Tymshychyn of Winnipeg while working on assignment PG14 on September 27, 2004 including being sent home at 14:30 and subsequent dismissal on account of accumulation of demerits.

UNION'S STATEMENT OF ISSUE:

On October 29, 2004 Mr. Tymshychyn was issued 40 demerits for rules violations. He also received a Form 104 dated October 29, 2004 dismissing him on account of accumulation of demerits.

Mr. Tymshychyn is a long service employee with 28 years of service. The Union's position is that the quantum of discipline is far too severe in these circumstances and the ultimate result of the discipline (discharge) is also excessive in the circumstances. The Union submits that the situation was exacerbated by the conduct of the Company officer at the scene. Moreover, the Company officer had already decided to send the grievor home even before approaching Mr. Tymshychyn to be reinstated in the grievance procedure.

The Union also believes that there are sufficient mitigating circumstances to warrant reinstatement without loss of seniority or benefits and with a substantial reduction in demerit points.

The Union also seeks compensation for all lost wages from a point deemed appropriate by the Arbitrator.

The Company rejects the position of the Union. The Company does not agree with the Union's assessment of the manager's performance or that there was a safer way to deal with the grievor at the scene in these circumstances. The Company believes that the grievor violated a series of safety rules and cannot be trusted to work in a safe manner.

The Company does not believe that the facts of this case warrant a reduction in the discipline in question nor do the facts as a whole warrant the reinstatement of the grievor under any circumstances.

FOR THE UNION:

(SGD.) D. FINNISON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Cooke	– Manager, Labour Relations, Calgary
J. McPherson	– Labour Relations Officer, Calgary
W. Stekman	– Road Manager, Winnipeg
S. Baker	– Manager, Yard Operations, Winnipeg
S. Cavanaugh	– Service Area Manager, Winnipeg

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. Finnson	– General Chairperson, Calgary
D. Able	– General Chairperson, Calgary
D. Olson	– Vice-General Chairperson, Calgary
A. Singer	– Vice-General Chairperson, Cranbrook
M. Parker	– Local Chairperson, Winnipeg
R. A. Hackl	– Vice-General Chairperson, CN Lines West, Edmonton
G. Tymshchyn	– Grievor

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied that the Company has discharged the burden of establishing that the grievor violated operating rules by crossing over the leading edge of a car in motion and for stepping over the rail, between two cars, while in a subsequent conversation with a supervisor, without obtaining three point protection for his train.

The issue to be determined is the appropriate measure of discipline. The Company assessed forty demerits against the grievor. Given that his prior record stood at forty demerits for an incident of sexual harassment (see **CROA&DR 3529**), the grievor was discharged for the accumulation of eighty demerits.

Upon a careful review of the entire record, the Arbitrator is persuaded by the argument of the Union that there are mitigating factors which suggest that the discharge of the grievor was excessive in the circumstances. At the time of the incident giving rise to his discharge the grievor had close to twenty-eight years of service with the Company. While his record is not free of any prior discipline, the Arbitrator is inclined to agree with the submission of counsel for the Union that the overall record does not disclose an employee with a long or consistent record of rules infractions. In the circumstances, and having regard to the seriousness of the rules violation which prompted his termination, the Arbitrator is satisfied that this is an appropriate case for reinstatement, albeit without compensation.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost and without loss of seniority. The period of time between the grievor's termination and his reinstatement shall be recorded as a suspension for the rules infractions committed on September 27, 2004, and his record shall stand at 40 demerits.

November 14, 2005

(signed) MICHEL G. PICHER
ARBITRATOR