

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

CASE NO. 3579

Heard in Montreal, Thursday, 14 September and Wednesday, 11 October, 2006

Concerning

VIA RAIL CANADA INC.

and

**TEAMSTERS CANADA RAIL CONFERENCE
EX PARTE**

DISPUTE:

Discipline and discharge of Locomotive Engineer Zennon Mysakowec.

UNION'S STATEMENT OF ISSUE:

On August 24th, 2005 during a yard movement prior to departure, Locomotive Engineers Mysakowec and Rainford were involved in a minor derailment of the last coach of train 90's equipment at Niagara Falls. The coach was cut off and the train proceeded in revenue service incurring a delay.

Several weeks later Engineer Rainford was called to attend a hearing on October 5th, and Engineer Mysakowec attended his on November 1st. Both men explained details of the occurrence to the best of their recollection based on the evidence before them.

Engineer Rainford accepted responsibility for the derailment as he was in charge of removing the derail and was disciplined. Engineer Mysakowec explained his recollections during the incident and was disciplined and discharged for accumulation of demerit marks.

The Union appealed the discipline and requested a copy of the grievor's discipline record which contained previous discipline in dispute. The TCRC noted the discrepancies in previous discipline dates and CMC records including the severity of discipline leading up to the discharge.

Further, the Union observed that the discipline assessed to his record in 2004 was not issued in a timely manner in accordance with article 20.4.

The parties have been unable to resolve the grievance.

FOR THE UNION:

(SGD.) J. TOFFLEMIRE
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

- A. Richard – Senior Officer, Labour Relations, Montreal
- E. J. Houlihan – Director, Labour Relations, Montreal
- G. Selesnic – Manager, Operations,
- G. Benn – Officer, Labour Relations, Montreal

And on behalf of the Union:

- C. Morrison – Counsel, Ottawa
- J. Tofflemire – General Chairman, Stratford
- M. Grieve – Local Chairman, Toronto

AWARD OF THE ARBITRATOR

At the outset there is a dispute between the parties concerning the correct status of the grievor's disciplinary record prior to the incident of August 24, 2005. The Corporation maintains that the grievor's disciplinary record stood at forty-five demerits as of the time of the derailment in Niagara Falls on August 24, 2005. Twenty-five of those demerits were attributable to the assessment of discipline following two investigation hearings which were concluded in September of 2004. Those hearings involved the grievor's alleged failure to report for work on August 8, 2004 as well as his poor work record and attendance over the year 2004, to that time. The undisputed assertion of the Union is that the Corporation issued the twenty-five demerits by means of a notice dated October 19, 2004. As that notice is dated thirty-four days after the final investigation hearing, the Union argues that the Corporation could no longer assess discipline by reason of the time limits established in article 20.4 of the collective agreement. The Union grieved that discipline. Article 20.4 reads as follows:

20.4 A hearing shall be held and the locomotive engineer advised in writing of the decision within twenty-eight calendar days from the date of the locomotive engineer's statement, unless as otherwise mutually agreed. No discipline will apply if the discipline is not assessed within 28 days from the date the locomotive engineer's statement is completed; however, when a Corporation Officer requests an extension in time limits, such extension shall not be unreasonably withheld. In addition, should locomotive engineers be absent from service on the last day for the Corporation to render a decision, such as due vacation, illness, etc., the time limits will be automatically extended by seven days beyond the date the locomotive engineers return to service.

The Arbitrator is not persuaded by the Union's argument. In the case at hand the automatic extension of seven days did apply as the grievor was absent and unavailable for service until such time as the notice was mailed to him. The record also discloses that the grievance was not progressed beyond Step II. As a result, it must be deemed settled, by the operation of article 21.4 of the collective agreement. His record therefore stood at forty-five demerits.

As regards the incident of August 24, 2005, the Corporation assessed twenty demerits against the grievor for violating operating rules by not performing a complete and proper brake test before moving his train consist into the station at Niagara Falls. It also assessed a further five demerits for his failure to ring the engine's bell, in violation of rule 13 of the CROR. Upon a review of the evidence the Arbitrator does not find that the assessment of that discipline was disproportionate or unreasonable in the circumstances. The failure to perform a proper brake test when taking charge of a train is a serious rules infraction. Given the grievor's record of some previous rules infractions, the assessment of twenty demerits was not unreasonable. Nor do I consider

it unreasonable to have assessed five demerits against Mr. Mysakowec for failing to operate his locomotive's bell when he was under an obligation to do so.

As is evident from the foregoing the twenty-five demerits so assessed would have placed the grievor in a dismissible position, as his record properly stood at forty-five demerits. However, I am satisfied that this is an appropriate case for a reduction in penalty by the exercise of the Arbitrator's discretion under the **Canada Labour Code**. Given the length of the grievor's service, dating back to 1981, the substitution of a suspension for the period held out of service is appropriate. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with no compensation for wages and benefits lost. His disciplinary record shall stand at forty-five demerits.

October 16, 2006

(signed) MICHEL G. PICHER
ARBITRATOR