

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

**CASE NO. 3653**

Heard in Calgary, Tuesday, March 11, 2008

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of 20 demerits and subsequent dismissal for an accumulation of demerits to Yard Foreman Kevin Barnabe of Calgary, Alberta.

**JOINT STATEMENT OF ISSUE:**

On April 12, 2005, Yard Foreman Kevin Barnabe was assessed 20 demerits for his alleged "Failure to be attentive in your duties as Yard Foreman and your failure to remove a derail from the route to be used causing a derailment of equipment at or near Hansen's Auto Compound at or near Ogden, Alberta on February 24th, 2005 a violation of CROR 104.5 (a) & (b), Calgary, Alberta."

The Union's position is that the investigation was not fair and impartial and the discipline and discharge was excessive, given the circumstances, and given his age and length of service the deferred discipline option should have been applied. As well, there are mitigating circumstances related to his health and other personal issues that contributed to his overall discipline record that should have been taken into consideration.

The Union seeks reinstatement of Yard Foreperson Barnabe without loss of seniority and benefits and with payment of lost wages resulting from his discharge. In the alternative, the Union seeks the grievor's reinstatement without loss of seniority on such terms as the Arbitrator see fit.

The Company has denied the Union's request.

**FOR THE UNION:**

**(SGD.) D. OLSON**  
**GENERAL CHAIRMAN**

**FOR THE COMPANY**

**(SGD.) C. AYTON**  
**FOR: ASSISTANT VICE-PRESIDENT, OPERATIONS WEST**

There appeared on behalf of the Company:

- |               |   |
|---------------|---|
| A. Azim       | - Manager, Labour Relations, Calgary                      |
| R. Hampel     | - Counsel   |
| R. Wilson     | - Assistant Vice-President, Industrial Relations, Calgary |
| Dr. K. Corbet | - Physician, Occupational Health Services, Calgary        |

And on behalf of the Union:

- |            |                                |
|------------|--------------------------------|
| M. Church  | - Counsel, Toronto             |
| D. Olson   | - General Chairman, Calgary    |
| D. Fulton  | - Senior Vice General Chairman |
| K. Jardine | - Local Chairman, Calgary      |
| D. Edward  | - Local Chairman, Medicine Hat |
| K. Barnabe | - Grievor                      |

### AWARD OF THE ARBITRATOR

The facts in this case are not in dispute. The grievor was working as a yard foreman at Hansen's Auto Compound in the Ogden yards. The engineer and the yard helper were at the head end of the movement. In preparation for entry of the movement into the auto compound, the grievor initially removed a derail from the wrong track. After realizing he had done so, he returned the derail back to its former position on the track. He then walked over to the proper track but forgot to remove the derail from the track where the movement was headed. He then opened the gate to the auto compound and lined the crossovers for access. He confirmed with the engineer that the derail was off, the switches were lined up and the gates open. The grievor's omission to take off the derail on the proper track caused the lead car of the movement to derail. The grievor then instructed the engineer to pull all other cars away from the derailed car to minimize the damage.

The Union submits that the penalty was excessive given that the grievor was suffering from an anxiety disorder and submits that this is a proper case for the Employer to exercise its discretion to impose a deferred dismissal.

As a preliminary matter, the Union claims that the investigation was improper. In that regard, the Union noted at the first step of the grievance procedure that it was the yard manager who, although he did not witness the incident, was the first investigating officer present at the site of the incident and gathered the facts to complete the Government-required MIDAS report. The same yard manager then presided at the grievor's initial statement taken on March 9, 2005. A second supplemental statement was taken by the Manager of Operations on March 23, 2005. The Union alleged for the first time at the second step of the grievance that the Manager of Operations was also involved in the information-gathering on the night of the incident. For these reasons, the Union claims that the grievor did not receive a fair and impartial investigation. The Employer noted that the grievor expressly waived his right to an accredited Union representative at the outset of the March 9, 2005 interview and that he had the benefit of Union representation at the supplemental interview on March 23, 2005. Further, the Employer noted that the grievor did not object to any other aspect of the investigative process during the course of either investigative interview.

The record indicates that the grievor was asked at the initial interview whether or not he wanted an accredited Union representative and he declined the offer. Although the Employer did not present a copy of the MIDAS report to the grievor at the initial investigation of March 9, 2005, it did so at the supplementary on March 23, 2005. In addition, the grievor attended the supplementary investigation with his Union representative where a transcript of the March 9, 2005 investigation was produced along with the MIDAS report. No procedural concerns were raised at the second interview by the grievor or his Union representative. Indeed, the grievor was expressly asked at the conclusion of the second interview "whether he was satisfied with the manner in which the investigation had been conducted" and he replied "yes". It was only at the first step of the grievance procedure that the Union raised a procedural concern over the yard foreman's involvement and then at the second step where the Union suggested that the Manager of Operations who conducted the second statement was also involved "in gathering information the night of the incident". Timely protest of procedural irregularities is important to maintaining the integrity of the investigative process. Whatever irregularities may have occurred in the first interview from the Union's perspective should have been addressed by the Union's representative at the second supplemental.

Further, it appears that the yard manager was "first-on-the-scene" after the derail. The yard manager's role was therefore essentially that of a site investigator. The fact that a Company official like the yard manager acted as a site investigator is an insufficient basis for suggesting that the investigation was not conducted in a fair and impartial manner. There is no evidence, for example, that the yard manager came up with any findings from his investigation of the scene which were contrary to the evidence of the grievor. As noted in **CROA 3015**:

... Nor do I view as irregular the fact that the grievor's Manager Customer Services, Mr. McIlhone, who initially spoke to the grievor on his failure to properly call the employer on April 28 also conducted the disciplinary investigation. This is not a circumstance where the investigating officer was in the position of being a witness providing evidence contrary to the evidence of the employee concerned. ...

I find for the above reasons that the investigation was fair and impartial on the basis of the evidence before me. The Union's preliminary objection is therefore dismissed.

Turning to the main issue, the Union noted that grievor, starting in 1999, experienced a series of personal problems, including marital breakdown, as well as debilitating medical conditions which included a heart attack, hemochromatosis disorder, and related medical conditions. All of these medical conditions contributed, from the

Union's perspective, to the grievor's work performance. There is no indication, nor has the Union argued, however, that the grievor's medical condition was affecting his memory to the point where he was unable to perform his duties. Rather, it is the Union's submission that the grievor's medical condition in the past two years is an important, and indeed overriding, mitigating factor which should be considered in the assessment of discipline.

The Arbitrator notes that grievor received an assessment of ten demerits of 2003 and another forty demerits for a side collision in 2004, bringing his total to the fifty demerits which stood at the time of his termination. This history of ongoing rules violations raises serious concerns for both the safety of the grievor and that of his coworkers. Despite the grievor's unenviable personal circumstances, this is not a case where the Arbitrator can, with confidence, return the grievor to his former position. The Arbitrator notes that the grievor previously received a deferred dismissal for accumulation of demerits in 1998. The grievor has, through the system of discipline, essentially been given a second chance already. He has been on notice since that time, and particularly recently with his record of fifty demerits, that continued safety breaches of the kind that occurred here could lead to his termination. Despite his twenty-two years of service, this is unfortunately not a case where the Arbitrator sees fit to alter the penalty imposed for the incident.

The grievance is dismissed.

March 24, 2008

**(signed) JOHN M. MOREAU, Q.C.**  
**ARBITRATOR**