

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

**CASE NO. 3661**

Heard in Calgary, Thursday, March 13, 2008

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**UNITED TRANSPORTATION UNION**

**DISPUTE:**

Assessment of a seven (7) day suspension to Assistant conductor Duane Kimmie of Calgary, AB for "Failure to comply with GOI section 8, item 12.4 Riding Equipment on Oct. 6, 2004."

**JOINT STATEMENT OF ISSUE:**

On October 6, 2004, the grievor, Duane Kimmie was working as Assistant Conductor on train 566. During the course of this tour of duty, the grievor was riding the leading end of a 58 car movement spotting a Louis Dreyfus facility at Lyalta, AB. When it was apparent to the grievor that the movement was not going to stop in time he advised the Locomotive Engineer to initiate an emergency brake application. The Engineer did so. The grievor was thrown from the end of the cars, causing personal injury.

An investigation was held with respect to this injury, following which, he was assessed a seven day suspension for: "Failure to comply with GOI section 8, item 12.4 Riding Equipment on October 6, 2004."

The Union contends that the Company has failed to demonstrate that any violation of any operating or safety rule has occurred. The Union further contends that the grievor has been disciplined contrary to the *Canada Labour Code*. The Union contends that there is evidence the Company advised the grievor prior to the statement taking place that, in its view, the grievor was responsible and would be subject to discipline. The Union requests that, the discipline be expunged and the grievor be made whole. In the alternative, the Union requests, if the Arbitrator determines some discipline is warranted, that the penalty of a seven day suspension be mitigated on such terms as the Arbitrator sees fit.

**FOR THE UNION:**

**(SGD.) R. S. THOMPSON**

**GENERAL CHAIRMAN**

**FOR THE COMPANY**

**(SGD.) K. MORRIS**

**FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
Doug VanCauwenbergh	– Director, Labour Relations, Edmonton
D. Brodie	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. S. Thompson	– General Chairman, Edmonton
W. Franko	– Vice-General Chairman, Edmonton
S. Hartley	– Local Chairman
D. Kimmie	– Grievor

### AWARD OF THE ARBITRATOR

The grievor was riding the point of the movement on October 6, 2004. It appeared to him that the movement was not going to stop prior to coming into contact with the stop block. On the instructions of the grievor, the engineer initiated an emergency brake application. The grievor was riding, as required, on the side of the lead car, level with the platform. The train experienced significant “slack action” which resulted in the grievor being spun around to the end of the car, losing his grip, and falling to the ground. He was off work due to his injury from October 7 to October 13, 2004, when he returned to modified duties.

The grievor provided his statement on October 20, 2004. He confirmed that he was on the side of the lead car, level with the platform and holding on with both hands. An “off the record” discussion took place during the interview at which time the representatives of each side discussed the positioning of the grievor’s feet in the area designated for pedestals when riding railcars. Subsequent to the “off the record” discussion, the grievor was asked the following questions:

Q 20: Do you understand that your feet must be in the designated foot pedestals when riding railcars except riding tank cars, intermodal flat cars and for the purposes of operating a hand brake?

A. Yes

Q 21: Do you agree that if you had been riding lower on the railcar, with your feet in the designated foot pedestals that you may have been able to de train safely thus avoiding this injury?

A: No.

The grievor also maintained that he had never been previously counselled or advised that the designated foot pedestal on the side of the railcar is the bottom step of the side ladder. The Union also noted that there are no designated foot markers on any of the pedestals leading up to the platform, including the bottom step.

The Union argued that the original assessment of a 7 day suspension amounted to retaliation on the part of the Employer for the grievor’s role on the OH&S Committee. Other than the grievor’s own perception of the events (as expressed by him at the investigation) that his participation on the OH&S Committee resulted in the discipline, there is no supporting evidence arising out of comments made by the Employer at the investigation, or elsewhere, that supports the grievor’s assertion. The Arbitrator therefore dismisses any suggestion that the discipline was motivated by the Employer’s interest in targeting the grievor for his role on the OH&S Committee. Nor, equally, is there any evidence before me to support the union’s allegation that the discipline imposed on the grievor was a veiled attempt for his absence due to a work-related injury in contravention of s. 239.1 (1) of the **Canada Labour Code**.

The issue of the positioning of the grievor’s feet on the foot pedestals is at the heart of this grievance. I do not agree, as the Union suggests, that the grievor’s answer is ambiguous. The reference in the question to whether the grievor “now understands” that his feet must be in the designated foot pedestals is, in my view, an acknowledgement that the grievor understood – as a result of the off-the-record discussion – that his foot was to be secure in the designated foot pedestals on the bottom rung of the steps.

The provisions of GOI, Section 8, Item 12.4 are clear: “Employees must ride on the side of equipment, utilizing the designated foot pedestals and handholds ... with the exception of tank cars and intermodal flat cars”. I accept the Employer’s submission that the rule makes sense because the bottom foot pedestal is the safest location to detrain as it is the closest point to the ground. There is also no evidence before me that the rule was ever challenged by the Union as being inappropriate. Under the circumstances, I find that the grievor was in violation of GOI, Section 8, Rule 12.4 on October 6, 2004 for failing to place his feet at the designated foot pedestal and is deserving of discipline. There are mitigating factors, however, which leads me to consider a modification of penalty.

The grievor has a solid work record. Apart from an incident dating back more than 20 years in 1987, the grievor has only one prior incident where 10 demerits were assessed for work record irregularities in 2002 and a written warning in 2003 for “overexertion”. Given the grievor’s positive record, his length of service of 28 years, his participation as co-chair of the OH&S Committee and, most important, his quick-thinking response in stopping the train on the date of the incident, I am persuaded that the 20 demerits is an excessive disciplinary response.

The grievance is upheld to the extent that the 20 demerit penalty imposed by the Employer for the grievor's breach of the pedestal safety rule is to be erased and substituted with a warning letter indicating that the grievor failed to take appropriate safety precautions on October 6, 2004 by not utilizing the designated foot pedestal, in contravention of the above cited rule.

March 24, 2008

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