

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

CASE NO. 3674

Heard in Montreal, Tuesday, 13 May 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTES:

M. Spain – 15 Demerits issued May 4th, 2007 effective April 15, 2007 – the alleged violation of GOI section 8, 12.7 pertaining to procedures for throwing hand operated switches, while working as the conductor on train M38731-15, on April 15th, 2007.

M. Spain – 10 Demerits issued May 23rd, 2007 effective April 22, 2007 – Delay to train M38731-22 on Sunday April 22nd, 2007, as the conductor you refused to take a ride to the head end of your train in a Company vehicle driven by Supervisor Duckworth.

M. Spain – 10 Demerits issued May 23, 2007 effective April 23, 2007 – for your conduct unbecoming a CN employee on April 23, 2007.

M. Spain – 10 Demerits issued May 23, 2007 effective April 26, 2007 – the delay to your assignment while working M38731-26 due to a partial closed angle-cock on car TTGX 160314.

M. Spain – 20 Demerits and subsequent discharge as a result issued June 01, 2007 effective May 22, 2007 – your failure to comply with CN's PPE policy while employed as conductor on M38731-22, May 22, 2007.

The above noted disputes are submitted jointly and severally to be determined by the Arbitrator. [sic]

UNION'S STATEMENT OF ISSUE:

On April 20, 2007 Mr. Spain attended a Company investigation and subsequent to the completion of the investigation Mr. Spain was assessed 15 demerits for: "The alleged violation of GOI section 8, 12.7 pertaining to procedures for throwing hand operated switches, while working as the conductor on train M38731-15, on April 15th, 2007".

The Union submits that the conclusions reached by the Company do not warrant the discipline assessed considering the extenuating circumstances regarding the alleged incident and request that the discipline be removed from Mr. Spain's record. In the alternative the Union request that such discipline be commensurate to the incident.

On April 30, 2007 Mr. Spain was required to attend a Company investigation and subsequent to the completion of the investigation Mr. Spain was assessed 10 demerits for: Delay to train M38731-22 on Sunday April 22nd, 2007, as the conductor you refused to take a ride to the head end of your train in a Company vehicle driven by Supervisor Duckworth.

The Union submits that the conclusions reached by the Company do not warrant the discipline assessed considering the extenuating circumstances regarding the alleged incident and request that the discipline be removed from Mr. Spain's record. In the alternative the Union request that such discipline be commensurate to the incident.

On April 30, 2007, Mr. Spain was required to attend a Company investigation and subsequent to the completion of the investigation Mr. Spain was assessed 10 demerits for: Your conduct unbecoming a CN employee on April 23, 2007.

The Union submits that the conclusions reached by the Company do not warrant the discipline assessed considering the extenuating circumstances regarding the alleged incident and request that the discipline be removed from Mr. Spain's record. In the alternative the Union request that such discipline be commensurate to the incident.

On April 30, 2007, Mr. Spain was required to attend a Company investigation and subsequent to the completion of the investigation Mr. Spain was assessed 10 demerits for: the delay to your assignment while working M38731-26 due to a partial closed angle-cock on car TTGX 160314.

The Union submits that the conclusions reached by the Company do not warrant the discipline assessed considering the extenuating circumstances regarding the alleged incident and request that the discipline be removed from Mr. Spain's record. In the alternative the Union request that such discipline be commensurate to the incident.

On May 25, 2007, Mr. Spain was required to attend a Company investigation and subsequent to the completion of the investigation Mr. Spain was assessed 20 demerits for: your failure to comply with CN's PPE policy while employed as conductor on M38731-22, May 22, 2007. As a result of the assessment of this 20 demerits Mr. Spain was subsequently discharge for accumulation of 65 demerits.

The Union submits that the conclusions reached by the Company do not warrant the discipline assessed considering the extenuating circumstances regarding the alleged incident and request that the discipline be removed from Mr. Spain's record. In the alternative the Union request that such discipline be commensurate to the incident.

The Union requests that Mr. Spain be exonerated of any wrongdoing. That he be returned to active service, without loss of seniority and compensated all loss wages and benefits.

The Company disagrees.

FOR THE UNION:

(SGD.) G. J. ETHIER
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

- R. A. Bowden – Manager, Labour Relations, Toronto
- B. Hogan – Manager, Labour Relations, Toronto
- F. O'Neill – Manager, Labour Relations, Toronto
- D. VanCauwenbergh – Director, Labour Relations, Edmonton

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- G. Ethier – General Chairperson, Sault Ste. Marie
- T. Redgrift – Local Chairperson
- M. Spain – Grievor

AWARD OF THE ARBITRATOR

As noted, the grievor was the recipient of five issuances of discipline for five separate events which occurred on April 15, April 22, April 23, April 26, and May 22, 2007. These events, taken cumulatively, resulted in the grievor's dismissal for accumulation of demerit points. The parties agreed to have all the incidents dealt with in a single arbitration hearing.

First Incident

15 demerits – GOI section 8, 12.7

The first incident involves the allegation that the grievor, on April 15, 2007, violated GOI, Section 8, 12.7. The grievor, in that regard, was observed throwing a hand switch with one hand on the switch instead of two hands as required under the GOI. The grievor admitted that he was aware of the requirement but failed to use the proper procedure because it was a "bad habit". The grievor further indicated that he had been trained initially to only use one hand but the Company later changed its practice and adopted the two-hand policy. The grievor's disciplinary record stood at ten demerits at the time of this incident. He was assessed a further fifteen demerits on May 15, 2005 for this incident.

The Union takes the position that the penalty was disproportionate to the offence and that the grievor should have been counselled or issued a letter of reprimand. The Company's position is that the nature of the infraction, coupled with the grievor's unenviable record, justified the penalty.

The Arbitrator agrees with the Union's position that this case involves only a technical rule violation. The grievor, by his own admission, agreed that he should have followed the rule of using both hands on the switch. There were, however, no injuries to either the grievor or anyone else. This was also not a critical or safety sensitive breach which warrants sending a message to other employees in a similar position. Rather, this is a case of the grievor, in my view, not adhering to a best practice rather than any serious rule violation. The fifteen demerits imposed by the employer was therefore a disproportionate response to the breach, bearing in mind the grievor's record stood at only ten demerits at the time. The grievance for the incident of April 15, 2007 is therefore granted in part and the fifteen demerits will be substituted with a letter of reprimand.

Second Incident

10 demerits – Delay to train

The second incident involves the grievor's refusal to accept a ride in a Company vehicle driven by a supervisor. The supervisor, in order to save time, regularly transported employees in a Company vehicle from one end of the yard to the other. Besides saving time, the practice also saved the employee from having to walk the entire length of the track or train. On April 22, 2007, the grievor was offered a ride by his supervisor. The grievor responded by requesting that his supervisor prove that he had insurance coverage or provide him with a taxi. His supervisor indicated that no taxi was available and that the grievor should walk the 500 feet to the end of the train. As he was walking, the grievor accepted a ride with a carman who was traveling in the same direction. One month later, on May 23, 2007, the grievor was issued ten demerits for delaying the train as a result of his refusal to take a ride to the head of the train in a Company vehicle driven by his supervisor.

The grievor acted irresponsibly by initially refusing the ride with his supervisor. His request for production of insurance was nothing more than a transparent attempt to incite his supervisor. The grievor, in my view, was insubordinate. But, the grievor was disciplined on May 4, 2007 for train delay and not for being insubordinate. The evidence is that the grievor was only required to walk a distance of some 500 feet and that he was picked up by a passing carman for part of that distance. That evidence, without more, is insufficient for me to conclude that the grievor's actions caused train M38731-22 to be delayed. I find there is no basis for the discipline alleged in the form 780. The ten demerits shall therefore be struck from the grievor's record for this incident.

Third incident

10 demerits – conduct unbecoming a[n] employee

The third incident occurred on April 23, 2007, the day after the grievor refused to ride with his supervisor. On that day, the trainmaster approached the grievor to deliver a Notice to Appear for investigation of the second incident. The grievor indicated that he was tired and annoyed with the payroll office for refusing to pay him a claim

for lost earnings when he attended a rule class. He stated in his interview that he was trying to avoid any confrontation that day which might lead him into even further trouble.

Although the grievor may have been upset over the pay refusal, it was not appropriate for him to refuse the Notice to Appear. The grievor had no reason to take out his frustrations on the trainmaster over his pay deduction issue. His immature behaviour was worthy of some discipline. The assessment of ten demerits on May 23, 2007 was not out of line for the grievor's misconduct under the circumstances. Accordingly, the grievance based on the third incident of April 23, 2007 is denied.

**Fourth incident
10 demerits – delay to assignment**

On April 26, 2007, three days after the grievor refused to ride with the supervisor, a delay occurred on the grievor's train because an angle cock was not fully opened. The angle cock was located approximately 66 cars back from the head end of the movement. The grievor accepted responsibility at his investigation for having forgotten to open the angle cock in fulfillment of his conductor's duties. The grievor was assessed ten demerits on May 23, 2007.

In my view, the grievor was accountable, in his duties as a conductor, for the angle cock and, again by his own admission, failed to perform his duties in that regard. The breach, however, was only a minor violation which did not result in any inordinate delays. The ten demerits was an appropriate disciplinary response under the circumstances and within the range of what an employee could reasonably expect for the omission. Accordingly, the grievance based on the fourth incident of April 26, 2007 is denied.

**Fifth incident
20 demerits & accumulation – failure to comply with CN's PPE policy**

The fifth and final incident leading to the grievor's termination occurred on May 22, 2007. The grievor had completed his duties for the day, except for his paperwork, and was waiting for a ride back to the office. The grievor took off his jacket, which included his reflector vest, and hung it on the car next to the locomotive. He then climbed onto the locomotive where he took off his work boots and changed into his tennis shoes in preparation for the arrival of a taxi to take him to a hotel in Detroit. The supervisor who had arranged to pick up the crew that day observed the grievor without a vest as he detrained from the locomotive. He also observed the grievor wearing tennis shoes instead of his boots and that he was also not wearing his safety glasses. The grievor did not deny the incident and mentioned in his statement that he had taken off his vest because it was extremely hot that day and that he had completed his duties. He further stated that he changed out of his boots for the same reasons. The grievor also indicated in his statement that he had learned from the incident and would not do it again.

The grievor received 20 demerits for the incident on May 23, 2007. Although observing the rules relating to protective safety gear is very important, this incident at the end of the grievor's shift was not worthy of a twenty demerit response. This was once again more of a technical violation without any serious repercussions to the health or safety of the grievor or others. I make that finding even though the grievor should have been more circumspect about his work duties given that he had attended investigations over four separate work-related incidents which occurred just a month earlier in April 2007. Accordingly, the grievance based on the fifth incident of May 22, 2007 is allowed. The twenty demerits issued for this incident will be replaced with a written reprimand.

The result of all the above is that the grievor's discharge of June 1, 2007 is set aside. The grievor, who I note is a long-service employee with 23 years of service, will be reinstated to his position with compensation to be paid for all lost wages and benefits since the date of his termination. His seniority credits are also to be restored and his record shall reflect the penalties previously noted for each incident.

May 20, 2008

(signed) J. M. MOREAU, Q.C.
ARBITRATOR

SUMMARY – CROA&DR 3674

Spain, M. – discipline accumulation – multiple grievances – Arbitrator discusses just cause, reason for discipline & severity – insubordination, delay to train, proper clothing in safety sensitive position – discipline rescinded or reduced – reinstate with compensation – GRIEVANCE ALLOWED

KEYWORDS – 3674

CNR – UTU May 2008 discipline accumulation just cause severity reduced compensation allowed