CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3702

Heard in Montreal, Wednesday, 14 October 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Les Grzesiak of Edmonton, Alberta, for a violation of CRC Rule 429 while employed as Locomotive Engineer on train A41751-26 on October 27, 2007 at Mileage 112.1 (Peers) resulting in a derailment and collision with train M34251 -26.

JOINT STATEMENT OF ISSUE:

On October 26, 2007, Mr. Grzesiak was called to work as the Locomotive Engineer on train A41751-26, departing Edmonton terminal at approximately 2330 traveling west towards Edson, Alberta. The grievor received an advance clear to stop signal at Mile 107.3 (advance to Peers), a clear to stop signal at Mile 109.5 (home signal Peers East), and a stop signal at Mile 112.1 (signal Peers west). Train A41751-26 failed to stop at signal Mile 112.1 and collided with train M34251-26 on October 27, 2007 at approximately 05:05 at the West end of Peers. The grievor was discharged for a violation of CRC Rule 429.

The Union contends that the Company failed to consider a number of mitigating factors, such as but not limited to, the grievor's years of service, discipline record, and fatigue which contributed to this incident. It Is the Union's position that Mr. Grzesiak's discharge is unwarranted and should be expunged, or in the alternative significantly reduced, Mr. Grzesiak should be reinstated without loss of seniority and compensated for any loss of wages and benefits.

The Company maintains that the discipline assessed was warranted and justified, and has declined the Union's grievance.

FOR THE UNION:

(SGD.) T. MARKEWICH
FOR GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) P. PAYNE
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
D. VanCauwenbergh	– Director, Labour Relations, Edmonton
K. Gilks	– Trainmaster, Edson
Wm. Barber	– Engine Service Officer, Edmonton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Vice-General Chairman, Edmonton
B. R. Boechler	– General Chairman, Edmonton
L Grzesiak	– Grievor

AWARD OF THE ARBITRATOR

The violation of CROR rule 429 is not disputed in the case at hand. The material before the Arbitrator discloses that as the grievor's train was moving westbound it was required to meet two eastbound trains at Peers. The plan was for the eastbound trains, train 416 and train 342, to take the siding while the grievor's train, train 417, would move past them on the main line. At 04:57 hours on October 27, 2007, the grievor's train encountered an advance clear to stop signal at mile 107.3, being some five miles from the signal at Peers West, the location of signal 112.1 where the rules infraction ultimately occurred. The signal indication put the grievor and his conductor on notice that they should proceed being prepared to stop at the second signal. They next encountered a clear to stop signal at mile 109.5 at approximately 05:01 hours. That signal indicated to them that they should proceed in a manner that would allow them stop at the next signal.

In fact, at both signals the grievor made no attempt to slow the movement of his train, maintaining the throttle in position 8 and a speed of approximately thirty to thirty-

five miles per hour. At it happens, train 342, the second train which was to take the siding at Peers, had not fully entered the siding when the grievor's train approached. Train 342 consisted of seventy-one cars, approximately forty-seven of which had entered the siding, with the balance of the train still occupying the main line. That movement is the obvious reason for the stop signal then indicated at mile 112.1.

With his train moving at between thirty-five to thirty-seven miles per hour, the grievor finally realized that he was approaching a stop signal beyond which train 342 was occupying the main track. He then initiated an emergency brake application. From the moment the train's emergency brake was applied until the point of collision with train 342 the grievor's train travelled some 475 feet. As the sight line for the signal is some 1,650 feet, it is clear that the grievor obviously approached the stop signal without in fact reacting to it until quite late. The collision caused the derailment of a total of thirty-six cars between train 417 and train 342, including the effective destruction of two locomotives and fourteen rail cars, with the locomotives going onto their sides and down an embankment. Fortunately there were no serious injuries, although the grievor and his conductor did suffer some minor injuries. Additionally, Mr. Grzesiak is said to now suffer from post traumatic stress disorder as a result of the incident. The total damage to equipment and track is estimated at approximately $3,000,000.

Following an investigation, based on its view that the collision and derailment were caused by the grievor's negligence, the Company terminated his services. The Arbitrator can well appreciate the Company's perspective. There is no more cardinal infraction than the violation of CROR rule 429. When the violation of that rule results in

a serious collision and substantial damage, it is not unusual to expect the most serious of disciplinary consequences (**CROA 2791**).

It is trite to say, however, that each case must be determined on its own merits, having regard to all aggravating and mitigating factors. In the Arbitrator's view there are mitigating factors to consider in the case at hand. Firstly, at the time of the incident, the grievor was an employee of thirty-three years' service. Most significantly, he incurred no discipline whatsoever for the first thirty years of his employment. Such prior discipline as Mr. Grzesiak did have on his record was entirely incurred between September 2004 and April 2006. During that time he received twenty demerits for a violation of CROR 429, as well as a written reprimand and twenty-five demerits for missing or declining calls.

The Union notes that the Company introduced a change of policy in October of 2005. It then effectively removed the possibility of an employee simply booking "unfit", apparently because there was some abuse of that privilege among some employees. The notice, dated October 12, 2005, reads, in part, as follows:

> Per CROR General Rules, Running Trades Employees, when reporting for duty must be fit and rested.
>
> Effective immediately Crew Dispatchers will no longer be permitted to book Running Trades employees "unfit" and this status will be removed from the system.

The Union grieved the Company's change of policy, and the Company's response to the grievance, drafted by then General Manager Albert Nashman on October 14, 2005 reads, in part, as follows:

> This is in response to your letter of October 13, 2005. The health and safety of all our employees is CN's number one priority and we would not condone anyone who is not working in a safe manner.
>
> Simply put – a recent review of employees booking unfit clearly showed abuse of the terminology and, in our opinion, nothing short of employees simply not wanting to work.
>
> As you are aware, employees are expected to fulfill their contractual obligation of being available and fit for duty unless they are legitimately ill, have scheduled a personal leave day or have requested and been granted a leave of absence. The removal of the category "unit" does not mean that the Company expects employees accept a call if they are unfit for duty. However, the status of employees that [sic] state they are unfit for duty will be logged as "absent without leave authority" and such instances will be investigated.

Counsel for the Union submits that the change of policy by the Company placed the employees in an invidious position. An employee who might question whether he or she was sufficiently rested to take on an assignment would, it is argued, be reluctant to decline a call knowing that it would result in an investigation and the possibility of discipline. Counsel notes that that is precisely the kind of discipline which Mr. Grzesiak incurred on three occasions in 2005 and 2006.

The Union next points to the specific circumstances of the grievor's call to work on October 26, 2007. Counsel stresses that the grievor held a regular assignment , and that his train had a bulletined start time of 11:00. Counsel points to the record which indicates that in fact between October 14 and October 26 the grievor's on duty time varied substantially from the bulletined time, and ran as late as 20:00 on October 18 and, most significantly he submits, 20:30 hours on October 26, the day the grievor undertook the assignment which resulted in the derailment.

While the Union does not deny that Mr. Grzesiak had some twenty-three hours' rest before the commencement of his assignment on October 26, counsel notes that in

fact he had little real opportunity to rest during the period his call was being delayed. He notes that the grievor was first called at 11:30 hours for a 13:30 on duty time. That was subsequently cancelled, and at 16:30 he was again advised that he would be called for 18:30 hours. In fact, he was finally called at 18:30 for an on duty time of 20:30 hours, with the result that he had already been awake and awaiting the commencement of his assignment some 13-1/2 hours. While the grievor may have felt fit for duty when he did report on the evening of October 26, the Union stresses that at the moment of the collision and derailment Mr. Grzesiak had been awake some twenty-two hours. On that basis it maintains that his explanation that he felt physically disoriented and believed that he was in fact in double track territory as he approached the obviously visible stop signal, it is the only credible explanation for what occurred. In all of these circumstances the Union submits that the factor of fatigue, prompted in part by the irregular calling process which occurred over the course of October 26, 2007 and aggravated by the change in Company policy which would have put the grievor at the risk of a disciplinary investigation if he had decided to book unfit, are factors which must be taken into account in mitigation in the case at hand.

The Arbitrator is compelled to find, on the balance of probabilities, that the grievor obviously was unduly fatigued at the time of the rule's infraction committed by both himself and his conductor, resulting in the collision and derailment. That, however, does not excuse what occurred, as the employee remains the ultimate watchman and guarantor of his or her own physical condition while operating a train in what is obviously a highly safety-sensitive position. I am compelled to conclude that when Mr. Grzesiak did take on his assignment he knew, or reasonably should have known, that he would find himself operating his train later during the course of the assignment at a

point where he would not have slept for close to twenty-four hours. That is a circumstance for which, in my view, he must take responsibility. The Arbitrator accepts, nevertheless, that it was fatigue and not mere recklessness or indifference during the moments before the collision, which was the main causal factor in what occurred. Fatigue and the ability to declare oneself unfit are important issues in railroading, as canvassed in **CROA 1759** and **3330**.

The more compelling basis for mitigation in the instant case, however, must be the extraordinary prior service rendered to the Company by Locomotive Engineer Grzesiak. Thirty years without attracting any discipline whatsoever is an extremely unusual and meritorious record of service. Against that background it is difficult to conclude that the substitution of a lengthy suspension, in all of the circumstances, would not serve a sufficient rehabilitative effect in an employee who has shown himself to be capable of excellent service over so many years. On that basis, I am satisfied that a reduction in penalty is appropriate in the case at hand.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost, and without loss of seniority. His return to work shall be conditioned upon his satisfying all normal requirements of physical and psychological fitness.

October 20, 2008

(signed) MICHEL G. PICHER
ARBITRATOR