

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

CASE NO. 3712

Heard in Montreal, Tuesday, 9 December 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of twenty (20) demerits to Conductor David Timmerman of Biggar, Saskatchewan, for failure to comply with CROR rule 142 (a) (H), 83.1 (g) and CROR rule 110 on train M34051-27 on October 28, 2007, and subsequent discharge for accumulation of demerits in excess of sixty (60).

COMPANY'S STATEMENT OF ISSUE:

On October 28, 2007 the grievor was working as conductor on train M340 operating between Biggar and Watrous Saskatchewan on the Watrous Subdivision. During the tour of duty the grievor's train was stopped at Goodeve station to make a meet with an opposing train. As the opposing train passed the grievor's train at Goodeve he was observed by a transportation supervisor as having failed to detrain from his locomotive consist in order to perform an inspection of the passing train.

The transportation supervisor entrained the grievor's locomotive consist to investigate the grievor's failure to perform an inspection on the passing train when the supervisor uncovered the fact the grievor had also failed to sign his Tabular General Bulletin Orders (TGBOs).

Following a formal investigation, the grievor's discipline record was assessed with twenty (20) demerits for failure to comply with CROR rule 142 (a) (ii), 83.1 (g) and CROR rule 110, and subsequent discharge for accumulation of demerits in excess of sixty (60).

The Union contends that the grievor did sign a copy of the TGBOs; that the Company failed to provide evidence at the investigation that would have disproved the grievor's claim; and that efficiency testing was designed to be educational in nature and not punitive.

The Union requests that the discipline be mitigated.

The Company disagrees.

FOR THE COMPANY:

(SGD.) P. PAYNE

FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

- P. Payne – Manager, Labour Relations, Edmonton
- D. Van Cauwenbergh – Director, Labour Relations, Edmonton
- C. Tytgat – Assistant Superintendent, Calgary

And on behalf of the Union:

- M. Church – Counsel, Toronto
- R. A. Hackl – Vice-General Chairman, Saskatoon
- G. Robinson – Observer
- D. Timmerman – Grievor

AWARD OF THE ARBITRATOR

The grievor is alleged to have violated CROR rules 110 and 142(a)(ii) as well as CROR 83(1)(g). It is not denied that there was a violation of rule 110, as the grievor and his locomotive engineer both failed to conduct a pull-by inspection of a passing train while their own movement was stopped in a siding. That infraction, observed by Assistant Superintendent Cameron Tytgat, is not in fact disputed by the grievor. While he explains that the incident occurred late in a long tour of duty, and that the employees were extremely tired, that does not excuse the failure to comply with a rule obviously dedicated to the fundamental safety of train operations.

The grievor disputes that he violated CROR rule 142(a)(ii). That rule requires that crew members initial and sign the TGBO documents which are given to them by fax transmittal. Essentially they are the train's operating orders which are to be verified and signed by the members of the crew. The evidence discloses that Mr. Tytgat asked to see the TGBOs of both the grievor and his locomotive engineer. According to Mr. Tytgat's recollection he noted that there were no initials and that there was no signature on the grievor's copy of the TGBO. According to his recollection, the locomotive engineer's TGBO documents had one set of initials and one signature. Most significantly, it appears that he stated to Mr. Timmerman that he had not signed his

TGBO, and that Mr. Timmerman in fact made no response to that assertion at the time. It is only later, during the course of the Company's investigation, that Mr. Timmerman offered the explanation that he had in fact co-signed the TGBO which was in the possession of the locomotive engineer, a practice which would be entirely appropriate.

The documents in question are no longer in existence. They could not be taken by Mr. Tytgat as evidence for any subsequent investigation because the train could not operate without them on board. Additionally, in accordance with normal practice, once the train reached its destination terminal the employees were at liberty to discard the TGBO documents, as normally happens. In all of the circumstances, however, the Arbitrator tends to prefer the evidence of Mr. Tytgat with respect to the state of the TGBO in the possession of Locomotive Engineer Collins. If, as Mr. Tytgat relates, he examined both sets of TGBOs and saw only one set of initials and signatures on the locomotive engineer's copy, it is more plausible that he would have put the question which he did to Conductor Timmerman. The fact that Conductor Timmerman made no explanation or response at the time tends to lend credence to the version of events related by Mr. Tytgat. On the whole, therefore, I am satisfied that the grievor did fail to initial and sign any copy of the TGBO which was in his possession in the operation of train M340 between Biggar and Watrous on October 28, 2007.

However, the Arbitrator can find no action on the part of the grievor which can fairly be characterized as a violation of CROR 83.1(g). The essence of that rule is to require that the crew be in possession of a valid TGBO applicable to the territorial limits in which their train or engine will operate. The material before me is clear that the

grievor was in possession of a valid, current TGBO at all material times, and that no violation of rule 83.1(g) is made out on the facts of the case at hand.

The grievor's discipline stood at forty-four demerits prior to the assessment of the twenty demerits which are the subject of this grievance. While it is unclear how the Company might have apportioned the demerits assessed, there are two elements which the Arbitrator considers must be viewed in mitigation of the penalty. Firstly, as noted above, the evidence does not disclose any violation of rule 83.1(g) of the CROR by the grievor. Whatever portion of the twenty demerits assigned against him might be attributable to that must be therefore viewed as inappropriately assessed. Secondly the Company appears to have taken the view that the grievor deliberately attempted to deceive and mislead the employer during the course of the investigation process. On a careful review of the materials, the Arbitrator has some difficulty with that characterization of Mr. Timmerman's conduct. As explained by the grievor, his normal practice is to make trip notes on the back of his own copy of the TGBO, and to initial and sign the other copy of the TGBO which he then gives to the locomotive engineer. I am satisfied that although he may have failed to do so in the case at hand, the grievor may well have believed that he proceeded in accordance with his normal practice on the night in question. Additionally, there is no contradiction between the grievor's statements when he admits that he did not sign his TGBO, and nevertheless asserts that he did sign the TGBO, to the extent that he may have believed that he initialled and signed the locomotive engineer's copy. It does not appear disputed that that would be satisfactory, although, as noted above, the Arbitrator prefers the evidence of Assistant Superintendent Tytgat as to what actually occurred. It is not clear to the Arbitrator that

the evidence in the case at hand confirms a pattern of deliberate deceit or dishonesty on the part of the grievor at any point in time.

The grievor has service with the Company which dates back to 1983, subject to one brief interruption. While the infractions assessed against him in the case at hand are not without significance, they are not cardinal rules infractions which would, standing alone, justify the termination of an employee. On the other hand, the grievor knew, or reasonably should have known, that by reason of his current disciplinary record at the time, he should have scrupulously observed all operating rules.

In the circumstances I am satisfied that this is an appropriate case for reinstatement, albeit without compensation. The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. His disciplinary record shall stand at forty-four demerits, with the period of time between his termination and reinstatement to be registered as a suspension.

December 15, 2008

(signed) MICHEL G. PICHER
ARBITRATOR