

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

**CASE NO. 3724**

Heard in Montreal, Tuesday, 10 February 2009

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Assessment of 25 demerits to Conductor Kevin Gelowitz of Melville, Saskatchewan for violation of CROR Rule 104.5(b) resulting in derailment.

**COMPANY'S STATEMENT OF ISSUE:**

On January 6, 2007, the grievor was working as Yard Conductor on 06:00 yard assignment at Melville Yard with Yard Helper Jeff Yeo and Trainee S. Unterschute. The grievor was in control of the belt pack locomotive when pulling a cut of cars out of track MR11. The grievor detrained from the locomotive consist during a reverse movement and the locomotive consist (7216-1436) was allowed to travel over a derail, resulting in derailment on east end of the B yard lead.

Following a formal investigation, the grievor's discipline record was assessed with 25 demerits for violation of CROR Rule 104.5(b), resulting in derailment of CN 71216 and CN 1436 on "B" lead, Melville Yard, while working as Yard Foreman on the 06:00 yard, January 6, 2007.

The Union contends that the discipline is excessive and must be mitigated to a lesser degree.

The Company has denied the Union's request.

**FOR THE COMPANY:**

**(SGD.) K. MORRIS**

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

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
D. Gagné	– Manager, Labour Relations, Montreal
D. S. Fisher	– Director, Labour Relations, Montreal

And on behalf of the Union:

M. Church	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairman, Edmonton
B. R. Boechler	– General Chairman, Edmonton

### AWARD OF THE ARBITRATOR

The grievor was assigned to pull back a cut of 44 cars in an eastward direction. Yard helper Jeff Yeo was situated on the west end of the cut of cars while the grievor and the conductor trainee were located on the locomotive consist. The grievor was in control of the belt pack movement at the time. The grievor was positioned at the point of the movement when he was contacted by the yardmaster and advised of changes in the destination to some of the cars he was switching. The grievor then detrained while continuing to observe the movement in order to discuss the changes with the yard helper and the conductor trainee. The yard movement continued to travel eastward down the lead track until the locomotive consist derailed when it struck and ran over the derail at the east end of the track.

The grievor readily admitted at the investigation that he failed comply with CROR rule 104.5 (b). The only issue to be resolved is whether the twenty-five demerits imposed by the Company is appropriate discipline.

The Union noted, in speaking to the issue of mitigation, that the grievor's discipline record consists of a previous CROR rule violation in 1994, which also resulted in a derailment, and for which he was assessed 10 demerits. The only other related discipline is for a November 1, 2006 incident when the grievor received twenty demerits for violating rule CROR rule 115. The Union noted that this was the first occasion the grievor had been disciplined for violating CROR rule 104.5 and that an appropriate penalty disposition should range from a written reprimand to 10 or 15 demerits. To further buttress the case for mitigating the discipline, the Union notes the disparity between the grievor and the yard helper who only received a written warning for the same incident. The Union highlighted that both the grievor and the yard helper acknowledged at the investigation that they had failed to comply with the CROR rule 104.5 (b).

The Arbitrator notes that the grievor, to his credit, readily admitted his role in the incident. He stated at the conclusion of his investigation that he took his mind off his assignment, that he regretted what occurred and that he was grateful no one was hurt. The grievor did not attempt to apportion any blame for the incident to his Yard helper but accepted full responsibility for the incident. In weighing the issue of penalty, however, the twenty demerits assessed just a few months earlier, which involved a cardinal rule violation for similar conduct involving inattention to the movement, leaves little room for adjustment of penalty when consideration is given to the principle of progressive discipline. I also place little weight on the fact that the Yard helper received lesser discipline given that the grievor was the key person responsible for the assignment as the Yard foreman. The twenty-five demerits imposed for this CROR rule violation is also within the range of penalties for such offences. I do, however, believe that the grievor's frank admission of his lapse of judgment deserves some favourable consideration. In addition, I note that twelve years have passed between his last rule violation in 1994 and the recent November 2006 CROR Rule 115 violation. Under the circumstances, I am prepared to substitute a penalty of twenty demerits for the incident.

The Company included references to disciplinary events that have occurred subsequent to January 6, 2007 incident. I agree with the Union that it is improper for the Company to refer at arbitration to subsequent rules infractions. The Arbitrator must deal with the circumstances as they stood at the time of the alleged misconduct. The disciplinary record leading up to the incident is relevant but any reference to post-incident disciplinary penalties is not. As Arbitrator Pamela Picher noted in **Re Toronto District School Board and CUPE** (2002) 107 L.A.C. (4th) 92 at p. 95:

Justification for the five-day suspension will depend on the degree of the grievor's misconduct, if any, in the alleged events supporting the five-day suspension, as well as the grievor's record **as it existed at the time of the grievance**. It will not depend on alleged similar misconduct that may have occurred ten months after the five-day suspension. The determination on the five-day suspension that will be made by this Arbitrator would normally be relevant to the issue of penalty in the ten-day suspension. The reverse, however, is not true. Findings respecting the subsequent ten-day suspension are not relevant to the five-day suspension under review. (emphasis added)

The grievance is upheld. The penalty of twenty-five demerits shall be substituted with a penalty of twenty demerits.

February 17, 2009

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