

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

CASE NO. 3743

Heard in Montreal, Wednesday, 15 April 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)**

DISPUTE:

Twenty (20) demerits assessed Mr Kemp for allegedly failing to properly fuel a locomotive which resulted in his dismissal for accumulation of demerits greater than sixty (60).

JOINT STATEMENT OF ISSUE:

On October 10, 2008, the Company conducted an investigation with Mr. Kemp relative to a unit's failure at Stephen's Point Wisconsin. Locomotive GTW5949 ran out of fuel and it is the Company's position that Stephen's Point was two-thirds of the distance the locomotive should have travelled before requiring fuel.

The Union requested comprehensive records and documentation on whether the current fuelling gauges, overflow and sight glasses were in disrepair and subject to the attention in the US operations mechanical department at Step 3 of the grievance process; as well as the actual investigation. These were not provided and the Union contends that the failure to do so resulted in Mr. Kemp being denied a fair and Impartial investigation.

In the alternative, the Union contends that the discipline assessed was severe In the circumstances. The Union requests the discipline be expunged and Mr. Kemp be made whole for lost wages and benefits resulting from the assessment of discipline.

The Company rejects the Union's position.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) D. S. FISHER
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

D. S. Fisher – Director, Labour Relations, Montreal
R. Bateman – Sr. Manager, Labour Relations, Toronto

And on behalf of the Union:

D. Olszewski – National Representative, Winnipeg

AWARD OF THE ARBITRATOR

The grievor acknowledged that he was responsible for fuelling the locomotive when it left the Symington yard. He noted at his investigation that he determines if the unit requires fuel by looking at the sight glass. He further stated that he does not always check the fuel gauge because they are often “broken and unreliable”. In answer to a question as to what he would do if the sight glass was defective, the grievor stated that he would apply the fuel nozzle and start fuelling. He did not have a specific recollection that it was broken on the day of the incident but did say that he tried to fuel the tank 3 or 4 times – but the fuel nozzle stopped almost immediately each time. The grievor was asked whether he then checked to see if there was any fuel in the overflow line and he stated that he did not recall seeing the fuel line on the unit.

The Union maintains that the grievor did not fuel the locomotive from the side alleged by the Company. It maintains that the grievor would most likely have fuelled the locomotive from the side of the locomotive that does not contain a fuel gauge because that is where the fuelling equipment at the Symington Diesel Shop is located. In addition, the arrow sign “BO” (for Bad Order) near the sight glass on the side where the Union submits the locomotive was fuelled supports the grievor’s recollection that the sight glass was defective. The Union submits that the grievor would likely not have seen the BO arrow sign given that the locomotive was likely covered in snow or dirt at the time.

Neither the two sight gauges (one on each side of the locomotive), nor the fuel gauge, nor the overflow line were reported defective on the Corrective Notification Report. Further, given that the grievor was able to recall that the nozzle stopped some three or four times while he was trying to fuel the locomotive, it is doubtful that he would not have commented one way or the other when asked about the fuel gauge at his investigation. His answer in that regard was to simply say that he does not check them “because allot [sic] are broken and unreliable”. The evidence, on balance, is more consistent with the Company’s submission that the grievor was filling the locomotive on the same side the fuel gauge was located. Had the grievor checked the fuel levels properly, he would have noticed that the tank was not full. The grievor should, at the very least, have followed up and checked the overflow line once he felt the fuel nozzle stopping three or four times or conducted a manual check to make sure the tank was full. The grievor, in my view, was being inattentive to his core duties and was deserving of discipline.

The grievor was on the tipping point for termination prior to this incident having accumulated 55 demerits. His recent discipline record includes a suspension from August 28, 2007 to January 23, 2008, at which time the grievor was reinstated pursuant to an agreement between the Company and the Union. The current incident of October 5, 2008 stands as a culminating incident for which the grievor was properly subject to discipline. Given his escalating disciplinary record and the seriousness of the current incident, the assessment of 20 demerits was not a disproportionate disciplinary response. The grievor was recently given a second chance to prove himself after a lengthy suspension but again failed in the performance of his duties. Despite his service record of some 24 years, this is regrettably a case where a further suspension would be inappropriate.

I would also add that this is not a case where the grievor was denied a fair and impartial investigation. The grievor was given the opportunity to make a full answer at the investigation and no procedural objections were raised by the Union. The grievor himself indicated that he was satisfied with the manner in which the investigation was being conducted at Q & A 23. I also agree with the Company that it was not incumbent to provide repair records at the investigation given that the grievor himself was unable to recall any broken equipment and the Corrective Notifications Report provided at the investigation showed that there were no outstanding repair issues recorded against the locomotive.

The grievance is dismissed for all the above reasons.

May 4, 2009

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