

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

CASE NO. 3781

Heard in Edmonton, Wednesday, 10 June 2009

concerning

VIA RAIL CANADA INC.

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of 25 demerit marks to the discipline record of Mr. Gary Bereska and his subsequent dismissal for the reason "for accumulation of demerits (80)".

UNION'S STATEMENT OF ISSUE:

On October 21, 2008, Mr. Bereska was operating Train #2 from Vancouver, B.C. to Mission, B.C. with second Locomotive Engineer J. Forsyth. Manager Train Operations, J. Gosse, entrained at Haig, B.C. and gathered evidence regarding Mr. Bereska's alleged failure to sign the Tabular General Bulletin Orders (TGBO) issued to his train.

Following an investigation, on October 30, 2008, Mr. Bereska was assessed 25 demerit marks for failure to comply with CROR rules 142(a) and 157-(c)(i) while operating Train No. 2 on October 21, 2008 and subsequently dismissed for accumulation of discipline.

The Union contends that Mr. Bereska was disciplined without a fair and impartial hearing in accordance with the provisions of Article 20 of Agreement 1.4.

The Union contends that the Corporation has not proven a violation of CROR Rule 142(a) for which Mr. Bereska was disciplined.

It is the Union's position that Mr. Bereska's discipline is unwarranted and should be expunged, or in the alternative, the discipline should be significantly reduced. Mr. Bereska should be compensated for all loss of wages or benefits.

The Corporation's only response has been acknowledgement of the Union's grievance, which was submitted at Step III of the grievance procedure on January 19, 2009.

FOR THE UNION:

(SGD.) T. MARKEWICH

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

A. Richard – Sr. Advisor, Labour Relations, Montreal

D. Stroka – Sr. Advisor, Labour Relations, Montreal
J. Gosse – Operations, Vancouver

And on behalf of the Union:

M. A. Church – Counsel, Toronto
T. Markewich – Vice-General Chairman, Edmonton
G. Bereska – Grievor

AWARD OF THE ARBITRATOR

This incident involves the grievor's failure to sign and initial the Tabular General Bulletin Orders (TGBOs) on October 21, 2008. There is no dispute that the TGBO is governed by the CROR operating rules and that it indicates the territory and track that a particular train is authorized to travel. As the Corporation explained, the TGBO is similar to a road map but also includes the restrictions and operating instructions that govern a train within specified times while it occupies a specified portion of the track within a given subdivision. A train cannot occupy a track without the proper TGBO.

CROR rule 157(c)(i) requires locomotive engineers to read and understand the entire content of each TGBO assigned to their train. The rule goes on to require the crew member initial each page on their copy of the TGBO. In this case, the TGBOs assigned to the Cascade and Thompson subdivision's were part of the TGBOs assigned to the grievor's train No. 2 which left Vancouver for Kamloops on October 21, 2008. Mr. Gosse was performing an efficiency test on train No. 2 that evening and boarded the train at Haig. He requested copies of the TGBOs from the crew and observed that two of the TGBOs issued for the Cascade and Thompson subdivisions had not been properly signed and initialled by the grievor, who was the operating locomotive engineer assigned to the two subdivisions at the time.

The Corporation maintains that the grievor is responsible for the safety of the crew and passengers on board the train which on that day consisted of two locomotive engines and 20 cars. It further adds that the knowledge of a TGBO is fundamental to avoiding situations of possible or imminent danger and that the grievor's rules violation is a serious infraction deserving of discipline.

The Arbitrator does not take issue with the fundamental importance of the maintaining proper records and particularly the TGBO. The grievor admitted during the investigation that he had not initialled or signed the TGBO as required by CROR rule 157(c)(i). The circumstances in this case provide a basis for the imposition of discipline given the grievor's clear failure to observe the requirements of initialling the TGBOs in two subdivisions, in contravention of CROR rule 157(c)(i).

In terms of penalty, I believe the grievor should be allowed the opportunity to resume his locomotive engineering duties. He is at the twilight of his career with 43 years of service to date. The infraction which led to the twenty-five demerits really amounts to an act of carelessness as opposed to a significant act of negligence. This finding is not to diminish in any way the importance of the TGBO, particularly on a passenger train, and the requirements in that regard set out in the CRO rules. Under the circumstances, however, a period of suspension without pay or loss of seniority is an appropriate disposition. Even with his reinstatement, the grievor nevertheless stands on the precipice of dismissal having accumulated fifty-five demerits. The grievor will find

himself again at the doorstep if he does not pay attention to his duties, including being attentive to the directions of his supervisors.

I would add that I do not find that the investigation conducted by Mr. Gosse was unfair as alleged by the Union. In this instance, Mr. Gosse simply picked up the TGBOs for review during his efficiency audit. The only assessment he was required to make was whether or not the TGBOs were properly signed or initialled as required by CRO rules. He was not in the position of a first-hand observer of events or, as in **CROR 3759**, the keeper of information whose testimony was critical to the matter under investigation. On the other hand, the arbitrator finds the Union does have a point in this case that the grievor should not have been required to answer questions about a violation of rule 142(a) as there was no specific advance notice of the alleged breach of this CRO rule provided in the Notice to Appear as there was, by comparison, for the violation of rule 157(c)(i). However, the lack of notice of rule 142(a) does not vitiate the entire discipline. The grievor was from the outset notified of his alleged breach of rule 157(c)(i) which the evidence has substantiated through these proceedings.

In summary, the grievor is to be reinstated to his employment without compensation or loss of seniority. His disciplinary record shall stand at fifty-five demerits.

June 25, 2009

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