



And on behalf of the Union:

- J. R. Robbins – General Chairman, Sarnia
- J. Lennie – Local Chairman, Niagara Falls
- N. Serieska – Alternate Legislative Representative, Niagara Falls
- R. Archibald – Vice-Local Chairman, Niagara Falls
- B. R. Boechler – General Chairman, Edmonton
- R. A. Hackl – Vice-General Chairman, Edmonton
- J. Noake – Grievor

#### **AWARD OF THE ARBITRATOR**

This grievance concerns two heads of discipline assessed against the grievor, each for thirty demerits. The first involves a delay to his assignment on October 31, 2007 and the second the improper handling of a siding switch on December 7, 2007. As a result of the accumulation of sixty demerits the grievor was dismissed.

The grievor has over twenty-seven years of service. Prior to the incident of October 31, 2007, he had been disciplined on only three occasions over his entire career, having received a written reprimand in 1989 and demerit points on two occasions in 1997.

With respect to the first incident the Arbitrator is satisfied that the grievor's crew was involved in an unnecessary delay of their assignment, substantially occasioned by their desire to take lunch other than on their locomotive, contrary to the order of their supervisor.

Article 29 of the collective agreement governs the taking of meals in road service, including work on a road switcher. It provides as follows:

**29.1** Train Service Employees performing road switcher (including road switcher runs operating in turn-around service beyond a 50-mile radius), work train, snow plow, or snow spreader service, and on regular wayfreight assignments, will have an opportunity of having a meal at a reasonable hour by previously advising the train dispatcher sufficient time in advance. While so occupied, for 20 minutes or less, no deduction will be made; if over 20 minutes, all time will be deducted in computing overtime.

**NOTE:** This paragraph 29.1 shall not apply to train service employees in any other class of service who qualify for and are paid wayfreight rates for a tour of duty pursuant to Article 15.

**Trains will not be delayed nor train operations disrupted solely as a result of stopping train to eat. Employees will report for work suitably prepared for a tour of duty recognizing that the opportunity to take a meal will be governed by the practicality of train operations.**

(emphasis added)

On the basis of the record before me, I am satisfied that the locomotive on which the grievor and his crew were working on October 31, 2007 was properly equipped with water and a microwave oven, even though it may not have been upgraded to the full standard contemplated as the ideal in Addendum No. 86E of the collective agreement. The Arbitrator would have been inclined to find that there was a degree of delay by the grievor and his crew which was deserving of a measure of discipline. I am in some doubt, however, that thirty demerits would have been appropriate with respect to the grievor, given his longevity of service and his disciplinary record prior to this incident. It is, however, unnecessary to comment further on the appropriate number of demerits which might have been assessed given the procedural objection which is made by the Union.

The Union notes that the Company conducted a separate investigation of the locomotive engineer on the grievor's crew, but failed to give notification to the grievor or to his Union representative of that investigation, thereby denying them an opportunity to

be present and to hear what would be said and to put questions to witnesses during the course of that investigation. Article 82.2 of the collective agreement has been amended since 2005 in the following terms:

Add new provision to Article 82 of Agreement 4.16, Article 30 of Agreement 4.2 and Article 117 of Agreement 4.3 to reflect that an Employee under Company investigation or his/her accredited representative shall have the right to attend any Company investigation, which may have a bearing on the employee's responsibilities. The employee or their accredited representative shall have a right to ask any questions of any witness/employee during such investigation relating to the employee's responsibilities.

In the result, the Arbitrator is compelled to conclude that in fact the Company did fail to provide to the grievor a fair and impartial investigation with respect to the assessment of the incident of October 31, 2007 (see e.g. **CROA 1937**).

The Arbitrator also heard an objection from the Union with respect to the same article, based on the fact that the investigation was conducted by the same supervisor who gave the employees their assignment. While I would not be inclined to sustain that objection, as the investigating officer had no real involvement in the actual incident itself, it is unnecessary to comment any further upon it. In light of the established jurisprudence, the failure to give to the grievor notice of the disciplinary investigation and statement of the locomotive engineer is, in and of itself, a substantial violation of article 82 of the collective agreement such as to make the discipline void *ab initio*. On that basis this aspect of the grievance must succeed and the thirty demerits must be removed from the grievor's record.

The next issue becomes the assessment of thirty demerits for the improper handling of the siding switch, which resulted in damage to a CP train. I am satisfied, on the whole of the evidence, that in fact the grievor was responsible for that incident and that there are no mitigating factors which can be called in his defence. While the Arbitrator would tend to agree that the assessment of thirty demerits is on the high side, it is not excessive when consideration is given to the fact that twenty-five demerits were assessed against the same employee in 1997 for a violation of CROR 115 in relation to a derailment. In the circumstances, therefore, the Arbitrator is not inclined to disturb the assessment of thirty demerits.

For all of the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the thirty demerits assessed against the grievor for the incident of October 31, 2007 be struck from his record. The assessment of thirty demerits for the mishandling of a switch on December 7, 2007 must stand.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost, and without loss of seniority.

July 20, 2009

---

**MICHEL G. PICHER**  
**ARBITRATOR**