

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3811**

Heard in Montreal, Wednesday, 14 October 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of discipline and discharge of Locomotive Engineer R. Scott Currie.

JOINT STATEMENT OF ISSUE:

Mr. Currie attended investigations on February 8, 2008 and a supplementary investigation on February 20, 2008 with regard to his tour of duty on Train 247-01 on February 2, 2008.

On March 3, 2008, Mr. Currie's record was debited with 50 demerits for five violations of rules or operating instructions for the tour of duty. Mr. Currie was also notified by an additional form 104 that he was dismissed for an accumulation of demerits under the Brown system of discipline.

It is the Union's position that the discipline is unwarranted. It is also the Union's position that the discipline is excessive. It is further the Union's position that there exist mitigating factors which need to be considered.

The Union requests that Engineer Currie be reinstated without loss of seniority, wages or benefits and that there are mitigating factors which warrant further consideration. In the alternative, and without prejudice to the above, the Union requests that Engineer Currie be reinstated upon such terms as the Arbitrator deems appropriate.

The Company disagrees and the denies the Union's request.

FOR THE UNION:
(SGD.) T. BEAVER
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) A. A. GARCIA
FOR: ASSISTANT VICE-PRESIDENT

There appeared on behalf of the Company:

- B. Deacon – Labour Relations Officer. Calgary
- D. Corrigan – Labour Relations Officer, Calgary
- S. Doyle – Road Manager
- S. Nelson – Manger, Road Operations
- R. Hempel – Counsel

And on behalf of the Union:

- M. A. Church – Counsel, Toronto
- T. Beaver – General Chairman, Oshawa
- J. Campbell – Local Chairman, Toronto
- R. S. Currie – Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. The grievor violated CROR Rule 429 as well as General Rule A.1, and Rules 106, 34 and 35, when his train failed to stop at a stop signal displayed at Mile 12.0 of the Galt Subdivision on February 2, 2008. It does not appear disputed that by reason of inattention as he approached the stop signal the grievor failed to apply his train's brakes in sufficient time to stop, as a result of which the movement passed some twenty-eight feet beyond the stop indication. It is true, as the Company asserts, that the grievor made an emergency broadcast on the train's standby channel but did not make a direct emergency call to the Rail Traffic Controller. However, as reflected submission of the Union, it appears that the Rail Traffic Controller, having apparently overheard the earlier message, immediately contacted the grievor's train and provided Mr. Currie and his crew with a Rule 564 permission which effectively allowed his train to be where it was. It is also common ground that no effort was made by the grievor to arrange for flagging of the adjacent track to warn any potential other train movements of the situation. In fact it appears that there were no other trains in the vicinity and that the grievor's train proceeded within approximately five minutes, without further incident. There can be no doubt but that the grievor's infraction, which included a violation of a cardinal rule,

merited a serious measure of discipline. The Company notes that the conductor was also assessed fifty demerits for the same infraction, a measure which he and his union chose not to grieve.

For the grievor, however, the consequence of the fifty demerit assessment were substantially more serious, as he previously had thirty demerits on his record, as a result of which he was discharged for the accumulation of demerits in excess of sixty. It is true, as the Company asserts, that the grievor's prior disciplinary record is less than enviable. In close to twenty years of employment he was disciplined on seven previous occasions for various rules infractions, including forty demerits issued on May 17, 2006 for his having improperly entered the limits of a foreman's track occupancy permit.

However, there are mitigating factors to be considered. As stressed by counsel for the Union, the grievor had remained discipline free for close to two years before the incident which is the subject of this grievance, and had registered similar lengths of time without discipline in the past. A further mitigating factor, in the Arbitrator's view, is the fact that the Company assigned the grievor to operate train 247-01 immediately after the conclusion of a prior tour of duty which, based on the records filed in evidence by the Union, appears to have exceeded ten hours. While the Company's presentation to the Arbitrator indicates that the grievor was called for train 247-01 departing Hamilton, his away from home terminal, at 05:55 "... shortly after completing an incoming trip to this terminal" the record indicates that the grievor's prior assignment, from Toronto to Hamilton in fact tied up at 06:16. It would appear that there may have been a back dating of the off duty time and the call time for the grievor, apparently in part by himself, to avoid the appearance of any violation of the ten hour work limit. While the Arbitrator draws no conclusion as to the legality of what transpired, the evidence is clear that at the time of the infraction which is the subject of this arbitration the grievor had been

effectively on duty for some fourteen hours and had been awake for approximately sixteen hours. In the circumstances, the Arbitrator finds it difficult to reject the suggestion of the Union that fatigue may have played a role in the grievor's inattention and that the circumstances giving rise to the fatigue did involve the decision of the Company to assign the grievor two back-to-back assignments as it did.

For the foregoing reasons the Arbitrator is satisfied that the grievance should be allowed, in part. It is directed that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. The assessment of fifty demerits shall be removed from the grievor's record, which shall stand at thirty demerits, and a suspension for the period of time between the grievor's termination and his reinstatement shall be substituted.

October 29, 2009

**MICHEL G. PICHER
ARBITRATOR**