

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

CASE NO. 3815

Heard in Calgary, Tuesday, 10 November 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The assessment of ten (10) demerits and dismissal for accumulation of demerits to Cam Flett of Winnipeg, MB, for “violation of CROR 44(e)”.

UNION’S STATEMENT OF ISSUE:

On October 28, 2008, the grievor, Cam Flett, was working a conductor on M31451-22. On that date a supervisor had placed a yellow flag near the track as an “efficiency test” for passing trains. Four trains passed the improperly placed signal and none noticed the flag.

The grievor was required to provide an employee statement with respect to this matter, following which he was assessed ten demerits and dismissed for the accumulation of demerits.

It is the Union’s contention that the “efficiency test” was not conducted in a fair manner, with the flag being improperly installed and displayed in a location where it blended in and could not be easily observed as required by the rule. Further, it is the Union’s position that if in fact any discipline is warranted, the dismissal of the grievor in such circumstances is excessive and improper.

The Union requests that the ten demerits be expunged or substantially mitigated and that the grievor be reinstated and made whole.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. HACKL

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
K. Morris	– Manager, Labour Relations, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton
D. Crossan	– Manager, Labour Relations, Prince George
H. Harapiak	– Trainmaster, Winnipeg

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. Boechler	– General Chairman, Edmonton
R. A. Hackl	– Vice-General Chairman, Edmonton
R. Thompson	– Vice-General Chairman, Edmonton
M. Rutzki	– General Secretary/Treasurer, Edmonton
W. MacLeod	– Local Chairman, Kamloops
J. Dwyer	– Local Chairman, Saskatoon
D. Bolianz	– Local Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses that on October 24, 2008 Transportation Officers Paul Hackett and Harvey Harapiak undertook rules compliance testing for train crews operating on the Rivers Subdivision. To that end they placed a yellow flag, with a reflector, in a position adjacent to the track to monitor compliance with CROA rule 44(e) which deals with "unusual track conditions". Under that rule the surprise appearance of a yellow flag without a GBO related to it requires a train to reduce its speed to ten miles per hour and immediately communicate with the rail traffic controller.

The flag in question was placed outside of the north track of double track some fifty feet east of a public crossing at mile 20.3 of the Rivers Subdivision. In the result, crews, including the grievor's crew, eastbound over that territory would have seen the yellow flag on their immediate left as they proceeded eastward from Rivers to Winnipeg. In fact four separate trains passed the yellow flag in a period of roughly fifty minutes, the grievor's train being the first to do so. Three of the four trains failed to see the flag or to take any action in response to it. In the result, all of the crew members of those trains, some seven employees, were each assessed ten demerits for having violated CROR 44(e).

It appears that virtually all of the employees who were disciplined denied having seen the yellow flag. In that regard the Union stresses, on the basis of photographic evidence, that the location of the flag, in proximity to the level crossing and related structures, including signal bungalows, a scanner, flanger board, radio tower and hydro lines, in addition to the crossing signs and hot box detector scanners, tended to obstruct the view of the flag of the oncoming movement. In essence the position of the Union is that the test was inherently unfair, as evidenced by the fact that fully three of four train crews failed to observe the flag which, its counsel stresses, was of a yellow colour against the background of what appears to be a golden coloured wheat field.

The Union points to a further concern. It notes that following discussions between the Company and the Union the discipline assessed against all of the other employees was removed. In the case of Mr. Flett, however, who found himself dismissed by the accumulation of demerits as a result of the assessment of ten demerits against him, no such adjustment was made. The Union submits that that is, on its face, discriminatory treatment inconsistent with the fair administration of discipline.

The Company denies that the treatment of the grievor was in effect discriminatory. It submits that his prior disciplinary record distinguished him from the other employees who, after a period of several months of discipline free service, were adjudged deserving of the removal of the ten demerits.

The Arbitrator has considerable difficulty with the case as presented by the Company. Firstly, I am less than persuaded that the test was in fact fair. At most, what can be said with respect to the grievor is that his reaction, or failure of reaction, to the yellow flag placed him well within the majority of all employees who encountered it. The fact that the crews of three out of four trains failed to observe the yellow flag in the circumstances in which it was erected does, in my view, tend to support the argument of the Union that it was in fact not sufficiently visible given its proximity to the structures surrounding the level crossing at mile 20.3 on the Rivers Subdivision.

Alternatively, even if it one accepts that the flag was subject to being reasonably viewed, it is difficult for the Arbitrator to accept the alternative treatment afforded to all of the other employees who committed exactly the same infraction as Mr. Flett. In that regard it should be noted that Mr. Flett's discipline was thought by the Company to be at fifty-five demerits following another incident reviewed in **CROA&DR 3814**. In fact as the award in that case now discloses, the events there considered deserved no more than a written reprimand, so that the grievor could not fairly be characterized as having stood at a high degree of discipline at the time in question. While that is obviously not something which the Company could then have known, to the extent that the discipline in question was under appeal, the employer was somewhat at risk in assuming that the grievor in fact stood so close to the point of termination.

When all of these factors are considered, and in particular that the fact that the ten demerits were removed from the records of all other employees who committed the same infraction within a forty-five minute period of the grievor's error, I am satisfied that the discipline cannot stand.

The grievance is therefore allowed. The Arbitrator directs that the ten demerits assessed against the grievor be removed from his record and that, in light of the conclusion expressed in **CROA&DR 3814**, he be reinstated into his employment forthwith, without loss of seniority and with full compensation for all wages and benefits lost, with his disciplinary record to stand at thirty-five demerits.

November 18, 2009

(signed) MICHEL G. PICHER
ARBITRATOR