

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3841

Heard in Montreal, Thursday. 10 December 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the assessment of 30 demerits to Locomotive Engineer S. Van Der Mark for a "Violation of CROR 114B resulting in a run through switch on the LuLu Island Industrial Line during your tour of duty on YLLS02 dated May 26, 2009" and the assessment of a discharge for a "Violation of CN Policy to Prevent Workplace Alcohol and Drug Problems on May 26, 2009 when you refused to take a post accident/incident drug and alcohol test."

JOINT STATEMENT OF ISSUE:

On May 26, 2009, Mr. Van Der Mark was assigned to Yard Assignment YLLS02 when he was unable to stop prior to running through a yard switch. As a result of the run-through switch, Mr. Van Der Mark was required to attend a drug test which he refused to do. Mr. Van Der Mark was then required to attend an investigation into the circumstances surrounding the run-through switch and a second investigation for refusal to attend a drug and alcohol test. Subsequent to the investigations, Mr. Van Der Mark was assessed 30 demerits for the run-through switch incident and a further discharge for failure to attend the drug and alcohol test.

The Union contends that the discipline is unwarranted and excessive and that the Company did not take into account the mitigating circumstances surrounding the run-through switch. The Union further contends that the requirement to attend the drug and alcohol testing was not required and that the request was in violation of its own policies.

The Union requested the Company reconsider the discipline assessed and resulting discharge and either expunge or reduce the discipline and compensate Mr. Van Der Mark for all loss of wages and benefits.

The Company has not responded to the Union's grievance.

FOR THE UNION:

(SGD.) T. MARKEWICH
VICE-GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) D. CROSSAN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
P. Payne	– Manager, Labour Relations, Edmonton
D. Gagné	– Sr. Manager, Labour Relations, Montreal

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. Willows	– General Chairman, Edmonton
T. Markewich	– Sr. Vice-General Chairman, Edmonton
P. Vickers	– General Chairman, Sarnia
B. Boechler	– General Chairman, Edmonton
R. Hackl	– Vice-General Chairman, Edmonton
R. Caldwell	– Sr. Vice-General Chairman, Belleville
R. Allen	– General Secretary/Treasurer, Saskatoon

AWARD OF THE ARBITRATOR

On May 26, 2009, Locomotive Engineer VanDerMark was operating the 07:00 yard assignment from the Greater Vancouver Terminal. During the course of his tour of duty he operated his train through an improperly lined switch by approximately a half car length. It does not appear disputed that the damage to the switch was relatively minimal and that there were no other negative consequences.

It also appears beyond dispute that there is no good explanation for the grievor's failure to avoid the run-through of the switch. By his own account he had a clear view as his locomotive progressed forward towards the switch, a switch he had passed many times before. By Locomotive Engineer VanDerMark's own admission he can give no explanation for how or why he ran through the switch in violation of CROR 114B.

Based on his observation of what appeared to be an inexplicable accident or incident, Trainmaster E. Crump directed the grievor and his conductor to undergo drug and alcohol testing. Locomotive Engineer VanDerMark refused to be tested. During the course of the ensuing disciplinary investigation he stated that he felt that he was being treated as a criminal, that running through a switch is a common occurrence and is not a significant accident or incident which should justify taking a drug and alcohol test.

Following the investigation the Company found that by refusing to undergo drug and alcohol testing Locomotive Engineer VanDerMark violated the Company's "Policy to Prevent Workplace Alcohol and Drug problems". Following the disciplinary investigation which ensued the grievor was assessed thirty demerits for violating CROR 114B and discharge for refusing to take a post accident/incident drug and alcohol test.

In the Arbitrator's view dismissal is overly harsh in all of the circumstances. A highly significant fact to be considered in this case is the grievor's prior service. The unchallenged representation of the Union is that Engineer VanDerMark recorded thirty years of service without incurring any discipline whatsoever. At most, it appears that a single instance of minor discipline was pending in the grievance process. The fundamental position argued by the Union is that in fact the circumstances surrounding the run-through of the switch did not, of themselves, constitute grounds to submit the grievor and his workmate to drug and alcohol testing. As counsel for the Union puts it, the Company violated its own policy.

After careful consideration the Arbitrator has some difficulty with the Union's submission. Firstly, from the standpoint of an accident or incident which would justify requesting an alcohol or drug test, an employee's length and quality of service may simply not be a relevant consideration. What the trainmaster was confronted with in the case at hand was an apparently inexplicable run-through of a plainly visible switch. While the damage in the case at hand was relatively minor, it is well known that running through a switch can cause more serious damage, including a possible derailment. The Arbitrator is not prepared to conclude, as the Union would have it, that the rule violation and accident which occurred was not of such a nature as to justify drug and alcohol testing. Indeed, it would appear that the Company's practice to test in such circumstances is relatively common and is generally acquiesced in by employees.

The issue of substance is the appropriate measure of discipline. As noted in a prior award of this Office, an employee who declines to take a drug or alcohol test in circumstances where it is reasonable that they do so risks the drawing of adverse inferences against him or her. While Mr. VanDerMark may well have declined to take the drug test for the most noble of reasons, there can be no certainty in his employer as to what a test might have disclosed, in light of his refusal. However, a very substantial mitigating factor comes to bear in the instant case, when the issue of outright dismissal is considered. As a running trades employee of some thirty years of service without any discipline whatsoever, the grievor brings a substantial weight of equity to the arbitration table. The summary dismissal of a person of such service for a single incident is unduly draconian in its consequences.

I am satisfied that there can be a substitution of penalty and that it is appropriate for the grievor to be reinstated into his employment. The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for his wages and benefits lost and without loss of seniority.

December 16, 2009

(signed) MICHEL G. PICHER
ARBITRATOR