

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

CASE NO. 3842

Heard in Calgary, Thursday, 10 December 2009

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Assessment of forty (40) demerits to Conductor Jim Turnbull of Winnipeg, MB, for “Violation of CROR Rule 104(k) ... Rule 35” while working as Yard Conductor on March 18, 2006.

UNION’S STATEMENT OF ISSUE:

On March 18, 2006, the grievor, Jim Turnbull was working as yard conductor on the 23:00 Belt Pack assignment. In the course of this tour of duty, the grievor was required to pull westward with a cut of cars before reversing direction to shove the cars in to track WF 42.

While pulling westward under the control of the grievor the grievor misidentified a switch as being properly lined and inadvertently ran through it. Upon reversing direction and shoving eastward the movement split the switch and derailed.

Following an investigation, Mr. Turnbull was assessed forty demerits resulting in his dismissal for accumulation of demerits.

While the Union submits that some degree of discipline may be warranted, dismissal is excessive in all of the circumstances.

Additionally, the Union submits that questions and answers recorded at the time of the incident and later entered into evidence constitute an improperly convened investigation contrary to article 117 of agreement 4.3. This violation of the grievor’s collective agreement rights compromises the impartiality of the investigation and, as such, the discipline assessed should be considered void *ab initio*.

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

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
B. Boechler	– General Chairman, Edmonton
R. Hackl	– Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

While working as yard conductor on a belt pack assignment at Fort Rouge Yard, on March 18, 2006, the grievor did fail to comply with rule 104.(k). It appears that while riding the head end of his movement he failed to properly observe the status of a switch, as a result of which his movement ran through the switch and, upon a making a reversing movement, partially derailed. It appears that the derailment caused debris to be thrown onto the south main line, immediately adjacent, which the grievor failed to observe. He therefore also failed to initiate an emergency broadcast to notify other train movements, as was his obligation.

The evidence confirms that supervisors attended at the derailment site and gathered information both by observing what had occurred and by questioning the yard crew. The report taken by the chief investigating supervisor, Assistant Superintendent Engineering Chris Yeroschak, was entered as an exhibit into the disciplinary investigation of the grievor held on March 22, 2006. The Union makes a preliminary objection with respect to that document and the supervisors' initial investigation.

Its counsel submits that a review of the document indicates that what in effect occurred was a full blown investigation of the incident, with verbatim questions and answers being recorded, in a manner not contemplated by the collective agreement. On that basis counsel for the Union submits that the grievance registered against Conductor Turnbull should be deemed void *ab initio*.

While the Arbitrator can understand the Union's perspective, the objection cannot be sustained. It is true that the report prepared by Assistant Superintendent Yeroschak is extremely detailed, and does contain verbatim questions and answers. However, it cannot fairly be characterized as a formal investigation as contemplated under the collective agreement. This Office has recognized the legitimacy of Company officers speaking to employees in the immediate aftermath of an accident or incident. Such interviews, generally done with a view to determining whether a formal investigation is warranted, have been acknowledged as being entirely appropriate in so long as they do not amount to bad faith or a veiled attempt to avoid the provisions of the collective agreement (see **CROA 2588**).

I am satisfied that those considerations apply in this case. While the supervisors' report can be faulted for being overly detailed and heavy with verbatim statements, it generally reflects the same substance as would have emerged if his report had been made in a more cursive fashion. The Arbitrator can see no prejudice to the Union in the manner in which the Company's preliminary examination of the site and the event was conducted, or in the form of the report which was ultimately filed during the eventual disciplinary investigation. The Union's objection must therefore be denied.

The issue of substance is the appropriate measure of discipline in all of the circumstances. The grievor has twenty-three years of service and was forty-six years of age at the time of his termination. It appears that between 1983 and 1995 he worked in the Engineering Department, transferring to the Transportation Department in 1995. As noted by counsel for the Union, he incurred no discipline whatsoever in his career until 2005. He was, the Union stresses, discipline free for twenty-two years. Counsel stresses that between June of 2005 and March of 2006, an eight month period, Mr. Turnbull encountered discipline on five separate occasions, including the instant grievance which resulted in his discharge.

While the Company stresses that the grievor's discipline was largely accumulated during his years in the running trades, there are nevertheless mitigating factors which I believe must be recognized. Firstly, Mr. Turnbull is a long term employee with twenty-three years' service. His first twenty-two years of service were, as the Union stresses, virtually without any discipline. That would have included his initial ten years of service within the running trades. While it is true that he accumulated a large number of demerits in a short period of time, standing at fifty-nine demerits at the time of the culminating incident, in the Arbitrator's view there is reason to consider the value of providing Mr. Turnbull a last chance to demonstrate his ability to operate safely, as he has apparently done in the past.

In the result, the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation and without loss of seniority. The period between his termination and his reinstatement shall be recorded as a suspension, with the forty demerits to be removed from his record.

December 14, 2009

(signed) MICHEL G. PICHER
ARBITRATOR