

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

**CASE NO. 3864**

Heard in Montreal, Wednesday, 10 February 2010

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**EX PARTE**

**DISPUTE:**

Appeal the assessment of 30 demerits to Locomotive Engineer R. Irving for "CROR Rules 104 and 114 resulting in the derailment of dangerous empty PROX 13326" and subsequent discharge for an accumulation of demerits in excess of 60 demerits.

**UNION'S STATEMENT OF ISSUE:**

On October 5, 2009, Mr. Irving was assigned to train L51451 and switching over a crossover in Scotford Yard. While in the switching process, Mr. Irving's movement cleared the crossover switches for a few minutes and a Car Department employee at Scotford lined one of the crossovers. Mr. Irving did not notice that the switch was now against his movement and ran through the switch. On the reverse movement, a car derailed at the switch.

The Union contends that the Company failed to consider mitigating factors which contributed to this incident as well as mitigating factors surrounding the actual investigation. The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of article 86 of the collective agreement including violation of article 86.4.

The Union also contends that the discipline is excessive and unwarranted.

The Union requested the Company reconsider the discipline assessed and expunge or, in the alternative, reduce the discipline and compensate Mr. Irving for all loss of wages and benefits.

The Company disagrees with the Union.

**FOR THE UNION:**

**(SGD.) T. MARKEWICH**  
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

- P. Payne – Manager, Labour Relations, Edmonton
- D. Brodie – Manager, Labour Relations, Edmonton
- K. Morris – Sr. Manager, Labour Relations, Edmonton

And on behalf of the Union:

- M. Church – Counsel, Toronto
- B. Willows – General Chairman, Edmonton
- T. Markewich – Sr. Vice-General Chairman, Edmonton
- R. Leclerc – General Chairman, CN Lines East, Grand-Mère
- R. Irving – Grievor

### **AWARD OF THE ARBITRATOR**

The material before the Arbitrator confirms that Locomotive Engineer Irving was responsible for a violation of CROR Rule 104 as well as Rule 114 by running through a crossover switch. The reverse movement of his train caused the derailment of an empty dangerous goods railcar in Scotford Yard.

The evidence discloses that the grievor was assigned to train L51451 on October 5, 2009. He and his crew were switching cars repeatedly over a crossover in Scotford Yard, which involved passing a number of times over two crossover switches which had been lined for their movement. However, apparently unbeknownst to Mr. Irving, a carman who had been performing work on a track connected to one of the crossover switches had, at the completion of his work, relined the switch to its normal position and locked it. There is no suggestion that the carman did anything improper, as the positioning of that switch was a form of track protection during the course of his work. However, the grievor, who had been travelling back and forth over the switch without incident, returned to the same location without any expectation that the switch would not

be lined as it had previously been. In the result, he ran through it and upon a reverse movement, derailed a car.

During the course of the hearing some discussion arose with respect to whether the carman had in fact created a “trap” for the grievor, albeit without any such intention. The Union’s representatives stress that good railroading would have suggested that he should have contacted the grievor by radio, as his was the only train operating in the yard at that moment, to let him know that the crossover switch had been changed. While there is no rule that would have required such advice, it does not appear disputed that it would be good railroading practice and would have avoided the problem which occurred. During the course of his own investigation Mr. Irving commented, in that regard, “... since we were the only job working on the yard at the time, I was not expecting the switches to be normalized by the Carmen.” The grievor nevertheless admitted that he was responsible for the violation of CROR 104. At the conclusion of his investigation he stated “... I am deeply sorry for the accident that occurred ...”.

The Company stresses that at the time of the incident the grievor’s disciplinary record stood at fifty-five demerits. That record was largely accumulated on the basis of attendance issues. Indeed, attendance matters resulted in a suspension of the grievor, reduced by the decision of this Office in **CROA&DR 3863**. It submits that in the circumstances the assessment of thirty demerits for Locomotive Engineer Irving’s violations of CROR Rules 104 and 114 is not unreasonable.

Counsel for the Union makes an entirely different submission. He stresses to the Arbitrator that having been hired as a trainman in 1975, and having qualified as a locomotive engineer in 1980, Mr. Irving worked some thirty-three years prior to the incident here under discussion, without incurring any discipline for a rules violation. He was, in the submission of counsel for the Union, a careful and productive locomotive engineer with an unusual record of adherence to all operating rules prior to the occurrence in Scotford Yard on October 5, 2009. In the Union's submission, the termination of Mr. Irving, on the basis of the assessment of thirty demerits, is excessive in these circumstances. While the Union does not diminish the weight of the prior record, it notes that it is almost entirely based on attendance irregularities, some of which are relatively recent and health related. Counsel also stresses the unusual nature of the fact situation which the grievor encountered as he was operating in the yard, having no reason to expect that any change would have been made to the position of the switch which he ultimately ran through. In all of the circumstances the Union submits that the termination of a thirty-three year employee as a result of this incident is excessive.

The Arbitrator is compelled to agree. If, as this Office has recognized, an employer can look to an employee's prior disciplinary record to justify a greater imposition of discipline by reason of a negative record, it is equally available to an employee's union to argue his or her prior good service in reduction of a penalty. That is particularly so where, as in the case at hand, an employee comes to the arbitration table with thirty-three years of service in the railway industry without a single record of an

operating rules infraction. While such a record obviously does not give an individual carte blanche to violate rules with impunity, it must give the employer, and an arbitrator, pause in considering the appropriate measure of discipline for what is a first infraction.

I am satisfied that the discharge of Locomotive Engineer Irving is excessive on the facts disclosed. Given that he was at the threshold of termination, by reason of other difficulties not related to the quality of his work but entirely to do with attendance problems, this is not a case for ordering compensation, although reinstatement into his employment is appropriate. The grievance is therefore allowed, in part. The Arbitrator directs that Locomotive Engineer Irving be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost. The period of time between his termination and his reinstatement shall be recorded as a suspension for his violation of rules 104 and 114 at Scotford Yard on October 5, 2009.

February 19, 2010

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**