

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

CASE NO. 3866

Heard in Montreal, Wednesday, 10 February 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

Appeal the assessment of a discharge to Locomotive Engineer K. Fox for "Violation CROR 439 at mileage 243.9 – Transcona East – Redditt Subdivision while working as Locomotive Engineer on August 1, 2009".

UNION'S STATEMENT OF ISSUE:

On August 1, 2009, Mr. Fox was assigned as the locomotive engineer on train X11441-01 when he was unable to stop prior to passing a stop signal at Mile 243.9 Redditt Subdivision.

The Company conducted an investigation of the incident and determined the grievor had violated CROR Rule 439 and was therefore subsequently discharged.

The Union contends that the Company did not take into account the mitigating circumstances surrounding the incident and Mr. Fox's commendable discipline history and that the discipline is unwarranted and excessive.

The Union requested the Company reconsider the discipline assessed and expunge or, in the alternative, reduce the discipline and compensate Mr. Fox 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:

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

– General Chairman, CN Lines East, Grand-Mère
– Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor did violate CROR Rule 439 at Mileage 243.9 of on the Transcona East – Redditt Subdivision on August 1, 2009. It is that infraction which led the Company to terminate his services. The sole issue is the appropriate penalty in all of the circumstances. The Union submits that mitigating factors have a substantial bearing on what should have been the result. Its counsel stresses that the grievor had some twenty-nine years' service prior to the incident which caused his discharge. His disciplinary record was clear at the time and, in fact, he had previously been disciplined only once in his career, as it happens for what was then a CROR 429 infraction in July of 2006. In counsel's submission when those factors are taken into account, as well as the actual facts of the incident, the termination of the grievor's employment is simply not justified.

The facts are not in dispute. At approximately 18:31 hours on August 1, 2009 Mr. Fox was in the process of operating two locomotive units, engines light, from Symington Yard to and into Transcona Yard where he and his conductor were to pick up their train. As they approached a signal located at Mileage 24.3 at Transcona East, the point at which they would begin to enter the yard, they encountered a stop signal for which they made a proper stop. The grievor then noticed that his power units were located on a section of track which continued to engage the bells, lights and barriers of an adjacent level crossing. In the result, highway traffic was being blocked on the Northeast Perimeter Road, also referred to as Highway 101, at a relatively busy hour of the day.

Locomotive Engineer Fox then asked his conductor whether they had room to move their units somewhat closer to the stop signal so as to clear the crossing and allow highway traffic to resume. It does not appear disputed that there is a general rule to the effect that a crew should not unnecessarily block a level crossing for longer than five minutes.

The grievor's conductor was stationed at the point of the two locomotive units closest to the stop signal, with the grievor being at the opposite end of the power consist, in the cab of the second locomotive. The conductor, Mr. Rory Hart, then indicated to Mr. Fox that there was about one car length of room left between the two power units and the signal. On the basis of that information the two employees attempted to move the locomotives a sufficient distance closer to the stop, obviously short of the stop signal, to allow the level crossing to be re-opened to motor traffic. The record reveals that as Conductor Hart radioed instructions to Mr. Fox the two locomotives moved in a balky fashion as their power was applied. Before Mr. Fox was able to bring them to a stop they had in fact proceeded some twenty-five feet beyond stop signal 2439, in obvious violation of CROR 439.

It appears that a download of the locomotive's event recorder indicated that the locomotives had in fact reached a speed of 8 MPH in the short movement which was attempted. During his disciplinary investigation Mr. Fox was asked to explain that speed, to which he responded: "I never intended to reach that speed, Sir, the units were not responding as I expected." In elaboration of that answer the Union's representatives stress that road locomotives, as contrasted with yard engines, are relatively sluggish to handle for the purposes of making reliable short movements and that the process of

raising and engaging power on them can cause them to make a forward “jump”, particularly when they are not coupled to the weight of a consist of rail cars.

In support of its decision, the Company stresses that the grievor did have a prior violation of CROR 439 on his record, in relation to an incident which occurred in 2006 which is the subject of a separate award of this office (**CROA&DR 3865**). Given the cardinal nature of CROR 439, the Company submits that it had reason to doubt the grievor’s reliability to maintain strict adherence to respecting stop signals, and considered that termination was appropriate.

The Arbitrator is not so persuaded. It is important, in my view, to note that Locomotive Engineer Fox does not come to this Office as an engineman with a lengthy record of rules violations. Quite to the contrary, in a career of some twenty-nine years he previously registered only one rule violation before the incident which is the subject of this arbitration. While unfortunately that violation did involve CROR Rule 439, the entirety of his record must be weighed, including some twenty-five years of service without a single rules infraction. Nor, is it disputed, did Locomotive Engineer Fox incur any discipline since the earlier incident in 2006, as a result of which his disciplinary record was entirely clear on the date of the events here under consideration. Additionally, as appears from the record of the Company’s investigation, Mr. Fox recognizes that he violated the cardinal rule and has expressed considerable remorse and resolve to avoid any such error in the future.

Another factor to be considered is the actual event. In fact, as counsel for the Union stresses, Mr. Fox and his conductor did properly stop in advance of signal 2439.

Their error, as should be evident from the account related above, occurred in the course of attempting to move two road locomotives a very short distance for the purpose of clearing an obstructed level crossing. This was not, in other words a mistake of inattention or indifference to their responsibilities. The problem, it appears, occurred because the locomotives reacted in a balky fashion in a way that Mr. Fox did not anticipate. While that does not exonerate him from what is obviously a violation of CROR 439, it does tend to colour the facts as less egregious than most that have been reviewed in this Office in prior awards concerning CROR 439 violations.

In the Arbitrator's view, this is manifestly an appropriate case for a substitution of penalty, albeit a nevertheless serious penalty against the grievor. The Arbitrator therefore directs that Mr. Fox be reinstated into his employment forthwith, without loss of seniority and without compensation for his wages and benefits lost. The time between his termination and reinstatement shall be recorded as a suspension for his violation of CROR Rule 439 on August 1, 2009.

February 19, 2010

(signed) MICHEL G. PICHER
ARBITRATOR