

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

CASE NO. 3901

Heard in Montreal, Wednesday, 12 May 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEEL WORKERS (LOCAL 2004)

DISPUTE:

The discharge of Adam Moreau.

JOINT STATEMENT OF ISSUE:

On May 17, 2009, the grievor was discharged for his alleged "failure to comply with CROR rules GEI sections 11.0, 11.1, 11.2, 11.3 11.4 11.7 and 11.10. Track Unit Operation on 24 April 2009, resulting in collision of ballast regulator with Mark IV on Bala Subdivision mile 189.20."

The Union argues that **(1)** the grievor was not behaving in a negligent manner; **(2)** the grievor was panicked by a bee that entered into the cab of the ballast regulator he was operating. The grievor maintains that he has a bee phobia and is terrified of bees. **(3)** the grievor was cooperative with the investigation and admitted his role in the accident. **(4)** the discipline is excessive and unwarranted and should be immediately removed from the grievor's work record.

The Union is aware of the grievor's limited service as an employee. The grievor has a good work record with only a minor inactive discipline from a previous offence which in no way is similar to the alleged infraction.

The Union has requested that the grievor be immediately reinstated to his former position with full redress with no loss of pay, benefits or seniority standing.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:

(SGD.) M. PICHÉ
STAFF REPRESENTATIVE

FOR THE COMPANY:

(SGD.) S. M. BLACKMORE
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Blackmore – Manager, Labour Relations, Edmonton
A. DeMontigny – Sr. Manager, Labour Relations, Montreal

W. Paczkowski – Supervisor, Work Equipment,

And on behalf of the Union:

M. Piché – Staff Representative, Toronto
P. Jacques – Vice-President,
R. Tompkins – Chief Steward, GLR,
A. Moreau – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was responsible for the collision of a number of track maintenance machines at the south switch at Drocourt on the Bala Subdivision on April 24, 2009. It appears that at the time five work equipment machines were travelling from Mile 183.2 on the Bala Subdivision to Drocourt South so as to place themselves in the clear to allow a train to pass on the mainline while they occupied the siding at Drocourt South. The grievor was in the fourth machine in the sequence of equipment as they travelled on the mainline, approximately three hundred feet apart. The record discloses that the first three pieces of equipment came to a stop at the south switch at Drocourt, waiting for the switch to be lined to allow them into the siding. It does not appear disputed that the operators of the three stopped machines radioed their situation and flashed their lights as they stopped.

Shortly thereafter, the grievor's machine, a ballast regulator weighing some 50,000 lbs, ran into the rear end of the third piece of equipment, a Mark IV Tamper at a speed estimated to be between 20 and 25 miles per hour. That caused a chain reaction whereby all four pieces of equipment were involved in some degree of collision. Fortunately there were no serious injuries, although the collision did cause more than \$190,000 in damages to the various pieces of equipment.

A post-incident drug and alcohol screening test administered to Mr. Moreau returned a positive for his urine drug screen but he tested negative on an oral fluid test. That would indicate that while he may have consumed cannabis at some time in the past, he was not impaired at the time of the collision. Following investigation the grievor was discharged for his failure to comply with GEI rules 11.1, 11.2, 11.3, 11.4, 11.7 and 11.10.

As argued by the Union's representative, the Arbitrator cannot find violations of rules 11.2, 11.3, 11.4, 11.7 and 11.10 in the actions of the grievor. Conversely, I must find that rule 11.1 was violated. It reads as follow:

11.1 Track units will operate under full control prepared to stop at all times. Operators must be increasingly vigilant as they approach any level crossing (public, private, farm or pedestrian), interlockings, animals or people near the track and when passing over bridges.

It obviously cannot be denied that the grievor's operation of his Regulator was not with the necessary degree of care and control, as is evident from the collision which took place in circumstances of straight track and clear vision. However, the Union submits that the grievor's explanation of the events does raise a mitigating factor which should be brought to bear in the assessment of discipline.

The unchallenged evidence of Mr. Moreau is that as his machine was proceeding towards the siding at Drocourt South a bee flew into the cab of the machine through its rear window, striking him in the face. He relates that he has a serious phobia with

respect to bees and that its presence in the cab caused him to panic, attempting to swat or kill the bee as his machine moved forward. According to his account he only realized that he was in proximity to the other machines, and at risk of a collision, at the last moment. When he then attempted to pull back on the travel stick, which would disengage the forward movement, he in fact grasped the vehicle's joy stick, which would have no such effect. Simply put, he was unable to take any meaningful step to slow or stop his regulator before the collision occurred.

The Company submits that in view of the grievor's relatively short service, and the fact that he has received prior discipline, discharge was the appropriate outcome. The Union, on the other hand, stresses the mitigating factors which caused the collision, arguing that discharge is excessive in all of the circumstances.

After careful consideration the Arbitrator is inclined to agree with the Union as to the mitigating factor of the presence of a bee in the cab of the grievor's machine, coupled with his particular aversion to bees. That condition is confirmed by a letter from his physician as well as a letter from a family friend and, finally, a brief account in a letter from his grandmother relating a traumatic experience which he had as a child as a result of being attacked by a swarm of bees. In the result, I am inclined to believe that the grievor's violation of the rules was prompted by something other than mere negligence or indifference, and that the presence of a bee in the cab of his machine, while not such as to excuse what occurred, can fairly be viewed as a mitigating factor. It is also notable that the grievor's disciplinary record was clear at the time of the incident,

although he did receive minor discipline on two prior occasions during his three years of employment. Overall, I am satisfied that this is an appropriate case for a substitution of penalty, albeit on conditions fashioned to protect the Company's interests.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages and benefits lost and without loss of seniority. His reinstatement shall be conditioned on his accepting to be subject to random drug and alcohol testing, to be administered in a non-abusive fashion, for a period of two years following the date of his reinstatement. A positive drug or alcohol test result in that two year period will result in his immediate discharge at the discretion of the Company.

May 17, 2010

(SIGNED) MICHEL G. PICHER
ARBITRATOR