

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

CASE NO. 3938

Heard in Montreal, 12 October 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge to Conductor Michael Spain for his accumulation of demerits effective 21 May 2010.

JOINT STATEMENT OF ISSUE:

On May 11th Mr. Spain was required to attend a formal statement in connection with his alleged failure to comply with CROR 112 while working as the conductor on train 435 operating between Toronto and London.

The 30 demerits issued 21 May 2009 effective 05 May 2009 – for “Failing to Comply with CROR 112” while employed as Conductor on Train 435 at Oakville yard resulted in his discharge from the Company’s service for his accumulation in excess of 60 demerits.

It is the Union’s position that the discipline assessed, in consideration of all the factors relating to this matter is unfounded and unwarranted and should be removed in its entirety. The Union requests that the discipline assessed be removed from his record and that the grievor be made whole. As an alternative the Union requests the discipline be amended in such a manner that would result in the grievor’s return to full employment with the Company.

In addition to this assessment of discipline that resulted in the grievor’s discharge, the following issues are also properly before the arbitrator, based on discussions between the Union and the Company:

1. The issuance of 14 demerits effective 15 June 2008 for his the grievor’s purported failure to properly sign and initial TGBOs as outlined in CROR Rule 157(i) when employed as the Conductor on aA43431-15 at MacYard
2. The issuance of 15 demerits effective 15 June 2008, the grievor’s purported violation of G.O.I. Section 8.12.6; not properly releasing hand brakes while making a lift at Paris West on cars AOK 28237, PROX 42022, PROX 43397.

It is the Union’s position that the Company has violated:

The Workplace Environment Provision as contained in the collective agreement article 84 (Grievance Process) of the collective agreement.

Article 85 (Interpretation and Application) of the collective agreement the Grievance Tracking System (GTS).

The Brown System of Discipline

As a result of such violations it is the Union's position that:

The Grievor be exonerated of any wrongdoing with all discipline removed, and

Given the violations of the collective agreement that a remedy is applicable in the circumstances consistent with Addendum 123 of the collective agreement. That the Company and the Union agree to meet within 60 [days] of the date of the Union's Step 3 grievance and attempt to reach agreement on the appropriate remedy to apply.

Failure as to the appropriate remedy (to be determined by either party upon written notice to the other) to be submitted to the arbitrator for resolution within 30 days of such failure.

The Company disagrees and deems that all the discipline assessed in each incident was both warranted and appropriate in these instance cases.

FOR THE UNION:
(SGD.) G. GOWER
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) F. O'NEILL
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- F. O'Neill – Manager, Labour Relations, Toronto
- D. Gagn – SR. Manager, Labour Relations, Montreal
- G. Hare – Assistant Superintendent,

And on behalf of the Union:

- G. Gower – Vice-General Chairman, Belleville
- T. Redgrift – Local Chairman, London
- P. Boucher – Local Chairman, LE, Belleville
- M. Spain – Grievor

AWARD OF THE ARBITRATOR

This arbitration involves three separate heads of discipline, including the termination of the grievor for the accumulation of demerits.

The record before the Arbitrator confirms that the grievor was reinstated into his employment as a result of a prior award of this Office, **CROA&DR 3674**. That arbitration involved a review of some five heads of discipline which, by reason of accumulation of demerits, resulted in the grievor's dismissal. Without dealing with the detail of the matters there considered, it is noteworthy that the arbitrator found that a number of the rule violations found to have been made by the grievor were, relatively "technical;". Several of the heads of discipline were reversed and Mr. Spain was reinstated into his employment with full compensation for all wages and benefits lost.

It is noteworthy that among the heads of discipline reversed by the arbitrator was the assessment of ten demerits for a delay to the grievor's train on April 22, 2007. The arbitrator concluded that the evidence was insufficient to find that the grievor had caused delay to this train and that there was no basis for discipline. On that basis he ordered as follows: "The ten demerits shall therefore be struck from the grievor's record for this incident." Unfortunately, the disciplinary record presented to the Office on the occasion of these grievances does not comply with that direction of the arbitrator. The grievor's disciplinary record tabled in evidence still shows the incident of April 22, 2007 as having merited ten demerits for a delay to the grievor's train on April 22, 2007. It

should go without saying that this Office relies implicitly on the Company carrying out the directives of the arbitrator, and also relies on the disciplinary record presented at the hearings as being accurate. Unfortunately that is not the case in the grievance at hand.

The first head of discipline involves the assessment of fourteen demerits effective 15 June 2008 for the grievor's failure to properly sign and initial TGBOs as required by CROR 157(i). The facts before the Arbitrator confirm that the grievor did properly sign and initial two of the four pages of his TGBO but, it appears, by reason of having been interrupted in the course of doing so he failed to sign the other two pages.

The Arbitrator accepts the Company's position that the signing of TGBOs is an important part of ensuring safe operations, as a means of verifying that an employee has fully adverted to the content of his or her operating orders. However in the case at hand I am inclined to characterize the grievor's error as one that is more technical than substantive. There does not appear to be any dispute that he did read and review the TGBOs for which he was responsible. In my view the assessment of fourteen demerits, for such an incident, is excessive and a written reprimand would have been sufficient. The fourteen demerits are therefore removed from the grievor's record, with a written reprimand to be substituted.

The second head of discipline, which involved the assessment of fifteen demerits, related to the grievor's method of releasing hand brakes on an number of cars while performing work at Paris West on June 18, 2008. While it is not disputed that the

grievor should have climbed onto the platform of the cars to release the hand brakes, he was observed reaching into the mechanism and knocking off the hand brake from the ground, something which he did with several cars. It is not denied that the hand brakes were in fact fully disengaged, as required. What the Company objects to is that the grievor did not follow the proper procedure of climbing onto the appropriate platform on the cars to release the hand brakes from above. The Union notes that there are situations in which it is appropriate, depending on the nature of the car, for an employee to release hand brakes from the ground. That was not the case with the cars here under consideration.

I find that the assessment of fifteen demerits is excessive in this case as well. In my view the assessment of five demerits would have been sufficient to bring home to the grievor the importance of releasing hand brakes in the proper way. The grievance is therefore allowed in part, with the grievor's record to be adjusted to show the assessment of five demerits for the incident of June 15, 2008.

The third and final head of discipline concerns the grievor's actions while setting off fifty cars in track OG-21 at Oakville Yard on May 5, 2009. It appears that he was then observed during the course of an efficiency test by Superintendent Colasimo and Supervisor G. Hare.

It does not appear disputed that in accordance with CROR rule 112, in securing the equipment the grievor should have applied the full number of hand brakes that was

appropriate and thereafter conducted a push pull test to ensure that they were properly engaged. That is reflected in CROR 112(b) which reads as follows:

- (b) Before relying on the retarding force of the hand brake(s), whether leaving equipment or riding equipment to rest, the effectiveness of the hand brake(s) must be tested by fully applying the hand brake(s) and moving the cut of cars slightly to ensure sufficient retarding force is present to prevent the equipment from moving. When leaving a cut of cars secured, and after completion of this test, the cut should be observed while pulling away to ensure slack action has settled and that the cars remain in place.

The record confirms that when he was observed by his supervisors Conductor Spain applied the hand brakes of only one car, at which point he did the push-pull test. It is not disputed that he went on to apply the proper number of hand brakes, but the Company asserts that he should have conducted the push-pull test only after all of the hand brakes were set. Following an investigation, on the basis of those facts, Mr. Spain was assessed thirty demerits and was discharged for the accumulation of some eighty-nine demerits.

The Arbitrator has great difficulty with the discipline assessed against the grievor in respect of this incident. Significantly, as stressed by the Union's representative, when he was corrected on site by the supervisors he immediately offered to return to the cars with the locomotive and conduct the proper push-pull test. For reasons they best appreciate, they told him that he need not bother doing so, and that he should get on with his assignment.

The Arbitrator has considerable difficulty with that aspect of the evidence. If, as the Company maintains, the grievor had created a sufficient situation of peril to justify

the assessment of thirty demerits, fully half the measure of discipline to justify discharge, it is difficult to understand why the Supervisors would not have complied with his suggestion that he do the test properly. The best inference would appear to be that they had little doubt but that the cut of fifty cars was in fact adequately secured on the basis of what the grievor had already done.

I am not satisfied that the incident, so described, justifies the assessment of thirty demerits and the summary termination of an employee of twenty-six years' service. While it is true that Mr. Spain does have a fairly substantial record of discipline over his years of service, that record is generally devoid of cardinal rules violations of the kind which typically will justify the termination of an employee. Particularly given the fact that his supervisors allowed his actions to continue, and declined his offer to conduct a proper push-pull test, I have some difficulty seeing the incident as being so serious as to merit thirty demerits. In my view the assessment of ten demerits would have been amply sufficient in the circumstances, and I therefore direct that the grievor's record be amended to show ten demerits for the failure to comply with rule 112.

During the course of the hearing the Union raised a number of arguments with respect to whether the Company had given the grievor proper notice of his alleged infractions and whether it had in fact denied him a fair and impartial investigation. Having reviewed the record I find that none of those allegations can be sustained.

In the result, the grievances are allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with his disciplinary record to stand at forty-five demerits. The grievor shall be compensated for all wages and benefits lost. In addition, prior to his resuming duties the Company shall take all reasonable steps to ensure that he has been properly refreshed and oriented with respect to operations.

October 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR