

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

CASE NO. 3961

Heard in Montreal, Wednesday, 16 December 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 15 demerits for failure to comply with CN Attendance Management Standards from Oct 01-Dec 25, 2007.

The assessment of 25 demerits for failure to protect his assignment, GO Job 2, on Tuesday, January 15, 2008.

The assessment of 15 demerits for failure to comply with CN Attendance Management Standards by missing a call on December 27, 2008 at 0908.

The assessment of discharge for failing to contact and receive instruction from a Rule 42 foreman before entering his work limits, while working on Q10651-09

JOINT STATEMENT OF ISSUE:

On January 6, 2008, Mr. Dwyer was required to attend a formal investigation in connection with the circumstances surrounding *“failure to comply with CN Attendance Management Standards from Oct 01-Dec 25, 2007”*. Following the investigation, the Company issued a Discipline Form 780 dated January 10, 2008, assessing Mr. Dwyer with 15 demerit points.

On January 19, 2008, Mr. Dwyer was required to attend a formal investigation in connection with the circumstances surrounding *“failure to protect his assignment, GO Job 2, on Tuesday, January 15, 2008”*. Following the investigation, the Company issued a Discipline Form 780 dated February 1, 2008, assessing Mr. Dwyer with 25 demerits points.

On January 6, 2009, Mr. Dwyer was required to attend a formal investigation in connection with the circumstances surrounding *“failure to comply with CN Attendance Management Standards by missing a call on December 27, 2008 at 0908”*. Following the investigation, the Company issued a Discipline Form 780 dated January 28, 2009, assessing Mr. Dwyer 15 demerit points.

On January 17, 2010, Mr. Dwyer was required to attend a formal investigation in connection with the circumstances surrounding *“failure to contact and receive instruction from a*

Rule 42 foreman before entering his work limits, while working on Q10651-09". Following the investigation, the Company issued a Discipline Form 780 dated January 20, 2010, assessing Mr. Dwyer with discharge and "time out of service from Jan 17 to Jan 20 to serve as a suspension".

The Union contends the discipline assessed is excessive and requests the removal of such. The Union requests that the discipline assessed Mr. Dwyer be reduced to a level that would preclude his dismissal.

The Company deems the discipline assessed as both appropriate and warranted.

FOR THE UNION:
(SGD.) P. VICKERS
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) J. LIEPELT
SR, VICE-PRESIDENT, EASTERN REGION

There appeared on behalf of the Company:

S. Fusco	– Labour Relations Officer, Toronto
B. Hogan	– Manager, Labour Relations, Toronto
D. Gagné	– Sr. Manager, Labour Relations, Montreal

There appeared on behalf of the Union:

J. C. Morrison	– Counsel, London
P. Vickers	– General Chairman, Sarnia
P. Boucher	– Local Chairman, Belleville
M. Dwyer	– Grievor

AWARD OF THE ARBITRATOR

There are four heads of discipline to be resolved within this award.

The first incident involves the grievor's failure to comply with attendance management standards for the period between October 1 and December 25, 2007. The evidence confirms that on a number of days the grievor booked rest, thereby missing the second half of his split shifts in GO train service. He apparently did so sometimes in such a way as to extend his weekend time off. In the Arbitrator's view the facts of this case fall sufficiently within the principles canvassed in **CROA&DR 3856** as well as the award of Arbitrator Weatherill in **AH 551**. I am compelled to the conclusion that the

grievor did abuse his right to book rest in a manner inconsistent with his service to the Company. In the result, I am must conclude that the assessment of fifteen demerits was appropriate.

The second incident under review concerns the assessment of twenty-five demerits for the grievor' lateness to work and failure to fully protect his assignment in GO train service on Tuesday, January 15, 2008. It does not appear disputed that the grievor, who was to be on duty at 04:00 in fact overslept and, only after a telephone call from the Company which wakened him, did he finally attend at work at 05:54 hours. Following an investigation he was assessed twenty-five demerits for that incident.

In the Arbitrator's view the grievor was plainly deserving of discipline for reporting late to work. I consider, however, that the assessment of twenty-five demerits was high, in relation to what appears to have been the first incident of that kind in the grievor's disciplinary record. I therefore direct that the discipline in relation to that matter be reduced to fifteen demerits.

The third discipline involves the assessment of fifteen demerits for the grievor's failure to respond to a call on December 27, 2009. It is not disputed that the grievor was then at his daughter's home and that his cell phone had lost its charge. While there may be some mitigating dimension in the fact he was then concerned about his daughter's emotional state, it is not clear to the Arbitrator that he could not have notified the Company of his circumstance and booked off prior to allowing himself to effectively miss

a call in a deliberate way. In the result, I am satisfied that the assessment of fifteen demerits was appropriate in that case.

The final head of grievance concerns Mr. Dwyer's discharge for an incident which occurred on January 14, 2010 while the grievor was the locomotive engineer on Train Q10651-09 from Macmillan Yard to Belleville. In accordance with his operating orders the grievor and his conductor were made aware that a track maintenance foreman held Rule 42 work authority between Mileage 265 and Mileage 263 on the Kingston Subdivision. They were therefore required to make contact with the foreman to obtain permission to enter his work limits, in accordance with CROR 42.

They failed to do so. It appears that as they approached the limits, and the grievor in fact saw a signal indicating that they were approaching it, he attempted to learn from his conductor as to whether he had received the necessary authorization. It would seem that his conductor was then on the telephone speaking with employees on the ground who had conducted a PK inspection of their train as it passed. Mr. Dwyer took the impression that his conductor had looked up and responded yes to his question, an assumption which was in fact incorrect. In the result the track foreman saw the grievor's train movement proceeding through his work limits without authorization and called Mr. Dwyer, causing him to stop his train.

Moving through the track occupancy limits of a work crew is a cardinal rule infraction of a kind which can have catastrophic consequences. The grievor was

removed from service and, following a disciplinary investigation, was discharged for that incident.

It is difficult to second guess the Company's decision in that regard. Unfortunately the grievor has an extremely negative record which respect to cardinal rules infractions. In October of 2000 Mr. Dwyer was assessed forty-five demerits for a violation of CROR 429, disregarding a stop signal, on the Halton Subdivision. Six years later, in November of 2006 he again violated CROR rule 429, as well as a number of related rules including the failure to report his violation, for an incident which occurred at Scarborough. As a result of that he was suspended for a period of several months after which he was returned to work subject to a restriction from working as a locomotive engineer for a period of two years. Barely a year after the lifting of that restriction, when he was back in service as a locomotive engineer he again committed a cardinal rules infraction by entering work limits on the Kingston Subdivision without authorization on January 14, 2010.

The issue is whether, in all of the circumstances, discharge was justified. I have come to the regrettable conclusion that it was. The record discloses that the grievor has been given the advantage of progressive discipline over the years, notwithstanding two of the most serious cardinal infractions relating to violations of CROR 429 and a two year demotion from the duties of locomotive engineer. Notwithstanding those events Mr. Dwyer operated his train in such a way as to disregard the working limits of a track maintenance foreman occupying a two mile section of track on the Kingston

Subdivision, in circumstances which could have been disastrous. Fortunately the foreman in question saw the grievor's train and stopped it before it reached the area where it appears the maintenance crew was at work. Given the progressive discipline previously given to Mr. Dwyer in relation to similar infractions, this Office is compelled to doubt that yet another demotion or last chance is likely to have any meaningful rehabilitative effect.

In the result, for all of the foregoing reasons, the Arbitrator is compelled to conclude that, while the grievor's disciplinary record should have stood at forty-five demerits at the time of the incident resulting in his discharge, his termination was justified by his violation of CROR 42 on January 14, 2010. The grievance is therefore dismissed

December 22, 2010

(signed) MICHEL G. PICHER
ARBITRATOR