

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

CASE NO. 3980

Heard in Calgary, Tuesday, 8 March 2011

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the issuance of 15 demerits to Conductor Cottrell and the resulting dismissal for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On April 20, 2009, the Grievor received a Form 104 that assessed him with 15 demerits "for failing to ensure your body remained clear and out of the path of the switch handle, as evidenced by you handling of the switch leading to "H" system at the Domtar Mill, resulting in a personal injury sustained during your tour of duty on March 20, 2009 and your failure to immediately report this injury, while employed as a Conductor at Kamloops, BC, a violation of the Canadian Pacific Summary Bulletin No. BCO-Q1/09, Safety Rule T-26 as contained in the Safety Rules and Safe Work Procedures for Transportation Field Operations Employees, and CROR 104 (c)." As a result of this assessment of discipline, the Grievor's employment was terminated by the Company for accumulation of demerits.

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Cottrell be made whole. The Union contends that the assessment of 15 demerits and dismissal of Mr. Cottrell is unwarranted and excessive in all of the circumstances.

The Union notes that the grievor was suffering significant personal stress at the time of the incident in question, which contributed to his conduct. The grievor has since successfully resolved this stress condition through professional treatment.

The Union requests that Mr. Cottrell be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions and denies the Union's request.

FOR THE UNION:
(SGD.) D. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) D. CORRIGAN
FOR: VICE-PRESIDENT OF CANADIAN OPERATIONS

There appeared on behalf of the Company:

M. Chernenkoff	– Assistant Labour Relations Officer, Calgary
T. Litowsky	– Superintendent, Pacific Gateway, VCR
D. Freeborn	– Manager, Labour Relations, Calgary
A. Azim Garcia	– Director, Labour Relations, Calgary

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice-General Chairman, Calgary
F. O’Genski	– Local Chairman
Wm. Pitts	– Local Chairman
K. Cottrell	– Grievor

AWARD OF THE ARBITRATOR

There is no dispute that the grievor did violate the safety rules cited in the joint statement of issue, save that the Union does dispute that there was any violation of CROR rule 104(c) by Mr. Cottrell. It appears that on March 20, 2009, while operating road switcher VK-41 at the Domtar Mill, Conductor Cottrell, who was then assigned as a brakeman, was responsible for lining two switches for his train’s movement within the Domtar Mill. At one point he instructed the locomotive engineer to commence moving his train and promptly realized that he had lined a switch in the wrong position. When his radioed request to stop the movement received no response he quickly went to line the switch back to the proper position. He did not, however, place himself in the safe position outside the swing of the switch’s arm. As the switch was loaded with the wheels of the leading cars of the movement, considerable pressure was created on the spring of the switch, as a result of which the arm struck him in the groin area causing an injury to his right hip bone and lower anatomy. It appears that he shortly thereafter commented to his conductor that the blow he received “hurt like hell”.

The grievor did not then report the incident or his injury to his supervisor and did not submit a "Marvin form" to report the incident before or at the end of his tour of duty, as required by Summary Bulletin No. BCO-Q1/09. By his own account that failure was prompted in substantial part by the fact that he was concerned his disciplinary record then stood at fifty-five demerits, and he was in genuine peril of being terminated.

In fact, it subsequently became impossible for Mr. Cottrell to conceal what had occurred. While he believed immediately after the incident that he did not sustain any serious injury, he experienced extreme discomfort during the ensuing night, as well as blood in his urine, as a result of which he was compelled to attend at a hospital to receive medical care the following day. While records indicate that he did make a call to the CMC to indicate that he would not be coming to work because he was required to go to the hospital for a work related injury, there is no suggestion anywhere in the record that he ever communicated that fact directly to any supervisor.

The Union submits that the assessment of fifteen demerits was excessive in all of the circumstances. Its counsel also maintains that Conductor Cottrell was denied a fair and impartial investigation.

The Arbitrator cannot accept the Union's position with respect to the quality of the investigation conducted by the Company. Counsel for the Union objects to the fact that the investigating officer asked a series of questions to the grievor's union representative who was in attendance with him, questions generally directed to whether there was any impropriety in the conduct of the investigation. While I would agree that that line of

questioning is questionable, and that arguably the Union representative might have simply refused to answer, I cannot conclude that the questions put to the Union's representative were in and of themselves a violation of the obligation to conduct a fair and impartial investigation. While it is also arguable that the investigating officer put to the grievor a characterization of rule 104(c) which might, in the strictest sense, be viewed as erroneous, no substantial unfairness resulted from that question. Nor do I consider that the questions put by the investigating officer were overly aggressive or suggestive of a pre-determined result, as argued by the Union. Lastly, the fact that the Company decided to conduct a supplementary investigation, following the statement of the conductor on the grievor's crew who related that he had stated to him that the injury "hurt like hell", was not itself inappropriate or unfair. In my view it was legitimate for the Company to confront the grievor with that statement of Conductor Hanes, particularly as it might have a reasonable bearing on whether Mr. Cottrell should have considered that his injury was sufficiently serious to report it. For all of these reasons the Arbitrator is compelled to dismiss the procedural objections raised by the Union.

On the whole of the record I am satisfied that the Company did have grounds to assess discipline against Mr. Cottrell. The assessment of fifteen demerit, in and of itself, does not appear unreasonable on its face. The substantial question is whether this is an appropriate case for the Arbitrator to exercise his discretion under the provisions of the **Canada Labour Code** to substitute a lesser penalty. I believe there are mitigating factors which would justify that alternative. Firstly, the grievor can be characterized as a long-service employee, having twenty-three years with the Company. It is not disputed that prior to this incident, which resulted in his termination for the accumulation of

demerits, the grievor suffered considerable stress in his personal life. That situation in fact caused him to request a referral for psychological counselling from the Company's Employee and Family Assistance Program (EFAP) in March of 2009, prior to the incident at hand. Additionally, while it is arguable that fifteen demerits might have been appropriate for the unsafe handling of the switch and the failure to report his injury, I am compelled to conclude that the Company has not demonstrated that the grievor violated CROR rule 104(c), as stated by the Company in the Form 104 notice of discipline provided to the grievor, dated April 20, 2009. When all of these factors are taken into consideration, including the indication that the grievor's situation with respect to the personal stress in his life has improved, I am satisfied that this is an appropriate case for a reduction of penalty, in the spirit of giving a long term employee another chance.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost and without loss of seniority. His disciplinary record shall be restored to the level of fifty-five demerits.

March 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR