

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

CASE NO. 3999

Heard in Montreal, Thursday, 14 April 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the assessment of a discharge to Locomotive Engineer D. Haynes for violation of CROR Rule 439, passing a stop signal without authority, at Signal 62ND in Walker yard, in Edmonton, Alberta, while working as locomotive engineer on Train Q11251-27 on September 29, 2010.

JOINT STATEMENT OF ISSUE:

On September 29, 2010, Mr. Haynes was assigned as the locomotive engineer on train Q11251-27 when he failed to stop prior to passing signal 62ND in Walker Yard in Edmonton, displaying stop indication.

The Company concluded an investigation of the incident and determined the grievor had violated CROR rule 439 and subsequently discharged him.

The Union contends that the discharge was extremely excessive under the circumstances and requested that the discipline be expunged or, in the alternative, significantly reduced and Mr. Haynes be made whole for all lost wages and benefits.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.) T. MARKEWICH
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) D. BRODIE
FOR: VICE-PRESIDENT, HUMAN RESOURCES

There appeared on behalf of the Company:

K. Morris	– Sr. Manager, Labour Relations, Calgary
D. Gagné	– Sr. Manager, Labour Relations, Montreal
B. Jessup	– Superintendent, Alberta
R. Czuy	– Manager, S&C Safety Assurance
D. Larouche	– Manager, Labour Relations, Montreal

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
T. Markewich	– Vice-General Chairman, Edmonton
R. Hewson	– General Chairman, IBEW, Aylmer
D. Haynes	– Grievor

AWARD OF THE ARBITRATOR

On September 29, 2010 Locomotive Engineer Haynes and his conductor, Mr. Gary Krochak, operated train Q11251-27 from Edmonton to Biggar, Saskatchewan. At 17:07 hours, as they entered Walker Yard off the Sangudo Subdivision, they encountered signal 62ND. That signal is a low level dwarf signal situated on the south side of the North Service Track which they occupied. According to the account of both Mr. Haynes and his conductor they saw the signal to be displaying a restricting signal, being a yellow colour. The documentary records confirm, through tape recordings in the possession of the Company, that they called the signal on their radio and, according to Mr. Haynes' employee statement taken on October 2, 2010 "... we verified it more than once." As they were proceeding beyond signal 62ND, towards Donvegan Junction, Mr. Haynes and his conductor were advised by radio that a signal alarm had been triggered, revealing that they had passed a stop signal at Signal 62ND without authorization.

Following subsequent investigations the Company determined that at all material times the dwarf signal in question was displaying a red stop indication. Based on that fact, and the grievor's prior disciplinary history which included an earlier CROR 439 violation, the grievor was notified of his discharge for passing a stop signal without authority, effective September 29, 2010, as notified on October 12, 2010. During their disciplinary investigations both Mr. Haynes and Conductor Krochak repeatedly asserted

that they saw a yellow indication on the dwarf signal as they approached it. According to Mr. Haynes' account, they first verified the signal at a distance of approximately twelve cars and, as he added: "We verified it until we were right on top of it."

The evidence before the Arbitrator concerns considerable documentation with respect to subsequent investigations of the location and signal where the infraction occurred. A report provided by Mr. Doug Brooks, S&C Manager for Alberta, included photos that were taken by his colleague, Supervisor Kevin Kirby, as well as the following comment: "Because of the light conditions it was difficult to see the signal indication. Whoever [sic] if there was any doubt about it should have been examined more closely. I believe that if you would have watched that signal all the way in you would see it as red. The download proved it was red as they went by."

In fact the Company conducted a more extensive examination of the site, generating a more detailed report which includes a number of log entries. Among the entries is the following with respect to the observations of Signal Supervisor Kevin Kirby and Signal Maintainer Mike Poltorak: "They did report that the signal did look yellow from the conductor's side of the unit, due to the Sun's reflection/angle, with respect to signal 62ND, so they will be coming back out tomorrow, same time of day to further confirm this possibility."

It is common ground that a subsequent examination of the signal showed that it was slightly misaligned. In fact maintenance was performed on it to correct its alignment and to install a new sun hood, among other things.

Counsel for the Union submits that the Company failed to provide to the Union information in its possession with respect to the subsequent examination of the signal site and the repairs made to the dwarf signal. On that basis he maintains that the Company failed to properly disclose relevant and exculpatory information to the Union. In fairness, the Arbitrator has some difficulty with that submission. It is not disputed that a very general and brief report was provided to the investigating officer by Mr. Brooks. That report was given to the Union at the time of the investigation. Most significantly, the more complete report concerning the observations of Mr. Kirby and Maintainer Poltorak was not in the possession of the investigating officer at any material time. Indeed it appears to have surfaced after efforts by the Union to discover its existence and get its production, shortly before the arbitration hearing.

The fundamental issue in this case is whether the Company has established just cause to discharge Locomotive Engineer Haynes, an employee of over thirty years' service who was two years from eligibility for retirement with an unreduced pension. It is trite to say that in this matter of discipline the burden of proof is upon the employer. It must establish, on the balance of probabilities, that the grievor knowingly or negligently ignored a stop signal in the operation of his train, in clear violation of CROR rule 439.

Upon a careful examination of all of the evidence, the Arbitrator cannot find that that burden has been discharged.

The observations of Signal Supervisor Kirby, recorded on the same day as the incident, openly confirm that as best he could determine from a position in the cab of a locomotive, notably the position the conductor, given the location of the bright late afternoon sun striking the low dwarf signal, that signal did transmit a yellow colour. That observation is entirely consistent with the explanation given by both Locomotive Engineer Haynes and his conductor. Both are adamant that what they saw was yellow signal emanating from the dwarf signal unit, an impression which is clearly consistent their calling of the signal, a call which was in fact recorded on the Company's radio system. It is also consistent with photocopies and video evidenced presented at the arbitration hearing.

While the Company's representative suggests that the grievor and his conductor may have made their observation and call from a distance which was less than optimal for reading the dwarf signal, suggesting that the preferable point of focus would be some 300 feet distant from it, that is a speculative and to some extent unrealistic suggestion, bearing in mind that the grievor and his conductor remained occupied with the ongoing operation of their train in the context of a relatively busy yard. It is also contradicted by the unchallenged statement of the grievor who says of the signal: "We verified it until we were right on top of it."

It is true, as the Company notes, that in fact the signal was recording a red colour, indicating stop, and that the grievor's train did pass a stop signal. However, I cannot conclude that disciplinary responsibility can be brought to bear on Locomotive Engineer Haynes in the circumstances disclosed. As indicated above, the Company's own investigation confirmed that the dwarf displayed a colour that would have appeared yellow to someone in the cab of a locomotive who approached it at that precise time on the date in question, with strong sunlight bearing directly on the misaligned lens of the signal. In the result I can see no basis upon which the grievor can be disciplined for the rule 439 violation in the case at hand.

The grievance is therefore allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with compensation for all wages and benefits lost.

April 18, 2011

(signed) MICHEL G. PICHER
ARBITRATOR