

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

CASE NO. 4006

Heard in Montreal, Tuesday, 10 may 2011

Concerning

VIA RAIL CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer Peter Kozusko.

JOINT STATEMENT OF ISSUE:

On September 7, 2010 Mr. Kozusko was dismissed for "failure to comply with CROR rule 43 as well as rule 157 TGBO requirements where TSO of 10 MPH was exceeded by 15 MPH while operating VIA Train 86 on August 5, 2010 Metrolinx/GO Transit Weston Subdivision."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the collective agreement. The Union contends that the discipline should be removed in its entirety and Locomotive Engineer Kozusko be made whole.

The Union contends that the dismissal of Locomotive Engineer Kozusko is unwarranted and excessive in all of the circumstances. The Union further contends that the penalty of discharge is discriminatory (that is disproportional) compared to the penalties previously assessed other employees in analogous circumstances.

The Union requests the Locomotive Engineer Kozusko 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 Corporation submits that Mr. Kozusko was assessed discipline for similar CROR rule violations in the past. Under the circumstances the Corporation considers the dismissal of Mr. Kozusko

**FOR THE UNION:
(SGD.) WM. MICHAEL
GENERAL CHAIRMAN**

**FOR THE CORPORATION:
(SGD.) D. STROKA
SENIOR ADVISOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

D. Stroka	– Senior Advisor, Labour Relations, Montreal
W. Buckley	– Manager, Train Operations, London
B. A. Blair	– Senior Advisor, Labour Relations, Montreal
J. Mailhot	– Advisor, Labour Relations, Montreal
S. Hazeltine	– Foreman, A&B Rail Services

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
Wm. Michael	– General Chairman, Kitchener
P. Hope	– Vice-General Chairman
P. Kozusko	– Grievor

AWARD OF THE ARBITRATOR

The record confirms that on August 5, 2010 the grievor was the In Charge Locomotive Engineer on train no. 86 operating from London to Toronto. Some ten miles from Union Station the grievor's train was given permission to enter the work limits of Foreman Steve Hazeltine. He and his operating engineer were then required to respect a Rule 42 section of track which included two separate Rule 43 sections, the first of which required a reduction to a speed of twenty-five miles per hour and the second of which mandated a reduction to ten miles per hour, as his train moved through an area of heavy track maintenance and construction.

It is common ground that the grievor's train respected the first speed limit, reducing to twenty-five miles per hour in the initial Rule 43 territory as required by GBO 6441. It is also established that Locomotive Engineer Kozusko did call to the Operating Engineer the advance yellow flag said to be two miles prior to the commencement of the ten miles per hour limit territory under Rule 43, in accordance with GBO 4737. For reasons he best appreciates, however, the operating engineer did not slow down over

that two mile period and in fact entered the ten mile per hour speed limit area at an unreduced speed of twenty-five miles per hour. It appears that it was the grievor, who had previously been performing administrative functions, who noticed that the train was operating over speed. Additionally the crew was given a telephone call by Foreman Hazeltine. In the circumstances the grievor initiated the stopping of the train. He then spoke directly with the Rule 42 Foreman Hazeltine, who contacted the RTC to advise of the situation. Shortly thereafter the train proceeded under the supervision of another locomotive engineer, and entered Union Station.

Following a disciplinary investigation the grievor was discharged. The sole issue in this arbitration is whether that discipline was appropriate.

The Arbitrator can readily appreciate the Corporation's concern, given that the grievor's record did include prior rules infractions of some seriousness. There are, however, mitigating factors to consider in the case at hand. Foremost among those is the differential treatment of Mr. Kozusko as compared with his operating engineer. While it is true that both locomotive engineers were equally responsible for the operation of the train, I am satisfied that it was the primary error of the operating engineer, who failed to take any action to slow his train after the approach signal was properly called by the grievor, which triggered the rule infraction which in fact occurred. However, the operating engineer was assessed only a deferred suspension, notwithstanding that he also had some prior discipline for operating infractions in 2003 and 2007. The Arbitrator is compelled to agree with the submission of counsel for the

Union that there is an unjustified disproportionality between the treatment of these two employees. With more than twenty-five years of service to the Corporation, the grievor merits some consideration, notwithstanding that he has received prior discipline for his work as a locomotive engineer. In the circumstances I am satisfied that his reinstatement, without compensation, will adequately convey to him the importance of being extremely careful in the observation of operating rules in the future.

The Arbitrator cannot, however, sustain the suggestion of the Union that the grievor was denied a fair and impartial investigation. While it may be true that he was asked a greater number of questions than were put to his workmate, it would appear that the extent of those questions may well have been justified given the seriousness of other incidents in which he had been involved, the most recent of which had resulted in a six month suspension.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. The time between his termination and reinstatement shall be recorded as a suspension for the incident of August 5, 2010. While this result may be more harsh than that experienced by the operating engineer, it is justified in light of Mr. Kozusko's record.

May 16, 2011

(signed) MICHEL G. PICHER
ARBITRATOR