

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

CASE NO. 4015

Heard in Edmonton, Alberta, Tuesday, 14 June 2011

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 45 demerits to Yard Foreman Fazio and subsequent dismissal on October 21, 2010.

JOINT STATEMENT OF ISSUE:

On October 21, 2010, Yard Foreman Fazio was issued a Form 104 assessing him with 45 demerits for "your deliberate and wilful delay to customer service at the Centerm Facility, ... October 12, 2010.". Also on this date Yard Foreman Fazio was issued a second Form 104 advising that he had been dismissed for accumulation of demerits in excess of sixty.

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 Yard Foreman Fazio be made whole.

The Union further contends that there is no cause for discipline or, in the alternative, that the penalty is excessive and unwarranted in the circumstances.

The Union requests that the discipline be removed entirely from Yard Foreman Fazio's record, that he be ordered reinstated with no loss of seniority and benefits and that he be made whole for all losses incurred as a result of his dismissal. In the alternative, the Union requests that the penalty be mitigated as the arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:

(SGD.) D. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) M. THOMPSON
FOR: MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

D. Burke	– Labour Relations Officer, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
T. Litowsky	– Superintendent, Pacific Gateway, Vancouver
J. Poeta	– Superintendent, Central Ontario, Toronto
M. Rickerby	– General Manager, Pacific Region, Vancouver

There appeared on behalf of the Union:

M. A. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice-General Chairman, Calgary
M. Rokosh	– Local Chairman, Vancouver
D. Able	– General Chairman, Calgary
B. Fazio	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that delays in the completion of an assignment given to Yard Foreman Fazio in Vancouver Yard on October 12, 2010 resulted in the Company receiving a telephone call complaint from Centerm, a major industrial intermodal customer located within the yard. After a disciplinary investigation the Company concluded that the grievor engaged in a wilful and deliberate delay of his assignment, as a result of which it assessed forty-five demerits against him which led to his discharge for the accumulation of demerits. The Union maintains that the grievor performed his work at all times as directly instructed by a member of management, Class Yard Coordinator Bob Milne.

The record confirms that for some time the Company had concerns about the efficiencies of its operations in the Vancouver Yard and related customer satisfaction, as a result of which it dispatched a number of supervisors to observe operations with a view to making improvements. As part of that initiative, in the early morning of October 12, 2010 Yard Manager Dave Doig and Manager Operations Jeff Poeta observed the grievor's Williston Yard assignment. Among the things they observed was the grievor's movement coupling onto track 9 at the Centerm facility, pulling the cars in that track out of it and carrying them one mile distant to spot them in N-Yard on track N-2. The grievor and his crew then returned to the Centerm facility to perform the identical operation,

pulling cars from track 10 to deliver them to track N-1 in N-Yard. It does not appear disputed that part of their assignment, as reflected in the switch list provided to them by their CYC also involved moving a cut of cars from track N-3 in N-Yard to track 9 at Centerm. However, they returned from N-Yard to perform the Centerm facility to pull track 10 without bringing the cars in track N-3 with them.

Seeing the manner of operation being performed by the grievor and his crew the Company's supervisors concluded that the grievor and his crew could have in fact doubled the cars in track 9 and track 10 at the Centerm facility to take them in a single move to the N-1 Yard where they could then be stored separately in tracks N-2 and N-1 as directed. They considered that the decision to make the two moves separately, travelling light engines to return from N-Yard to the Centerm facility effectively involved making two extra moves, aggravated by the failure to pick up and transfer the cars in track N-3 as part of their return to the Centerm facility. These moves, in the estimation of the Company, caused an additional delay of an hour and a half, during which the customer was effectively shut down and incurring an important tab of unproductive wages for its then on duty longshoremen, which prompted the telephone complaint which the Company received from its customer.

The parties offer two very contrasting theories of the work expectation of the grievor's crew on the night in question. The Company maintains that the job briefing which took place between the grievor, his helper and the CYC, at which point the switch lists would have been provided to Mr. Fazio, was essentially intended to convey to him the work which had to be completed, leaving to him and his helper the discretion to decide how to perform the work in the most efficient manner. In contrast, the Union

submits that the method of operating of CYC Milne was that he expected the work to be performed in the order indicated on the switch lists which he provided to the crew. In that regard the Union stresses that the CYC has the better knowledge of the general movements and requirements within the yard over the course of the tour of duty, and is better situated to structure the timing and order of the various moves.

In the Arbitrator's view the case, as presented, leaves elements to be desired on both sides. The Company, which bears the burden of proof, did not produce CYC Milne as a witness and, to that extent, did not rebut the assertion of the grievor that he was simply carrying out the work as it was strictly assigned to him by Mr. Milne. By the same token, I am left with some doubt as to all aspects of the grievor's explanation. I am troubled that the evidence would indicate that he made no attempt to explore with the CYC the possibility of pulling both tracks 9 and 10 in a doubling move, nor did he appear to consider the common sense efficiency of pulling N-3 to move its cars to track 9 at the Centerm facility rather than simply returning to the N-Yard light engines over a distance said to be approximately a mile. To that extent he was, in my view, liable to discipline of a serious degree.

In considering this matter there are also some mitigating factors to be considered with respect to the grievor. An employee of twenty-three years' service, he has never previously been disciplined for similar conduct and, save for one rule violation in 2009, his record contains only relatively minor demerits and cautions.

The Arbitrator also considers it significant that the Company has not proved that the grievor's actions were deliberate and wilful, as it alleges. There was, nevertheless, a degree of serious negligence and inefficiency on the part of Yard Foreman Fazio.

Having regard to all of the evidence, I am satisfied that the Company did have grounds to assess discipline against the grievor. Given that the Company did not produce clear evidence from CYC Milne as to his directions to the crew, coupled with the Arbitrator's conclusion that there were clearly questionable failures of efficiency on the part of the grievor, I am satisfied that a reduction of penalty is justified, albeit the penalty should nevertheless be maintained at a serious level.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority, with compensation for one-half the wages and benefits lost between the time of his termination and his reinstatement. The forty-five demerits shall be removed from his record and a corresponding suspension for one-half the period since his termination to be reflected as the penalty for the events of October 12, 2010

June 20, 2011

(original signed by) MICHEL G. PICHER
ARBITRATOR