

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4049**

Heard in Montreal, Thursday 13 October 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION**

DISPUTE:

Dismissal of Mr. C. Gervais for an accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On January 25, 2010, the grievor, Mr. C. Gervais, was issued two Form 104s; 20 demerits for a rules violation and a dismissal for an accumulation of demerits. A grievance was filed.

The Union contends that: **1.)** The grievor was not a dishonest or insubordinate employee. His problems have all been performance related. **2.)** The Company did not consider other measures that could have been taken in the circumstances such as deferred discipline or restriction/demotion. **3.)** The dismissal of the grievor was unwarranted and excessive in the circumstances.

The Union requests that the grievor be reinstated into Company service immediately under such conditions as the arbitrator deems appropriate.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:
(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:
(SGD.) M. GOLDSMITH
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

M. Chernenkoff	– Labour Relations Officer, Calgary
M. Goldsmith	– Labour Relations Officer, Calgary
J. Love	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl – President, Ottawa
D. Brown – Counsel, Ottawa

AWARD OF THE ARBITRATOR

Having reviewed the materials the Arbitrator is compelled to agree with the Union that there are strong mitigating factors to be considered with respect to the discipline assessed against Machine Operator Charles Gervais. The record discloses that for a number of years Mr. Gervais operated machines without incident, having incurred discipline on only one occasion with respect to the operation of a ballast regulator in 2007. Remarkably, what the record further discloses that in a brief period of six months, he experienced an additional five accidents which involved the unsafe operation of a Company machine. Those incidents resulted in the additional imposition of three measures of ten demerits, one of twenty-five demerits and the culminating incident, being twenty demerits, which led to his termination for the accumulation of demerits.

The material before the Arbitrator confirms that in the latter part of 2009 the grievor's family life fell apart, as his wife left him for another man who, it appears, deliberately made it difficult for him to see his own children. There is no dispute before the Arbitrator that these events caused the grievor substantial personal stress which, I am satisfied, was a factor in the uncharacteristic string of accidents which he experienced between September of 2009 and January of 2010. In my view this is a significant mitigating factor which should properly be taken into account in assessing the appropriate measure of discipline in the case at hand.

The Arbitrator can well understand the Company's concern. It is indisputable that an employee who is suffering personal stress should be careful not to allow that circumstance to interfere with their operation of machinery in a safety sensitive environment. I do not consider the Company's argument to the effect that Mr. Gervais should have taken steps to remove himself or to seek other assignments during this period to be unreasonable. The fact remains, however, that over a number of years the grievor established a record as a good employee who could operate safely and without incident, and that there appears to be a dramatic relationship between his personal life stresses and the uncharacteristic series of events which led to a number of accidents in the operation of his machine on some five occasions in a short period.

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 his wages and benefits lost. The period between the grievor's termination and his reinstatement shall be recorded as a suspension and the 20 demerits shall be removed from his record. The Company may, at its discretion, withhold the grievor from any assignment in the operation of machinery for a period not to exceed one year from the date of his reinstatement.

October 17, 2011

(signed) MICHEL G. PICHER
ARBITRATOR