

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4061

Heard in Montreal Tuesday, 12 December 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS UNION – LOCAL 2004

DISPUTE:

Discipline assessed G. Bayard resulting in discharge for accumulation of 89 demerit marks.

JOINT STATEMENT OF ISSUE:

The grievor received 30 demerits and a discharge after the Company held a formal investigation regarding alleged violation. The alleged offences were responsibility for the accident sustained to ballast regulator CN 618-89 on June 22, 2011 and failure to report accident and damage to the proper authority in a timely manner.

The Union argued that the Company has violated Part II of the *Canada Labour Code*, Section 124. The Union contends that the discipline is unwarranted and unfair. The grievor contends that the grievor reported the incident to his direct report which was his foreman, reported the incident to the on-duty mechanic and did participate in the repair of the machine so as to finish the shift in a sage manner without causing delay.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

FOR THE UNION:
(SGD.) M. PICHÉ
STAFF REPRESENTATIVE

FOR THE COMPANY:
(SGD.) S. BLACKMORE
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

C. Gilbert	– Manager, Labour Relations, Montreal
D. Laurendeau	– Manager, Labour Relations, Montreal
R. Haggart	– Assistant Chief, Engineering

There appeared on behalf of the Union:

M. G. Piché	– Staff Representative, Toronto
P. Jacques	– Vice-President, Edmonton

It appears to be common ground that the machine was taken out of service and repaired on the ensuing days off and that there was no loss of production in relation to it.

Following a disciplinary investigation the Company assessed thirty demerits against the grievor. That assessment was based on two aspects: firstly, his responsibility for the accident and damage to his ballast regulator and, secondly, Mr. Bayard's failure to report the accident to his own supervisor.

On the grievor's behalf, the Union submits that he did nothing wrong. Firstly, it is argued that he was not responsible for the damage to his machine as the obstruction, being a buried slab of concrete, was effectively invisible to him, not having been previously identified or marked for avoidance. Additionally, the Union's representatives submit that it is not unusual for an employee in the circumstances of the grievor to first contact a field mechanic to repair what might well be minor damage to a machine, rather than to notify a supervisor, at least until the seriousness of the damage is known. The Company maintains that the grievor should have been able to avoid the obstruction which damaged his machine and that, apart from that question, he was under a clear obligation to notify his own supervisor of the damage which occurred.

With respect to the first issue I have some difficulty with the Company's case. The unchallenged evidence of the grievor is that he could not see the concrete slab which was at ground level and covered by ballast as he operated in the dark, with dust

in the air and some grime covering the lower portion of the window of his machine. I am satisfied that the grievor cannot be faulted for the collision between his machine and the concrete slab in question. I find the suggestion of the Company, that an indent in the grass line along the side of the track should have alerted the grievor to the concrete slab, to be less than compelling.

The greater issue relates to whether the grievor did fail to report the damage to his machine to his supervisor. There appears to be no dispute that CN Safety Rules Item 3.1(g) requires such a report. It reads, in part: "Immediately report all accidents, injuries or damage as well as near misses to the proper authority." It is clearly the position of the Company, not seriously challenged by the Union, that an Extra Gang Foreman would be the appropriate person to advise, as he or she would be responsible for maintaining ongoing production and must be made aware if damage to any equipment could interrupt the sequence of work being performed by track maintenance machines. It is obviously of concern to a foreman if a piece of machinery is to be removed from production for any significant period of time, as ultimately occurred in the case at hand.

It the instant case there is some genuine confusion as to whether the Extra Gang Foremen were ever advised. Both Extra Gang Foreman Tim Thackeray and Extra Gang Foreman Phillip Cunningham filed statements to the effect that no one had reported damage to them. In contrast to that, Mechanic James Hiltz records in his narrative statement that: "... I phoned the foreman and reported that the machine was back to

work.” Whichever version is accepted, the fact remains that the grievor did not himself contact a supervisor when damage occurred to his machine, I am satisfied that it was his duty to do so and that by failing in that duty he made himself liable to discipline.

At the time in question the disciplinary record of Mr. Bayard stood at fifty-nine demerits. The assessment of thirty demerits for this incident resulted in his termination for the accumulation of demerits.

While I do not question the Company’s entitlement to assess discipline on the facts of the case at hand, I do consider that there are mitigating factors to consider. The employee has some sixteen years’ service. While it is true that his prior disciplinary record is not exemplary, and he had recently been subjected to a suspension for having caused damage to private property with his ballast regulator, the culminating incident here under consideration did involve what appeared both to the mechanic and to the grievor as relatively minor damage which was fixed in a matter of ten to fifteen minutes. As noted above, it also appears that the mechanic may have called the foreman to advise him of what had occurred. While these facts do not excuse the grievor’s failure to meet his own obligation to advise his supervisor, the seriousness of what occurred is somewhat attenuated.

In the circumstances, I am satisfied that the grievance can be allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for wages and benefits lost, and without loss of seniority. His

disciplinary record shall be restored to the level of fifty-nine demerits and the time between his termination and reinstatement shall be recorded as a suspension for the events of June 22, 2011, save that no discipline shall apply to the collision itself.

December 19, 2011

(signed) MICHEL G. PICHER
ARBITRATOR