

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 4116

Heard in Edmonton, Thursday, 13 June 2012

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE

The assessment of twenty (20) demerits to Conductor R. McIntyre of Edmonton, Alberta, for impeding the investigation process involving the derailment of train Q11131-23 by attempting to influence CN Car Mechanics to make false statements about having inspected train 111 as it was assembled at Edmonton Intermodal Terminal on February 25, 2011, and subsequent discharge for accumulation of demerits in excess of sixty (60).

COMPANY'S STATEMENT OF ISSUE:

On February 25, 2011, the grievor was assigned as the Conductor on train Q11131-23. During the process of departing McBain Intermodal Terminal, a derailment occurred. Assistant Superintendent M. Merson responded to the derailment and proceeded with an onsite investigation of the derailment. As part of the investigation, Assistant Superintendent Merson interviewed the grievor and asked if the Mechanical Department staff had completed a roll by inspection of his train on departure, to which the grievor responded, on four different occasions, that the Mechanical staff had in fact performed a roll by inspection of the train.

During subsequent discussions with the Mechanical staff, Assistant Superintendent Merson was advised a roll by inspection had not been undertaken on train Q11131-23, moreover the Mechanical staff reported to Assistant Superintendent Merson, the grievor had left several telephone voice mails with the Car Mechanic with advice to tell Assistant Superintendent Merson that a roll by inspection had been completed. Assistant Superintendent Merson used the Car Mechanic's cellular phone and re-dialed the last number received on the cellular telephone, at which time the grievor answered and before any identification could be established between the parties and the grievor stated "just tell Merson you rolled it out when he asks".

As a result of the incident, the grievor was required to provide an employee statement and was subsequently assessed twenty (20) demerits. As the grievor already had forty-nine (49)

active demerits on his discipline record, the grievor was discharged for accumulation in excess of sixty (60) demerits.

The Union contends that the grievor should not have made the call to the Carman but the derailment was not his fault and the results of the investigation into the cause for the incident revealed a broken wheel as the cause. The Union also contends that the twenty (20) demerits and subsequent dismissal are extreme and should be mitigated to a much lesser degree and he be made whole.

The Company disagrees with the Union's contentions.

FOR THE COMPANY

(SGD) P. PAYNE

FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations,, Edmonton
K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. VanCauwenbergh	– Director, Labour Relations, Toronto
D. Crossan	– Manager, Labour Relations, Prince George
D. Brodie	– Manager, Labour Relations, Edmonton
M. Merson	– Superintendent, Vancouver
J. Boychuk	– General Manager, Edmonton
R. Fisher	– Operations, Edmonton

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
B. R. Boechler	– General Chairman, Edmonton
D. Finnsen	– Vice-President, TCRC, Calgary
R. A. Hackl	– Vice-General Chairman, Edmonton
R. S. Thompson	– Vice-General Chairman, Edmonton
M. Rutzki	– General Secretary/Treasurer, Melville
J. Dwyer	– Local Chairman, Saskatoon
M. Johnson	– Local Chairman, Edmonton
B. Willows	– General Chairman, TCRC LE, Edmonton
D. Able	– General Chairman, TCRC LE, CP Lines West, Calgary
R. McIntyre	– Grievor

AWARD OF THE ARBITRATOR

The facts of this case, as unfortunate as they are, are accurately reflected in the Company's *ex parte* statement of issue, the content of which the Union does not dispute. The evidence before the Arbitrator further confirms that while the grievor's train

was on the process of being assembled on February 25, 2011 at the McBain Intermodal Terminal, while there was still one more track doubling to complete to fully assemble what was obviously a long train, said to be some 10,000 feet in length, a wheel on a car in the forward section broke, causing a derailment. At the time of that incident the grievor was not in the cab of the locomotive, but rather was at some distance towards the rear of the movement where he was not in a position to know, and clearly did not know, whether staff of the Mechanical Department had in fact completed a roll by inspection, in whole or in part, of his train. Shortly thereafter, Assistant Superintendent Merson drove the grievor to the head end to allow him to get on the train. During that drive, in response to questions from the Assistant Superintendent, apparently on four separate occasions, the grievor told Mr. Merson that the Mechanical staff had performed a roll by inspection of the train. Subsequently, after dropping the grievor off, Assistant Superintendent Merson returned to the derailment site where he spoke with Mechanical staff. They advised him that a roll by inspection in fact had not been completed on the grievor's train. Additionally, they told him that the Car Mechanics had received several telephone voice messages from Mr. McIntyre advising them that they should tell the Assistant Superintendent that a roll by inspection had been completed, because he had told him that that inspection had been done.

Being advised of that fact, Mr. Merson took possession of the cell phone of one of the car mechanics and dialed the last number which had been received on that phone. The grievor immediately answered and before Mr. Merson could identify himself Mr. McIntyre stated "... just tell Merson you rolled it out when he asks." When the

Assistant Superintendent identified himself the grievor immediately admitted that he had misled him earlier when he told him that a roll by inspection of his train had taken place. The grievor was immediately removed from service pending a disciplinary investigation.

During the course of that investigation Mr. McIntyre stated that he had assumed that the carmen were inspecting the train as he noticed their truck and believed that they must be doing a roll by inspection, anticipating that the inspection was being done in segments given the extraordinary length of the train.

It is common ground that a roll by inspection had to be performed. That is in accordance with a General Notice issued by the Company, General Notice – DST-066 dated December 24, 2007. That notice states, in part:

Effective immediately, no outbound cars are to depart Edmonton Terminals without receiving a roll by inspection. The Mechanical Department will be the primary department responsible for ensuring employees are available for the roll by to take place. ...

Prior to pulling for departure, if the outbound train crew has not already received confirmation that employees are in place, they are to call the West Tower yardmaster to determine if employees are in place to perform the roll byes [sic]. No train is to depart until it is confirmed that employees are in place to provide the proper inspection.

To be clear, the grievor's train was not fully assembled when the derailment occurred. Arguably, the time might not yet have arisen for the roll by inspection to occur, although it appears that it might have been done on a partial basis in accordance with what the grievor describes as the local practice. As stressed by the Union's counsel, the grievor was not himself responsible for overseeing the roll by inspection, although it

appears that as the conductor of the outbound train crew he was responsible to confirm with the West Tower yardmaster that the mechanical staff were in place to perform the roll by. I accept that that is something that he might he well have done once he reached the head end.

Any derailment is a relatively serious occurrence. The Company's officers are bound to investigate a derailment in an effort to understand what might have caused it, partly for the purpose of safety and the prevention of any recurrence, if possible. It follows that it is therefore incumbent on all employees to be candid and forthcoming with respect to any questions put to them concerning the events surrounding any derailment.

Upon a review of the evidence I am compelled to conclude that for reasons he best understands the grievor consciously deceived the Assistant Superintendent by positively confirming that a roll by inspection had taken place when in fact he did not know whether that had happened. He compounded his deception by contacting the carmen to tell them what he had said to Mr. Merson, in what could only be understood as an effort to have a number of employees coordinate their "story". That intention was unfortunately confirmed out of the grievor's own mouth when Mr. Merson telephoned him on the cell phone of one of the carmen. Thinking that the caller was a car mechanic, before identifying who was calling Mr. McIntyre promptly said "... just tell Merson you rolled it out when he asks." In other words, he invited whoever it was who might be calling to join in the deception that he had commenced.

I consider this case to be close to tragic. Mr. McIntyre was hired in 1975 and had thirty-seven years' service at the time of this unfortunate event. While that may be seen as a mitigating factor, there is much in the way of aggravating factors in the instant case. The first, in my view, is what can only be seen as the obvious intention of the grievor to provide false information to his Assistant Superintendent, including a concerted effort to enlist others into his falsehood. While there may be harmless white lies told in the workplace, the grievor's was a statement of some importance, relating as it did to the circumstances surrounding a derailment and the obvious effort of the Assistant Superintendent to investigate what had occurred. The grievor's action, however it might have been motivated, was clearly a deliberate attempt to deceive the Company and impede the investigation process in relation to a derailment.

Nor do I consider the fact that the grievor "came clean" with Mr. Merson on the telephone once he was found out to be much of a mitigating factor. What choice did he have? Equally aggravating is the grievor's disciplinary record. While he may have long service, his disciplinary record is very unimpressive, especially since 2003. In that year he received a seven day deferred suspension for a rule violation. The following year a further rule violation resulted in his discharge which was reduced to ultimately allow for his reinstatement after ninety-six days of suspension. While the incident in that case occurred in April of 2004 and he was reinstated in July, in October of the same year he was again suspended for a rule violation, apparently for the time held out of service pending his investigation. He received demerits on five other occasions as well as one written reprimand. Then Mr. McIntyre was discharged for a second time for the failure to

properly carry out his work delivering cars on the Vegreville Subdivision in August of 2008. That resulted in a six week suspension. Next, the grievor was assessed twenty demerits for failing to appear at a Company investigation, which again resulted in his discharge. Once more, the Company reduced that penalty to a suspension and reinstated him to his employment.

At the time of the present incident, Mr. McIntyre's discipline stood at forty-nine demerits. The assessment of twenty demerits obviously placed him in a dismissible position, having accumulated sixty-nine demerit marks. Most critically, the Company submits that the grievor's deliberate deception of his Assistant Superintendent, and his efforts to enlist others in that scheme, have broken the bond of trust essential to the employment relationship. Sadly, I cannot disagree. In my view the grievor's actions, coupled with his disciplinary record, do not justify his reinstatement into service on what would be his third discharge. It is obviously important for the Company to be able to trust an employee who works unsupervised exercising the highly safety sensitive duties of a conductor. By attempting to conceal the true circumstances surrounding a derailment, the grievor has irrevocably broken that trust.

For the foregoing reasons the grievance must be dismissed.

June 15, 2012

MICHEL G. PICHER
ARBITRATOR