

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4139

Heard in Montreal, Wednesday, 12 September 2012

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of discipline and discharge to Conductor M. Villemaire.

JOINT STATEMENT OF ISSUE:

On September 3, 2010, the grievor was assessed 30 demerit points for “Failing to conduct yourself in a professional and courteous manner ... during your tour of duty on May 15, 2010 ...” Additionally, on September 3, 2010 the grievor was assessed 20 demerit points for “Failure to ensure proper securement of your train ... May 15, 2010. Finally, on October 29, 2010, the grievor was assessed 30 demerit points “For failing to provide accurate and timely information concerning an alleged injury damaged equipment ...”

The Union contends that the investigations – particularly the final investigation – were 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 Conductor Villemaire be made whole.

It is the Union’s position that there is no just cause for the cumulative assessment of demerits and discharge to Conductor Villemaire and that the penalties are each excessive and unwarranted in all of the circumstances. In addition, the Union contends that there are compelling mitigating factors present, including the grievor’s bona fide medical disability which warrants accommodation under the collective agreement and the *Canadian Human Rights Act*.

The Union requests that the discipline be removed in its entirety and that the grievor 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 Company disagrees with the Union’s contentions and denies the Union’s request.

FOR THE UNION:
(SGD.) D. W. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) A. BECKER
LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

M. Thompson	– Manager, Labour Relations, Calgary
R. Hampel	– Counsel, Calgary
M. Merriam	– Trainmaster, Cranbrook / Fort Steele
C. Ruff	– Superintendent, NMC, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. S. Olson	– General Chairman, Calgary
D. R. Able	– General Chairman, Calgary
D. Fulton	– Vice-General Chairman, Calgary
B. Church	– Local Chairman, Cranbrook
K. Stewart	– Local Chairman, Cranbrook
B. Weisgerber	– Local Chairman, Medicine Hat
M. Villemaire	– Grievor

AWARD OF THE ARBITRATOR

The grievor was assessed a total of eighty demerits in relation to three separate incidents. The first was the assessment of thirty demerits for his alleged discourteous manner in dealing with a taxi driver who was driving his crew on May 15, 2010. The second discipline was the assessment of twenty demerit marks for the improper applying of hand brakes and the failure to secure his train on the same date, May 15, 2010 in the Swift Current Yard. Finally, the grievor was assessed thirty demerits and discharged for accumulation, by reason of his having failed to provide accurate and timely information in relation to an alleged injury on duty on June 4, 2010.

Having regard of the facts of the taxi incident, I am concerned that the assessment of thirty demerits was excessive in the circumstances. While it is true that

there was a degree of discourtesy exhibited on the part of the grievor, prompting a complaint from the taxi driver in question, I am not persuaded that what occurred was sufficiently serious to justify the assessment of demerits to the point of one-half of the grievor's job. In my view fifteen demerits would have sufficed, and a substitution in that regard is therefore directed.

However I can see nothing in the material before me to justify a reduction of the second head of discipline, which is the assessment of twenty demerits for failing to properly secure his train and to properly apply hand brakes. There can be no real dispute on the facts as to the grievor's having violated a number of rules with respect to securing his train and applying hand brakes, as he was observed in the Swift Current Yard on May 15, 2010. The twenty demerits assessed for that action is, in my view, well within the appropriate range of discipline.

Greater concern arises with respect to the assessment of thirty demerits for the alleged falsification of information with respect to an injury which the grievor sustained as the Viterra Silver Sage Grain Elevator at Mile 2 on the Maple Creek Subdivision on June 4, 2010. The Union submits that the Company's investigation into that alleged impropriety by the grievor was in violation of the collective agreement obligation to conduct a fair and impartial investigation. A review of that investigation leads the Arbitrator to the same conclusion.

The investigation, said to be “in connection with ... “your reporting of an alleged injury while working train 356-067 at the Viterra Silver Sage Grain Terminal at Swift Current June 4, 2010”.” extended over some fourteen days and involved 420 questions and answers. It appears that in doing a preliminary investigation of the incident Manager of Operations Craig Ruff had a telephone conversation with the grievor. That conversation, which apparently occurred two days following the incident, on June 7, 2010 was recorded in a memorandum by Mr. Ruff, which was filed in evidence at the Company’s investigation. It appears that during that conversation Conductor Villemaire “lost it” and made a number of statements, obviously in anger. For example, he said such things as: “You guys are all over me”; “You guys have taken the fun out of going to work”; “I can’t figure out why I feel like I always feel”; “So many things are bothering me down there”, to cite just a few. For reasons only he can understand, Investigating Officer Rob McNulty addressed each and every one of the some twenty-three remarks from the grievor which had been recorded by Supervisor Ruff. With respect to each of them he reiterated the question: “What did you mean by this comment?” An overview of the questions and answers placed in evidence in respect of that investigation causes great concern as to its ultimate fairness towards the grievor. I am compelled to accept the submission of the Union that in this exceptional case the nature of the questions put, many of which were patently irrelevant, and the tone of accusation and disbelief adopted by the investigating officer can only be characterized as amounting to an abuse of the investigation process.

The right of the Company to conduct a disciplinary investigation is clearly circumscribed. The requirement that it be done in a manner that is fair and impartial must, at a minimum, imply that an investigation shall limit itself to matters which are relevant to the subject of the investigation. I can see no basis upon which the rambling remarks of Mr. Villemaire to his supervisor, ranging over some twenty-three topics which had nothing to do with the incident of his knee injury, and which were thoroughly pursued by the investigating officer notwithstanding their irrelevance, could properly be made part of this investigation. While I do not dismiss outright the suggestion of the Company's representative that some of the length of the investigation may have been contributed to by certain of the grievor's answers, the conducting of an investigation over fourteen full days, with substantial time and effort being devoted to wholly irrelevant facts or comments made by the grievor does not, in my view, conform to the expectation of a fair and impartial investigation. I find it difficult to disregard the emphatic submission of the Union's counsel to the effect that Mr. McNulty plainly prejudged the grievor's responsibility and strayed well beyond what was required for a fair and impartial investigation. On that basis the thirty demerits assessed against Mr. Villemaire for failing to provide accurate information respecting his injury must be deemed void *ab initio*.

The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with full compensation for all wages and benefits lost, without loss of seniority and with his disciplinary record to reflect fifteen demerits for conduct unbecoming in his behaviour towards the taxi driver on May 15,

2010 and twenty demerits for his failure to ensure the proper securing of his train and improperly applying hand brakes, on the same date.

September 18, 2012

(signed) MICHEL G. PICHER

ARBITRATOR