

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4193

Heard in Montreal, April 9, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

- Assessment of a 15-day suspension for an incident on April 6, 2012.
- Assessment of 20 demerits on July 12th, 2012 for an incident on July 4th, 2012.
- Assessment of 20 demerits on July 12th, 2012 for an incident on July 5th, 2012 resulting in discharge being assessed to Conductor Neil Hayes for accumulation of demerits on July 12th, 2012.

JOINT STATEMENT OF ISSUE:

On April 7, 2012, the Grievor was removed from service as his medical expired on April 6, 2012. The Company provided notice in October 2011 and February 2012 advising the Grievor of his medical expiry date to ensure he had sufficient time to renew his documents. The documents were not renewed prior to the expiry date and he was removed from service. Subsequently he was assessed with a 15-day suspension.

On July 12th, 2012, the Grievor received a Form 780 that assessed him with 20 demerits for "Failure of Rules CROR 112, GOI sections 8.12.4 and GOI section 8.12.6 while working on the 0900 east control assignment July 4th, 2012."

On that same date, the Grievor received a second Form 780 for "Failure to properly detrain and line switches while working the 0900 east control assignment July 5th, 2012."

On July 12th, 2012 the grievor was given a third form 780 assessing discharge for accumulation of demerits terminating his employment.

The Union's Position: The Union contends that the investigation was not conducted in a fair and impartial manner as per the requirements of the Collective Agreement. For this reasons, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Hayes be made whole. The Union contends that the assessment of 40 demerits (two issuances of 20 demerits) and the decision to terminate Mr. Hayes are unjustified, discriminatory, excessive and disproportionate in all of the circumstances based on the facts. The Union contends that Mr. Hayes' substantive rights were violated through the use of surreptitious surveillance by video camera from a remote location. The use of the video camera violated Mr. Hayes' right under *PIPEDA*. The Union contends that the Company violated Articles 82, 84, 85.5 and addendum 123 of the 4.16 Collective Agreement. The Union requests that Mr. Hayes be ordered reinstated and made whole for all lost wages and benefits since he was discharged on July 12th, 2012. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position: The Company disagrees with the Union's position. The statement was conducted in a fair and impartial manner and discipline assessed in each of the three instances of discipline was both warranted and appropriate given the nature of the infractions and the

discipline history of the Grievor. The company further contends that the use of video surveillance has been addressed by CROA and its use is supported as a method of ensuring the safe movement of our equipment and in monitoring the fluidity of the yard. Its use in this manner is not a violation of PIPEDA. The Company requests that the grievance be dismissed.

FOR THE UNION:
(SGD.) J. Robbins
General Chairperson

FOR THE COMPANY:
(SGD.) V. Paquet
Labour Relations Officer

There appeared on behalf of the Company:

D. Larouche	– Labour Relations Manager, Montreal
M. Marshall	– Senior Labour Relations Manager, Toronto
D. Gagne	– Senior Labour Relations Manager, Montreal
V. Paquet	– Labour Relations Manager, Toronto
S. Dale	– Assistant Superintendent, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson
G. Gower	– Vice General Chairman, Belleville
N. Hayes	– Grievor, Toronto

AWARD OF THE ARBITRATOR

As reflected in the Joint Statement of Issue, this award concerns three heads of discipline and the ultimate discharge of Conductor Neil Hayes for the accumulation of demerits.

The first head of discipline is the assessment of a fifteen day suspension for the grievor's failure to properly maintain the currency of his medical clearance. A review of the facts confirms that the grievor did receive notice from the Company of the need to renew his medical clearance before the expiry date of April 6, 2012. Mr. Hayes first received a letter from the Company dated October 11, 2011 advising him of the need to update his medical card which was to expire on April 6, 2012. It appears that a follow-up letter was sent in February of 2012 and that as of February 8, 2012 a message was posted to him on

the CATS System, a message which he apparently viewed some fourteen times. Notwithstanding these notices, the grievor in fact failed to renew his medical card and had to be removed from service on April 7, 2012. He returned only on April 12th, having finally passed the necessary medical examination. As a result of the grievor's actions he was assessed a fifteen day suspension.

The record confirms that at the time the grievor's discipline stood at fifty demerits. The assessment of a suspension was therefore resorted to as a means of avoiding his discharge by reason of accumulation of demerits. In my view the assessment of the fifteen day suspension was not inappropriate, having particular regard to the grievor's prior disciplinary record and the repeated efforts on the part of the Company to advise him of the need to renew his medical card before its expiry. I can therefore see no basis to allow the grievance in respect of that discipline or to substitute a lesser penalty.

The next incident resulting in discipline concerns the grievor's conduct during his tour of duty on July 4, 2012. On that occasion he was observed by Assistant Superintendent Steven Dale. He was then involved in the movement of several cars which were being pushed by a slave power unit. According to the observations to Mr. Dale, Mr. Hayes was stationed on a side ladder at the rear-end of the last car, being essentially between the last car and the power unit which was pushing the consist. Mr. Dale observed Mr. Hayes leaning behind the car and turning the hand break as the movement was being shoved. As he did so, according to the account of Mr. Dale, he effectively placed himself between the engine and the cars being pushed. Mr. Dale's memorandum indicates that after the incident he spoke to the grievor who acknowledge that he was applying the break

incorrectly, as a handbrake should not be applied to moving equipment. However, in the subsequent disciplinary investigation, Mr. Hayes gave a different response, indicating that he was simply winding the slack in the chain of the handbrake as the consist moved towards its destination.

The Union argues that the Company failed to conduct a fair and impartial investigation. It bases that assertion, in part, on the fact that Mr. Dale's report was before the investigating officer. That is no doubt true. In fact that report describes what Mr. Dale observed and his own conclusion that Mr. Hayes violated CROR 112 (c) as well as G.O.I. Section 8.12.4 and 8.12.6.

I cannot accept the Union's argument that the fact that Mr. Dale's memo asserts conclusions made it illegitimate for the investigating officer to receive the memo and share it with the grievor and his Union representative as part of the disciplinary investigation. Nor am I persuaded that the turns of phrase used by the investigating officer, for example asking him whether by not following the rules he did not place himself in a precarious situation, the officer himself violated the obligation of a fair and impartial investigation. It is well established that a Company's disciplinary investigation is not intended as a quasi-judicial proceeding. The fact that Mr. Dale had an opinion and that the investigating officer put it to the grievor that it appeared that he had violated the rules does not, of itself, constitute a failure to conduct a fair and impartial investigation. The give and take of disciplinary investigations requires the ability for the lay persons conducting such proceedings to use ordinary language and, on occasion, to be accusatory in their questions. That does not, of itself, confirm that the method of proceeding is not fair and

impartial. To sustain the Union's objection would effectively muzzle a Company officer in a reasonable attempt to gauge an employee's understanding of the rules and the consequences of not observing them. On the whole, therefore, I am not satisfied that the Union has demonstrated that the Company deprived the grievor of a fair and impartial investigation.

Nor am I impressed with the merits of the Union's case with respect to the incident of July 4, 2012. By placing himself between the slave power unit and the last rail car in the consist the grievor plainly violated G.O.I. section 8.12.4. That rule expressly provides as follows:

When riding equipment, employees MUST ALWAYS:

- unless it is the trailing car in the movement, ride the side ladder on the leading end of equipment in the direction of travel.

As can be seen from the foregoing, the grievor was improperly positioned at the time he was observed by Mr. Dale, was in violation of the above rule, and arguably placed himself in a position of some peril. The Arbitrator cannot accept the suggestions of the Union that in fact the grievor was riding the trailing car of the movement because he was on the rear-most car. The car he was riding was not in fact the "trailing car" as it was followed by the slave power unit which was pushing the consist. While the car may have been the last car before the locomotive power, it was clearly not a trailing car in the sense intended by Rule 12.4 of G.O.I. Section 8.

In the grievor's relative short years of service he has been disciplined on a number of occasions for the violation of operating rules. At the time of the incident his record stood

at fifty demerits. In the Arbitrator's view, even if it is accepted that the grievor did not apply the handbrake as his consist was moving, but was merely winding the slack in the chain, he nevertheless placed himself in a hazardous position contrary to the Rules. On that basis he was liable to discipline and in my view the discipline assessed was not unreasonable and should not be disturbed.

The above conclusion makes it unnecessary for the Arbitrator to deal with the third incident which involved the assessment of twenty demerits for the grievor's alleged improper detrainning and handling of a switch during his tour of duty on July 5, 2012, the day following the events reviewed above. However, if it were necessary to rule on the matter, I would not sustain the Union's objection with respect to an alleged violation of the *Personal Information Protection and Electronic Documents Act*. The material before me confirms that while Supervisor Dale was attempting to monitor what he felt was a delay in yard operations he viewed the grievor's movement, and the grievor himself, through a remote camera system. As he did so he incidentally observed what he felt was an improper method of detrainning by the grievor, as well as the improper use of his foot in the lining and securing of an ergonomic switch. While it may be true that with a ball type switch handle an employee may use their foot to secure the switch, there is no such exception for the type of switch which was being handled by the grievor on the day in question.

Nor can I share the view of the Union that there was a violation of the grievor's rights of privacy under *PIPEDA*. Mr. Dale's use of the camera system to check on the status of the marshalling of the train on which the grievor was working was well within his normal obligations. His observation of the grievor's actions was simply incidental to that exercise of

his duties. This is not, as the Union suggests, a deliberate surveillance of the grievor for the purpose of finding fault with his work as a means of imposing discipline.

What of the measure of discipline? In the Arbitrator's view it would have been arguably more appropriate to assess something less than twenty demerits for the detrainning and handling of the switch observed by Mr. Dale. However, even the assessment of ten demerits, standing alone, would have resulted in the accumulation of sixty demerits and placed the grievor in a dismissable position, quite apart from the additional events reviewed in respect of July 4, 2012.

In the result I am satisfied that the Company did not violate *PIPEDA* in its treatment of the grievor, and that all three heads of discipline reviewed herein gave cause for the assessment of discipline and that the discipline assessed was not unreasonable, save that the third incident might have properly been dealt with by the assessment of ten demerits, a result which would still not have avoided the grievor's termination.

For all the foregoing reasons the grievances must be dismissed.

April 15, 2013

MICHEL G. PICHER
ARBITRATOR