

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4205

Heard in Montreal, May 14, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

A seven day suspension assessed against Mr. Michael Byrnes (187578) for his actions which caused operational delay on September 14, 2012.

JOINT STATEMENT OF ISSUE:

Mr. Michael Byrnes is a locomotive engineer from Capreol, Ontario. He was working the X30131 14 on September 14, 2012 from MacMillan Yard to Capreol on the Bala Subdivision, on duty at 1000. At approximately 1315, Mr. Byrnes stopped the train on the mainline north of Sparrow Lake in order to use the washroom. He did not allow the Conductor, Shawn Viel, who was CLO qualified to operate the train while he was in the washroom.

The Union filed a grievance dated November 27, 2012 in accordance with Article 73.1 of the of the 1.1 Collective Agreement alleging that the discipline issued to Mr. Byrnes, a seven day suspension, was unwarranted and requesting that it be rescinded and that he be compensated for all lost earnings resulting from the suspension.

The Company disagrees with the Union's position and maintains that the discipline assessed was both warranted and appropriate.

FOR THE UNION:
(SGD.) P. Vickers
General Chairman

FOR THE COMPANY:
(SGD.) M. Marshall
Senior Manager Labour Relations

There appeared on behalf of the Company:

M. Marshall	– Senior Manager Labour Relations, Toronto
D. Gagne	– Senior Manger Labour Relations, Toronto
W. Glass	– Senior Engine Service Officer, Toronto
V. Paquet	– Labour Relations Manager, Toronto
D. Larouche	– Labour Relations Manager, Montreal
D. Van Cauwenbergh	– Director Labour Relations, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
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P. Vickers	– General Chairman, Sarnia
P. Boucher	– Arbitration Coordinator, Ottawa
J. Lennie	– Vice General Chairman, Port Robinson
J. Robbins	– General Chairman, Sarnia
B. Willows	– General Chairman, Edmonton
B. Ermet	– Vice General Chairman, Winnipeg
R. Beatty	– President, TCRC, Ottawa
P. Proudlock	– Locomotive Engineer, Toronto

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not disputed. On September 14, 2012, while operating his train from McMillan Yard to Capreol the grievor stopped on the main line so that he could use the washroom. As reflected in the parties' joint statement of issue, he did not hand over control of the train to the CLO qualified conductor who was working with him, to use the washroom while the train continued underway.

Following a disciplinary investigation the grievor was assessed a seven day suspension. Upon a review of the facts I am satisfied that the Company was entitled to assess discipline against the grievor. For reasons related below, however, I believe there is a case for making an adjustment in the discipline assessed.

In defence of the grievor's actions, the Union stresses that Conductor Shawn Viel, who was the CLO qualified who was working with the grievor, was not sufficiently experienced to be entrusted with the operation of the train should the grievor choose to use the onboard washroom.

The Union relies in substantial part on the definition of a CLO as it appears in the CROR. As noted in Company correspondence the CROR defines the CLO as “a Conductor qualified to operate the engine under direct supervision of the locomotive engineer.”

The parties are substantially apart with respect to the meaning of the concept of direct supervision. Locomotive engineer Byrnes, the grievor in the instant case, effectively states that he did not believe that he could supervise Conductor Viel as a CLO within the meaning of the Rules if he did not at all times have his eyes upon him. According to that approach the grievor would have been justified to stop the train if he was required to use the washroom facility with the door closed, and presumably would have been in the same position to stop the train if, for example, he had been required to exit the locomotive to tend to a problem in a second or third locomotive unit.

With the greatest respect, the Arbitrator cannot agree with Mr. Byrnes’ interpretation of the concept of direct supervision of a CLO as intended by the rules. As stressed by the Company, it has gone to great expense to train conductors in the basics of locomotive operation precisely to allow them to be able relieve locomotive engineers for brief periods while the CLO operates the locomotive, albeit at all times under the supervision of the locomotive engineer. In my view the concept of supervision does not, as the grievor would have it, require uninterrupted eyes-on supervision. Just as a locomotive engineer might divert his attention while taking a drink of water or preparing his meal in the cab of the locomotive while the CLO is at the controls, so might he

absent himself from the cab for a short time, whether to use the washroom or to attend to a problem in another locomotive unit. The grievor knew, or reasonably should have known, that the very purpose of CLO qualification is to ensure that trains continue to operate to the extent that a CLO can provide relief in the control of a locomotive in such circumstances as the locomotive engineer needing to use the washroom facility. In the result, I am compelled to conclude that in this case the grievor did render himself liable to discipline.

What, then, is the appropriate measure of discipline in all of the circumstances ? In my view there are a number of mitigating factors to consider. Firstly, the grievor is a long service employee, being in his twenty-ninth year of service at the time of the events here under review. I consider it notable that from the time he was hired in 1984 until 2011 the grievor was disciplined only twice for rules related infractions, albeit he did attract a number of demerits and reprimands for attendance problems. It appears that the grievor was free of active demerits at the time of the incident here under review.

In support of its position counsel for the Union refers the Arbitrator to a number of facts. Among his submissions is reference to an investigation report of the Canadian Transportation Safety Board concerning an incident in relation to a train on July 25, 2004 on the Balla subdivision. The derailment in that incident was attributed, in part, to the inexperience of a CLO who was left in control of the train. The Transportation Safety Board Report contains a number of observations with respect to the use of CLO's, including the following :

Safety Concern

Training and Certification of Personnel Operating Locomotives

Its response to RSA 03/05, *Training and Certification of Personnel Operating Locomotives*, TC discussed the current status of CN's CLO training programs. As part of these discussions, CN presented a description of its CLO program, which matches information it had already provided to TSB investigators. Based on CN's Information, TC indicated that the CLO program is consistent with safe railway operation.

However, TC's assessment did not address the safety issue that was the basis for RSA 03/05 (that is, that there is a fundamental gap between what CN states as the intended use of CLO-designated conductors and the actual practice). In situations where conductors are sharing equally in train operation, they are no longer providing intermittent relief the locomotive engineer, as was defined in the CLO program. Rather, they are acting as de facto second locomotive engineers. CLOs operating in this manner will inevitably find themselves at the controls during a complex operating situation.

In comparison, in air transportation, only persons who have earned and maintained qualification in the operation of an airframe (that is, who have undergone the same minimum qualification, training and regular recertification) are permitted to be at the controls during operation.

It has been unable to provide documentation indicating that either TC or industry has conducted a formal risk assessment of this practice consistent with safety management practices. In addition, there is no tracking or measurement of CLO operation by TC, and consequently, there are no formal records of how frequently CLOs are placed in complex operating situations. Such instances are only identified after they have led to a reportable occurrence warranting a TSB assessment.

The recent ALERT (Advanced Locomotive Engineer Refresher Training) program has not been provided to CLOs (unless they are also qualified locomotive engineers). It was indicated that the information learned at the training would be passed on to the CLOs by the locomotive engineers. However, there is no process or method to ensure that this occurs.

In view of the above, the Board is concerned that the use of CLO-designated conductors to operate locomotives may not be consistent with safe railway operations.

In the Arbitrator's view the relationship between a locomotive engineer and the CLO he or she is assigned to directly supervise must work on a common sense basis. I cannot accept the position enunciated by locomotive engineer Byrne which is to the

effect that he could never take his eyes off the CLO who was assigned to assist in the operation of his train, should the CLO be in fact required to operate the locomotive. As a general rule, for brief periods, being within voice or radio contact of the CLO would, in my view, maintain the locomotive engineer in a reasonable position to supervise the CLO, and in particular to be advised should the latter be encountering any difficulties in operating. The radical suggestion implicit in Mr. Byrnes conduct, which is that he could not entrust his CLO to operate the locomotive for the briefest of time while he used the washroom facility, is in my view unreasonable and inconsistent with the very premise by which CLO's are trained to operate locomotives and are assigned, at least in part, to be able to provide short term relief to locomotive engineers as needed.

To put the matter differently, if locomotive engineer Byrne believed at the commencement of his tour of duty that CLO Veil was not fit to operate the locomotive without constant and direct visual supervision, it is arguable that he should have declined the assignment for possible safety reasons. It simply was not, in my view, open to the grievor to effectively stop his train, incurring what appears to have been a twenty-minute pause, albeit the time was later made up, for the sole purpose of taking a washroom break.

Notwithstanding the foregoing observations, I am satisfied that there is a basis for a reduction of the penalty in the instant case. As became evident during the course of the hearing, the Company could point to no specific directives concerning the handing of control of a locomotive to a CLO or the degree of direct supervision, whether

visual or otherwise, that might be required. While I am satisfied that in fact the grievor did abuse his discretion, it was within a context where the Company's rules were less explicit than they might be.

In the circumstances, I am satisfied that it is appropriate to reduce the discipline assessed to the grievor to a written reprimand. His record shall therefore be amended accordingly and he shall be compensated for his wages and benefits lost.

May 17, 2013

MICHEL G. PICHER
ARBITRATOR