

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4250**

Heard in Montreal, October 10, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer Ken Zmaeff.

JOINT STATEMENT OF ISSUE:

On September 25, 2012, following an investigation, Locomotive Engineer Zmaeff was dismissed from Company service for "failure to exercise vigilance and attentiveness as evidenced by your train operating within the limits of a Rule 42 GBO without the proper authority, a Cardinal Rule Violation, and for allowing and failing to report the deliberate and willful use of a cellular phone by a co-worker (70 occurrences) while on duty, violations of CROR Rule 42, CROR Rule 142, Safety Rule Book for Field Operations Section II (Page II T-0 Job Briefings), CROR Rule 106, CROR General Rules A (i), (iii), (vi), (viii), (xii) & SSI, and CROR General Notice, during your tours of duty as Locomotive Engineer on Train 861-200 on August 17th, 2012 and Train 874-835 on August 18th, 2012, while operating on the Shuswap Subdivision. The Union contends that the investigation was 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 Locomotive Engineer Zmaeff be made whole. The Union further contends that Mr. Zmaeff's discharge is unjustified, unwarranted and excessive in all of the circumstances. The Union requests that Mr. Zmaeff be reinstated without loss of seniority and benefits, and that he 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 and denies the Union's request.

FOR THE UNION:
(SGD.) D. Able
General Chairperson

FOR THE COMPANY:
(SGD.) A. Becker
Labour Relations Officer

There appeared on behalf of the Company:

D. Freeborn	– Director Labour Relations, Calgary
J. Poeta	– Superintendent, Central Ontario

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
-------------	--------------------

G. Edwards	– Vice General Chairman, Revelstoke
D. Able	– General Chairman, Revelstoke
L. Daley	– Local Chairman, Revelstoke
K. Zmaeff	– Greivor, Revelstoke

AWARD OF THE ARBITRATOR

On September 8, 2012, Locomotive Engineer Zmaeff received a notice that he was required to attend an interview for his “consecutive tours of duty on Train 861-200 (9375 West) on August 17, 2012 and on Train 874-835 (9612 East) on August 18th, 2012 and a Rule 42 possessed by Foreman Gooding on August 18, 2012.” Following the Company’s investigation, Mr. Zmaeff was dismissed from employment, effective September 25, 2012.

On August 17, 2012, Mr. Zmaeff and Conductor Eastabrook were called for train 861-200 at 10:00 in Revelstoke. The August 17, 2012 trip was without incident.

On August 18, 2012, the crew was called for their return trip at 02:10 on train 874-835. A Tabular General Bulletin Order (TGBO) issued indicated a Rule 42 between Mile 114 and Mile 107 on the Shuswap Subdivision. The Conductor contacted the Foreman for instructions as required. The train was to proceed eastward on the South Track. Prior to the train’s arrival at Ducks the Conductor had several conversations with the Foreman about the work to be undertaken. The Conductor conveyed to Mr. Zmaeff his erroneous belief that the train had been cleared through the entire limits. The Conductor then had several conversations with the Foreman regarding the train stopping within his limits to perform switching and that the train’s routing would take it to the North Track. It was not until after the Foreman had contacted the crew after the crossover to ask if they wanted more track that Mr. Zmaeff realized that the train was occupying the North Track

without authority. He put the train into emergency and performed an emergency radio broadcast.

Upon the arrival of Trainmaster Dergousoff, who responded to the incident, the Conductor reported that he had forgotten his watch and that he had been using his cell phone in airplane mode during the trips as a timekeeping device. The Conductor has conveyed to the Company that he did not think Mr. Zmaeff was aware that he had used his cell phone. The Conductor had left it on his desk and had used it in excess of 70 times.

Mr. Zmaeff maintains that he was unaware of the Conductor's use of his cell phone. Reproduced below is Mr. Zmaeff's explanation in support of that assertion:

Q 143. For all the occasions Conductor Eastabrook was required to note a time in performing his duties you never once observed where he was obtaining his source from is that correct?

A. On the trip from Revelstoke to Kamloos I had a side console for controls which limited my view of the Conductor's side of the Cab. Even if I was to stand up and look directly at the desk there are areas such as behind the hot plate that are hidden from view. A conductor's desk can at times be covered in paper work as well as personal items such as food containers. Many conductors remove their watch and place it on the desk. Even if I had noticed Conductor Eastabrook reaching to his desk to see the time, this motion would not be out of the ordinary for many Conductors. On the return trip much like the trip over it was mostly daylight and any illumination from a cell phone would not be obvious and although I did not have a side console on the return trip, as I explained on the trip over a cell phone on a cluttered desk may not be obvious and the motion of a conductor to reach out to obtain the time is not an unusual motion that occurs. Most Conductors have their overhead lights on the entire trip because of the Signal Recognition Forms.

In the circumstances described above, train 874-835 (9812 East) entered Foreman Gooding's Rule 42 limits without the proper authority. To have done so is a serious rule violation. Mr. Zameff's claim that he found Foreman Gooding's radio communication unclear is no excuse and in fact it is of concern that Mr. Zmaeff proceeded in spite of unclear instructions. It is not, however, analogous to *CROA 3881*, relied on by the Company, where the grievor had continued to operate under an assumption that was contrary to the objective facts that had been communicated to him repeatedly.

The Union raises an objection to the lack of specifics in the Company's notice to Mr. Zmaeff to attend the interview on September 8, 2012. Specifically, there is no reference to the subject matter of cell phone use. I have reviewed Article 23 of the Collective Agreement together with *CROA cases 2280* and *Ad Hoc 521* where Arbitrator Picher references the essential right of an employee to know in advance the precise conduct that will be the subject of the investigation. Without such information, an employee is deprived of a meaningful opportunity to prepare himself to respond to the investigator's questions. In such circumstances, the employee would be denied a "fair and impartial" investigation.

Having reviewed the documents that were shared with Mr. Zmaeff prior to his interview, and considering how matters unfolded, I have no doubt that he was well aware of what would be the subject matter of the investigation as it pertained to the August 17 and 18, 2012 trips above and beyond the Rule 42 violation. Mr. Zmaeff had a fair opportunity to think about his crewmate's cell phone usage as a timekeeping device and contemplate what his responsibilities were vis-à-vis that cell phone usage as set out in CROR General Rules A (i) (iii), (vi), (viii), (Xii) & SSI. Mr. Zmaeff's answer to the

question reproduced above reveals a well considered response. As for the substance of that considered response, it appears to me to be vague and largely unresponsive, albeit self-serving. I have considerable difficulty accepting that in the circumstances Mr. Zmaeff was unaware of the Conductor's cell phone usage.

The Company dismissed Mr. Zmaeff in the circumstances described above. At the time of his dismissal Mr. Zmaeff had 29 years of service with the Company. His record at the time of his dismissal stood at no demerit points. Over the entire course of his employment of 29 years, Mr. Zmaeff has amassed a total of 215 demerit points, 85 of which were for rules related infractions. All things considered, this is not a case in which outright dismissal is warranted.

Even considering that I have found Mr. Zmaeff to have been less than forthright with respect to his knowledge of his crewmate's cell phone use, the circumstances here do not elevate this case as analogous to those referenced in *CROA 2356*. In that case, the Trainman proceeded four car lengths past a signal with a stop indication in violation of CROR Rule 429 (now Rule 439). As others had realized the error simultaneously, the passenger train moving in the same direction, on what would have been a side-collision course, also came to a stop. The Trainmaster, realizing what he had done, then committed additional infractions, the most significant of which was instructing the locomotive engineer to pull back without any authorization from the RTC to do so. In substituting the penalty of discharge, and reinstating him with without compensation and without loss of seniority, with a significant period of suspension, Arbitrator Picher reviewed the then prior CROA awards where outright discharge had been sustained:

Outright discharge for a violation of Rule 292 (which had been Rule 429), generally coupled with other rules violations, is revealed in a relatively limited number of cases (see **CROA 474, 681, 745, 1479, 1505, 1677 & 2124** [*reduced to a suspension*]). In each of the cases involving an imposition of outright discharge by the company there has been some aggravating factor. For example, in **CROA 681** and **2124** the employee discharged for passing a stop signal had committed his second offence against the rule. In **CROA 745** a locomotive engineer was dismissed where a violation of Rule 292 was found to also involve a violation of Rule G, resulting in a collision and two fatalities. Serious collisions were also involved in **CROA 1479** and **1677**, while in **CROA 1504** the discharge of the locomotive engineer was motivated, in part, by his falsification of an employee statement intended to evade his responsibility. More recently, employers have again used the assessment of suspensions for violations of rule 292 of the UCOR and rule 429 of the CROR (See, e.g., **CROA 2126, 2161, & 2267.**)

Mr. Zmaeff's part in the Rule 42 violation, though serious, is less serious than the conduct described in *CROA 2356* decision and the cases cited therein dealing with outright discharge.

In all the circumstances, this is an appropriate case to substitute a penalty short of discharge. Mr. Zmaeff is to be reinstated without compensation and without loss of seniority, with the period of his discharge and his reinstatement to be recorded as a suspension for the infractions listed in the notice provided to Mr. Zmaeff on September 25, 2012, and I so order.

October 17, 2013



CHRISTINE SCHMIDT
ARBITRATOR