

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4366**

Heard in Montreal, February 12, 2015

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAILWAY CONFERENCE**

**DISPUTE:**

Appeal of the discharge of the Grievor, Joe D'Arcey, on March 25, 2014 for "failing to inspect a passing [train], in violation of CROR Rule 110" during his tour of duty on train 100-08 on March 8, 2014.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

It is not in dispute that the Grievor did not detrain to inspect at Three Valley East on the Shuswap Subdivision after stopping to meet a westbound train.

The Union contends that the Grievor has clearly indicated through the investigation that, on March 8, the avalanche rating in that area was "considerable," and the terrain where the Grievor's movement was stopped precluded him from safely inspecting the passing train from the ground. The Grievor has clearly complied with Rule 110 and the Union submits that the Company cannot prove a violation. In the alternative, the Union contends that the penalty assessed is unwarranted, unjustified and excessive in the circumstances.

The Union requests that Engineer D'Arcey be reinstated into his employment and that he be made whole for all lost earnings and benefits he suffered as a result. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

**FOR THE UNION:**  
**(SGD.) G. Edwards**  
**General Chairperson**

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

B. Medd	– Officer, Labour Relations, Calgary
M. Jackson	- Superintendent, Revelstoke
N. Hasham	- Legal Counsel, Toronto

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
L. Daley	– Local Chairman, Revelstoke
J. Linnell	– Local Chairman, Kamloops
J. D'Arcey	- Grievor, Revelstoke

## **AWARD OF THE ARBITRATOR**

1. Joe D'Arcey is a Locomotive Engineer. He had 10 years service with the Company at the time of his dismissal. He had received a total of 50 demerits over the course of his employment, in 2004, 2009 and 2012. At the time of his termination, he had no current demerits.

2. Inspecting a passing train is an important safety function. The checks enable the ready identification of damage and potential dangers. Transport Canada mandates that inspections be performed every 30 miles by way of hotbox detectors or visual pull-by or standing inspections. As the Company submits, these inspections are crucial to safe railroading and are in place to minimize the risk of catastrophic events. When performing a pull-by inspection, crew members must detrain and position themselves on the side of the observed train in order to look for dangling hoses, locked breaks, listing equipment, unsecured, shifting loads, leaking tank cars, and damaged safety appliances or equipment. The crew must especially look out for hot journals or hot wheels on the passing equipment.

3. The Grievor failed to conduct a pull-by inspection on the track between Revelstoke and Kamloops on the Shuswap Subdivision at the Three Valley Siding. His Conductor left the locomotive and stood on the north side of the track to do the inspection of the passing train, 863-034, heading in a westerly direction. The Grievor remained in the locomotive cab in the Engineer's seat.

4. Photographs of the area were produced. The track runs along the edge of a mountain on its north side and, from the track, the landscape falls off abruptly into a lake on the south side. The siding there was created with a steep rock bank cut into the north side. It has a rock wall beside it, secured in places with rock bolts and anchors. There was room on the north side

of the track to do the pullby inspection, where the Grievor's crewmate Conductor stood. The Grievor could have done his inspection there, alongside the Conductor, or he could arguably have done it on the south side. The Union contends it was not safe for him to stand on the south side because he would have had nowhere to move away safely if there were a derailment. The Company disputes this. It says that the terrain on the south side of the line is sufficient for a steady foothold far enough from the passing train for safety. I do not need to decide this difference because the Grievor could have observed the passing train from the north side.

5. The Grievor explains why he never emerged from the locomotive cab. The day before he had personally witnessed the force of an avalanche east of the siding at Three Valley. He was particularly concerned of an avalanche risk at the point where he would have had to do the pullby inspection at Three Valley Siding. He spoke of this safety concern to the Conductor once they had notice of the oncoming train they would have to inspect. He advised the Conductor of his concern and why he would remain in the cab. The Conductor did not share his fear and left the cab to do his inspection. The Grievor moved to a position in the cab where he could see the Conductor, so that he could keep him under observation if the passing train were to cause an avalanche, in accordance with the avalanche protocol.

6. At that time the official avalanche risk at Three Valley Siding was low (the risk evaluations are: high, moderate and low). The Company says also that the Grievor would not have been in the slide path of any avalanche at the point where he would have done the inspection. The Grievor was aware that the official assessment was of low risk of an avalanche, but he was nonetheless too concerned by the risk to leave the locomotive. He did not report his safety concern to his Rail Traffic Controller, the Trainmaster, to passing trains, Road Crews or any Officer of the Company; nor did he exercise a work refusal.

7. Despite the Grievor not making such a report, I am satisfied that the Grievor's reason for not leaving the cab and doing the inspection was bona fide, and not the consequence of neglect or disobedience.

8. Rule 110 of the Canadian Rail Operating Rules (CROR) is what the Company claims the Grievor breached, for which he was terminated. The relevant portion reads:

**110. INSPECTING PASSING TRAINS AND TRANSFERS**

(a) When duties and terrain permit, at least two crew members of a standing train or transfer and other employees at wayside must position themselves on the ground on both sides of the track to inspect the condition of equipment in passing trains and transfers. When performing a train or transfer inspection, the locomotive engineer will inspect the near side. When a group of wayside employees is present, at least two employees must perform the inspection.

EXCEPTION: Crew members of passenger trains are exempted from the above requirements except when standing at meeting points in single track territory. However, every effort must be made to stop a train or transfer when a dangerous condition is noted.

9. The Union relies on the preamble to the provision, "when duties and terrain permit ...". It argues that the terrain was such, with the risk of an avalanche, that the Grievor was reasonable in not leaving the locomotive, and that his failure to inspect was therefore justifiable, and so not deserving of discipline.

10. If an individual wishes to assert a safety reason for not complying with a CROR rule, the reason must withstand scrutiny; in other words, the reason must be objectively correct. In this case, I am satisfied that the Grievor was not correct in asserting his fear of an avalanche. That was not a reasonable apprehension at the time, given the official determination that the risk of an avalanche was low, and the fact that uncontrolled avalanches are rare. Approximately 90% of avalanches, such as the one the Grievor witnessed the day before, are controlled, caused to remove potentially dangerous build-up of snow and ice. As I have said, I accept the Grievor was bona fide in his fear of an avalanche – his experience the previous day had made the threat of

an avalanche all the more real – but he was not justified by reason of “terrain” to abstain from the obligation he had to perform the inspection. His failure to carry out the inspection was therefore a breach of CROR 110.

11. What is the appropriate discipline for the Grievor’s misconduct? Although there has been more severe discipline issued (lengthy periods of unpaid suspension) for instances where employees deliberately ignored their obligation to do pull-by inspections (**CROA 3924**), or they already had substantial accumulated demerits (**CROA 3711, CROA 3712**), I am satisfied that termination for the Grievor’s offence is disproportionate and excessive, particularly having regard to his clean disciplinary record.

12. Having reviewed the customary discipline for this type of offence, and given the bona fide, though mistaken, reason for the Grievor’s failure to inspect, I partially uphold the grievance. The appropriate sanction is 20 demerits. That penalty is substituted for the Grievor’s termination. The Grievor is reinstated in employment with compensation for lost wages and benefits, including pension, and without loss of seniority.

13. I remain seized of the implementation of the award.

February 27, 2015



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**CHRISTOPHER ALBERTYN**  
**ARBITRATOR**