

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4411-D

Heard in Montreal, June 11, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 45 demerit marks for his attempts to mislead the Company by providing false statement regarding emergency broadcast, and ability to observe his entire train once stopped on double track. Train handling and policy violations while operating as locomotive engineer on Q11251-20 including: CN 8960-G1.2 (i) Use Forward Planning for planned stop; CN 8960 G2.7 Releasing Train Brakes; CN 8960 G3.7 Running Release; CN 896 G2.12 Use of Dynamic Brake; CROR failures of rules 102, 106, 125 item (iii); GOI Section 8 12.1 Crew Job Briefing and System Special Instructions B1.5 and B1.52 HPTA Policy.

And the resulting discharge for accumulation of demerit marks in excess of sixty, effective May 6, 2014.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On April 23, 2014, Mr. Foreman was assigned as the LE on Train Q11251-20 when he initiated an emergency brake application at approximately Mileage 140.9 of the Reddit Subdivision while stopping to meet two opposing trains at McNulty station.

The Company conducted an investigation of the incident and determined Mr. Foreman had violated the Rules and Company Instructions noted, and subsequently assessed him with forty-five demerit marks, and discharged him for accumulation of demerit marks in excess of sixty.

The Union's appeal contended that that discipline assessed was excessive under the circumstances and that the Company did not take into account all of the mitigating factors. The Union requested that the Company reconsider the discipline assessed and expunge or, in the alternative, significantly reduce the discipline and compensate Mr. Foreman for all lost wages and benefits.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) J. Shields
Manager Labour Relations

There appeared on behalf of the Company:

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|---------------|---------------------------------------------|
| K. Morris | – Senior Manager Labour Relations, Edmonton |
| D. Brodie | – Manager Labour Relations, Edmonton |
| L. Fredericks | – Trainmaster, Toronto |
| D. Crossan | – Manager Labour Relations, Prince George |

There appeared on behalf of the Union:

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|-------------|---------------------------------------------|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| B. Willows | – General Chairperson, Edmonton |
| B. Ermet | – Senior Vice General Chairperson, Edmonton |
| B. Barr | – Local Representative, Vancouver |
| B. Foreman | – Grievor, Winnipeg |

AWARD OF THE ARBITRATOR

1. On April 23, 2014, the Grievor was assigned as the Locomotive Engineer on Train Q11251-20 operating on the Redditt Subdivision between Winnipeg, Manitoba, and Sioux Lookout, Ontario.

2. There were train handling violations by the Grievor during this journey. The first involved the Horse Power Ton Analyser (HPTA) restriction, provided to the crew on the train journal. The Grievor was to operate his locomotive consist no higher than throttle position No. 7. He failed to do this for forty-eight minutes before relief was given through communication with the Chief RTC.

3. The Grievor's explanation for his failure to comply with the HPTA restriction was that he was unaware of the restriction because his conductor had failed to tell him. Although, as the Company points out, under CN System Special Instructions B1.5 and 81.5.2, the Grievor had a responsibility to determine what restrictions existed and to apply them, in this case it appears that he asked the conductor if there were any restrictions,

and the conductor said there none. He himself had an obligation to check the manifest to determine whether any restrictions applied, but it is common for the locomotive engineer to rely on the conductor for information of restrictions. Although the Grievor ought to have checked the manifest himself, his ignorance of the restriction is mitigated by the conductor's failure to mention the restriction in the pre-job briefing when he was asked if there were any restrictions.

4. As the Grievor and his crew travelled Eastward from Station Wade at Mileage 143.7 of the Redditt Subdivision, they were aware that they would be required to stop to meet two opposing trains at McNulty station, at Mileage 140.4. They did not anticipate, though, how steep was the gradient leading down to the McNulty station.

5. At 05:40:19 hours the Grievor made a full service brake application of the automatic brake system. Sixteen seconds later at 05:40:40 at Mile 140.9 of the Redditt Subdivision the Grievor applied the emergency brake.

6. The Company treats use of the emergency brake as an action of last resort in train-handling practices.

7. The Grievor over-aggressively slowed and stopped his train at the McNulty station. He should have slowed down earlier using throttle manipulation, then the dynamic brake to stop the train, applying split service reduction of the brakes. Instead he used both a heavy dynamic brake and then the emergency brake. This meant that the train brakes as well as the locomotive brakes were fully applied simultaneously. In the investigation the

Grievor admitted he could have done a better job, but said he was extremely tired having been awake for twenty-four hours.

8. By failing to adequately forward plan and not slowing down earlier by using throttle manipulation and then the dynamic brake to stop his train, the Grievor placed in potential jeopardy his own and his conductor's safety, and he put at risk CN's equipment, the track structure and, potentially, the opposing trains because an emergency stop may cause objects to fall from the train onto an adjacent main track that can become obstructed.

9. The Grievor's failure to anticipate the extent of the braking required to stop the train safely before the McNulty station is somewhat mitigated by the unexpectedly steep gradient of the terrain leading down to the station, which made the train handling difficult (see **CROA&DR 4145**).

10. CRO Rule 102 required the Grievor, upon using the emergency brake, to immediately transmit a radio broadcast on the standby channel, "EMERGENCY, EMERGENCY, EMERGENCY" with details of the train's exact location so that opposing trains in the vicinity may respond appropriately by stopping. Also, as soon as possible, the crew must advise the RTC of the train's emergency stop location, indicating whether adjacent tracks are liable to be obstructed. Also, the emergency broadcast must be repeated at intervals not exceeding ninety seconds until the crew is advised by the RTC that all affected movements on other tracks have been secured, stopped or advised of the emergency stop, or it is known that the adjacent tracks are safe and clear for movement.

11. The Grievor did not comply with these obligations. He claimed to have made one emergency call, but this was not heard by the CN Trainmaster who was riding on the approaching, opposite train. It was also not heard by the conductor with the Grievor in the locomotive cab. In all likelihood, the Grievor did not make the call, otherwise it would have been heard. Also, it is apparent that the Grievor did not repeat the emergency call, as the Rule requires, until he was advised by the RTC that all affected movements on other tracks have been secured, stopped or advised of the emergency stop. By the time he communicated with the RTC he ought to have broadcasted the emergency message eleven times.

12. The Grievor claims that he was about to contact the RTC when he was contacted by the RTC. This is unlikely because the RTC contacted the Grievor seventeen minutes after he had applied the emergency brake, after use of the emergency brake sounded an alarm in the RTC office. Inquiries were made by the RTC office as to whether the adjacent track was fouled or clear.

13. The Company accuses the Grievor of dishonesty, or reporting that he could see his entire train when this was not possible because it was 8,100 ft in length, traversing three successive curves in the track. In fact, the Grievor did not report that the adjacent line was clear until the conductor had physically inspected the whole train and the adjacent line and confirmed that there was no damage to the train and the adjacent line was clear.

14. The Grievor's applied the emergency brake when more prudent management of the train might have avoided him doing so. He completely failed to perform his responsibilities

under CRO Rule 102. Even if the steepness of the gradient at McNulty station is such as to substantially mitigate the Grievor's use of the emergency brake, his failure to have complied with Rule 102 was a significant infraction, deserving of discipline.

15. As a result of **CROA&DR 4411-A**, described below, the Grievor was at forty-five demerit points when the incidents giving rise to his termination occurred. Applying the demerit points, whether the forty-five the Company imposed, or a lesser number I would find to be appropriate, will result in the Grievor's termination. The question is whether he ought to be given yet another change in his employment. That requires an analysis of all the relevant considerations.

16. The Grievor has a considerable disciplinary history. In 2006, he was discharged for a violation of CROR General Rule 11G11 and the CN Policy to Prevent Workplace Alcohol and Drug Problems as a result of a positive drug test following a train derailment accident. This was ultimately resolved between the parties by the Grievor's reinstatement with monitoring, with a lengthy suspension substituted in place of the discharge.

17. In 2008, the Grievor was assessed a reprimand for a violation of the CN Locomotive Engineer Operating Manual, Form 8960, Section G, Train Handling, for a train separation while operating Train M346.

18. On July 22, 2009, with his active discipline record then at forty-five demerits, the Grievor was disciplined with an eleven-day suspension for violation of CROR Rule 111 (e) while Conductor of Train M30451-27 on May 29, 2009. The assessment of this

suspension, rather than additional demerit marks, prevented the Grievor's discharge for accumulation of demerits. Effectively, the Grievor was given a further opportunity to correct his behaviour, short of losing his employment.

19. On June 24, 2010, the Grievor was discharged for an accumulation of demerits, as a result of forty-five demerit marks assessed for his violation of CROR 429 (now CROR 439) at Signal 91.2 Canyon West, on the Redditt Subdivision while working as Locomotive Engineer on W90141-06, June 06, 2010. On October 18, 2010, the Grievor was reinstated without compensation for lost wages and benefits, pursuant to **CROA&DR 3942**. The forty-five demerit marks were removed from his record and substituted with thirty demerits at the time of his reinstatement. The arbitrator found some mitigation for the Grievor's misconduct because he could not see the signal from where he was positioned at the time. Also, the arbitrator took account of the Grievor's then twenty-two-years' service and the fact that his operating rule infractions had not included breach of a cardinal rule.

20. The Grievor's reinstatement by the arbitrator was a further opportunity for him to correct his work performance and ensure that he complied with the operating rules of his position.

21. Following the Grievor's reinstatement in 2011, he successfully worked off twenty demerits with one year of discipline-free service.

22. On September 6, 2012, the Grievor was assessed thirty demerit marks for his verbal harassment of Conductor Adam McDermid, contrary to the CN Policy on

Harassment-Free Environment. That penalty was reduced to twenty demerits under **CROA&DR 4411-A**.

23. The Grievor was issued a written reprimand for his failure to comply with Horse Power Ton Analyser (HPTA) instructions, while operating Train M30141-12 on November 12, 2012.

24. On June 25, 2013, the Grievor was assessed fifteen demerit marks for his violation of CROR 114 (b) (iii) while working as a Locomotive Engineer on train Q10721-23, resulting in the Track WM1, west end switch being run through in Transcona Yard. That discipline was upheld in **CROA&DR 4411-B**.

25. The Grievor was assessed an eight-day suspension for four separate train handling failures in February 2014. That discipline was upheld in **CROA&DR 4411-C**. A suspension was imposed to protect the Grievor's continued employment because, had he been assessed demerit points, he would have gone beyond sixty, resulting in his loss of employment. This was a further opportunity for the Grievor to correct his performance in order to maintain his employment.

26. The principal factor conducing to mitigate the disciplinary penalty is the Grievor's long service of nearly twenty-seven years. That factor has already been taken into account when the Grievor was reinstated in **CROA&DR 3942**. At the investigation, the Grievor expressed a desire to be coached, and a willingness to learn.

27. The aggravating factors are that the Grievor was not honest regarding his breach of Rule 102. He has also again failed to comply with an operating rule, which has been his consistent failure over his disciplinary history. Also, the Grievor has been previously reinstated by an arbitration award, despite his operating rule infraction and his excessive demerits, largely on account of his long service.

28. As in **CROA&DR 3824**, **CROA&DR 2991** and **CROA&DR 4320**, I am not persuaded that the Company can have any reasonable confidence that, if the Grievor is reinstated, even with extra training and coaching, he will comply with the train manual and with the operating rules. I recognize that the Grievor has only a short period to reach his normal retirement age, but I am not persuaded that the Grievor is capable of consistently performing the safety sensitive duties and responsibilities required of a locomotive engineer. Despite progressive discipline and repeated chances to prove his capacity to abide by the operating rules, the Grievor has failed to meet the necessary requirements of the position.

29. In the circumstances, the grievance is denied.

July 21, 2015



CHRISTOPHER ALBERTYN
ARBITRATOR