

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

CASE NO. 4419

Heard in Montreal, October 16, 2015

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the assessment of a discharge to Locomotive Engineer Stewart Harrower for his "violation of CRO Rules 105c, and 115, resulting in collision with M31451-15 on November 17, 2014, violation of CN Form 8960, Locomotive Engineer's Manual, section G regarding train handling, and for using your personal communication device in violation of General Rule A (xii) during your tour of duty on Train A45441-15 on Nov 17, 2014, while working as Locomotive Engineer.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 17, 2014, Mr. Harrower was assigned as the Locomotive Engineer on Train A45441-15. While in the process of bringing his locomotive consist of two locomotives back to the shop track, Mr. Harrower's locomotive consist collided with the locomotives from Train M31451-15, in Symington Yard, in Winnipeg.

The Company conducted an investigation of the incident and determined that Locomotive Engineer Harrower had violated CRO Rules 105 (c), 115, and General Rule A (xii), (for using a personal electronic device), and was also in violation of CN Form 8960, Locomotive Engineer's Manual, Section G regarding train handling, and subsequently assessed him with a discharge from CN service.

The Union contends that the discharge was excessive under the circumstances, and requested that the discipline be significantly reduced.

The Company disagrees with the Union's contentions.

FOR THE UNION:

(SGD.)

FOR THE COMPANY:

(SGD.) D. Brodie

Manager Labour Relations

There appeared on behalf of the Company:

- D. Brodie – Manager Labour Relations, Edmonton
- K. Morris – Senior Manager Labour Relations, Edmonton
- T. Brown – General Manager OPS, Edmonton
- C. Michelucci – Director Labour Relations, Montreal

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- B. Ermet – Senior Vice General Chairman, Edmonton
- K.C. James – Vice General Chairman, Melville
- S. Harrower – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

This matter concerns CN's ("the Company") discharge of Locomotive Engineer Harrower ("the grievor") stemming from a collision on November 17, 2014, as well as his use of a Nintendo DS much earlier on that same tour of duty.

At the time of his discharge the grievor had seven years of service with the Company. He had been working as a locomotive engineer ("LE") for two and a half years. The grievor's discipline record stood at ten demerits when he was discharged, and that assessment of discipline was under appeal at the time of the arbitration hearing.

On the tour in question the grievor was working with Conductor Grewal ("Grewal"). Upon arriving at Winnipeg's Symington Yard, the crew yarded their train. They were directed to travel light locomotives (engines 2802 and 8942) eastward to Navin and then westward by signal indication via RX03 track to the west receiving yard. The crew knew they were operating behind Train M314-15's ("T314") set of locomotives on track RX03.

Upon receiving the signal at Navin, the crew proceeded to a red route indicator. They stopped and waited for a progressive signal. Once the crew received that signal, their 2-unit locomotive consist began their reverse movement, reaching the maximum track speed of 25 mph.

Before the crew had entered an "S" curve on Track RX03 neither the grievor, nor Grewal saw T314 ahead of them. The grievor erroneously believed that T314 was further down the track at the overpass at the other end of the lead. Grewal stayed with the grievor in the lead engine rather than riding on the leading point their movement during the reversing process. The grievor thought it was safe to back up, and did so moving the throttle from 0 immediately to 8. During the critical part of the reverse movement prior to the collision, Grewal was seated on the outside of the "S" curve.

Moments before the collision Grewal lost his line of sight. During his investigation statement, Grewal said that he had told the grievor this. According to the grievor, he did not hear the conductor. Neither reacted, both still believing the track was clear. The two locomotive consists collided with stationary T314.

The estimated damage to the four locomotives involved in this preventable collision is almost 1.5 Million dollars. Both the LE and Conductor of T314 suffered relatively minor injuries but were not immediately able to return to regular duties.

At the hearing there was some contention between the parties about whether or not in the normal course, in similar circumstances, the conductor would make his or her way to the leading point of the train consist rather than stay in the lead engine. The Company was adamant that Rule 115 required the Conductor to be on the point.

CROR Rule 115 reads in part:

115. SHOVING EQUIPMENT

(a) When equipment is shoved by an engine or is headed by an unmanned remotely controlled engine, a crew member must be on the leading piece of equipment or on the ground, in a position to observe the track to be used and to give signals or instructions necessary to control the move.

EXCEPTION: A crew member need not be so positioned when the portion of the track to be used is known to be clear. ...

...

(d) Unless it is known to be clear, when reversing a locomotive consist and visibility is restricted, a member of the crew must be on the leading end in a position from which signals necessary can be properly given.

Immediately following the collision, on November 17, 2014, the Company issued a bulletin to operating employees at Winnipeg, Melville, Fort Frances and Sioux Lookout regarding CROR 115 (d) reproduced above. The bulletin reads:

In addition to the provision of CROR 115(d), within greater Winnipeg while operating in 105 territory, the following applies:

When reversing with a locomotive consist system (including single unit), a member of the crew must be on the leading platform and or footboard, and in a position from which signals necessary can be given.

There is no dispute that the grievor violated CRO Rule 105(c). The grievor himself acknowledged that, in manipulating his throttle as he did, he made a poor decision.

With respect to the allegation pertaining to the grievor's violation of CROR General Rule A (xii) with respect to the use of his Nintendo DS, the grievor knew its use was prohibited. At his investigation, the grievor admitted that "in a moment of foolishness" he used it anyway, not having considered it to be "an issue" at the time.

Decision

The Company takes the position the grievor's conduct was extremely reckless and constitutes a breach of trust. As a result, the Company says that the grievor can no longer be trusted to perform his employment functions in a safe manner. At its core, the Company submits the grievor should have insisted that Grewal go to the point as required by Rule 115. In addition, the Company argues that his failure to make incremental throttle adjustments is similarly indicative of a less than safety conscious approach to his reverse movement in the circumstances. Finally, the Company points to the grievor's use of his gaming device during his tour of duty. The Company urges me not to disturb the discharge.

The grievor was clearly mistaken in believing that the route ahead of his reversing two locomotive consist was clear and that the crew's combined sightlines would be sufficient to protect the point during the reverse movement. His erroneous subjective belief is irrelevant to whether or not the grievor violated Rule 115. Regardless of his mistaken belief, he did breach the Rule. I have considered the Company's issuance of the bulletin reproduced above immediately after the collision and the Union's submission

that the bulletin was “in addition” to Rule 115. In my view, the bulletin simply clarified what should have been obvious.

The crew’s failure to protect the point of its movement led to a very serious collision with substantial financial losses to the Company in this case. I agree that the grievor’s critical error was his failure to have insisted that Grewal go to the point as argued by the Company and as required by Rule 115. The injuries sustained by the grievor’s colleagues in T314 at the time of impact, though minor, could have been much worse.

In support of the Company’s decision to discharge the grievor it directs me to a number of cases from this Office. In **CROA&DR 2791**, despite a stop signal having been called, the LE in that case claimed that his failure to stop, resulting in a head on collision, was caused by what Arbitrator Picher found to be an unsupported medical condition. The LE had released the brake of his train knowing he was under a clear to stop instruction. The Arbitrator upheld the discharge and found that the LE did not take the steps required when he approached an anticipated stop signal disoriented and unsure of his location. Similarly, in **CROA&DR 3684** Arbitrator Picher upheld the dismissal of a Thermite Welder who had eight years of service and no disciplinary record because he introduced a flame onto the seat of a Company vehicle as a means of eliminating the smell of gasoline. In **CROA&DR 4090**, a long service Conductor whose unauthorized cell-phone use led to a cardinal rule infraction was reinstated but without compensation.

None of the cases cited by the Company are factually analogous to the one at hand, and I do not find them helpful in guiding my assessment of whether or not I should exercise my discretion in favour of altering the Company's penalty of discharge.

The Union also provided me with a number of cases. Of particular interest was **CROA&DR 4251** where Arbitrator Picher reduced the thirty-day suspension to fifteen demerit points to a Conductor who did not protect the point of his movement, thus violating Rule 115. The Conductor in that case instructed the LE to shove westward, proceeding beyond the fouling point and onto the main track, which resulted in a collision with cars being shoved by another movement. Arbitrator Picher found the thirty-day suspension was excessive and accepted the Union's submission that in a number of awards of this Office dealing with similar violations of CROR 115, a penalty of fifteen demerits was deemed the appropriate disciplinary response (see **CROA&DR 3752, 3773, and 3936**). These three other cases, like those provided by the Company, I have also reviewed. They are all of limited assistance as they are not factually analogous to the dispute before me.

Of all the cases brought to my attention, **CROA&DR 2910**, was the most helpful one. It has provided some guidance on this Office's approach to an appropriate sanction in circumstances similar to this case. In **CROA&DR 2910** the LE (there is no mention of his years of service in the Award) was in the rear unit and his conductor was on the leading unit of a 3-locomotive consist. The grievor allowed his three locomotives moving in a reverse direction to travel in excess speed, and failed to ensure that his conductor was in the appropriate position on the leading locomotive so as to ensure vigilance with

respect to the occupancy of the track ahead of them. The grievor failed to make any effort to confirm the distance that his movement could safely operate. The result was that the three locomotives collided head-on with another yard movement, with 2 Million dollars of damage to the 5 locomotive units and minor injuries sustained to both crews. Arbitrator Picher rejected the Union's submission that greater responsibility for the accident should have been placed upon the Conductor. Arbitrator Picher imposed upon the LE a six-month demotion to the position of yard helper.

There is an added dimension to this case that was not present in **CROA&DR 2910**. That concerns the grievor's choice to bring a Nintendo DS gaming device onto an operating train and using it while on duty. That conduct raises significant concerns about the grievor's judgment. I make this comment fully appreciative that the grievor used the device only for a few minutes many hours before the collision while waiting for a train to pass.

Notwithstanding the Company's legitimate concerns about the grievor's most serious error in failing to insist that Grewal go to the point lack of their movement, and his decidedly and exceptionally poor decision to use a gaming device during a tour of duty, I am not persuaded that the grievor's misconduct in this case warrants his termination in all of the circumstances. While it is true that the grievor is not a long service employee and his error was a critical one, it is not properly elevated to the degree of recklessness such that the employment relationship is beyond redemption.

Having regard to all of the forgoing I am of the view that the imposition of a serious sanction, short of termination, will have the desired rehabilitative impact on this grievor. I therefore direct the Company to reinstate him forthwith without loss of seniority but without compensation for any wages or benefits lost.

October 28, 2015



**CHRISTINE SCHMIDT
ARBITRATOR**