

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

CASE NO. 4443

Heard in Toronto, January 12, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of 30 demerits assessed to Conductor Nick Fedorowicz, resulting in his dismissal for accumulation.

JOINT STATEMENT OF ISSUE:

On August 25, 2014, following a formal investigation, Mr. Fedorowicz was assessed 30 demerits for “failure to verify your TGBO for train 340-242 August 1st, 2014, a violation of SSI to R Rule 157(c) and failing to have 4 required documents while on duty (Time and Table 21 Modules 12.1 & 2.1 2, 2012 Emergency Response Guidebook & Thunder Bay Summary [sic] Bulletin effective May 1st, 2014, a violation of General Rule A (i) , (ii), (iii), General Rule B, CROR 83 (b) & Thunder Bay Summary [sic] Bulletin page #3, while employed as a Conductor out of Thunder Bay, Ontario. Mr. Fedorowicz was subsequently discharged for accumulation of demerits.

The Union contends that the discipline and ensuing dismissal of Mr. Fedorowicz’s employment is unjust, excessive and unwarranted in all of the circumstances, including mitigating circumstances pertaining to the August 1, 2014 assignment. Additionally, the discipline assessed is dissimilar to previous incidents and circumstances with other employees.

The Union requests that the 30 demerits be removed from Mr. Fedorowicz’s employment record, he be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union’s contentions.

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

FOR THE COMPANY:
(SGD.) L. Smeltzer
Labour Relations Officer

There appeared on behalf of the Company:

B. Scudds	– Assistant Director Labour Relations, Toronto
J. Bairaktaris	– Director, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary

D. Edward	– Senior Vice General Chairperson, Medicine Hat
R. Finnon	– Vice General Chairperson, Wynyard
R. McCann	– Local Chairman, Thunder Bay
N. Fedorowicz	– Grievor, Thunder Bay

AWARD OF THE ARBITRATOR

This Award deals with the assessment of discipline in this case and in **CROA&DR 4442**. The incidents in both cases arise out of common facts and connected events.

The Grievor, was assessed ten demerit points for absences and thirty demerit points for failing a proficiency test. As he stood at thirty-five demerits before the events giving rise to these grievances (although ten of those demerits are grieved) he was discharged for accumulation of demerits after the second of these events.

The Absences

The Grievor was issued ten demerits in March 2014 for booking sick for four separate absences: December 9-10, 2013, January 8-11, 2014, January 29-30, 2014 and February 23-24, 2014. On three of these occasions the Grievor said he was ill but when asked, refused to disclose to his manager the nature of his illness and said he was not comfortable doing so. On one of the occasions the Grievor said he had to have emergency dental work done and brought in a note saying he would need to be off for “a day or so”. He was off January 8-11 on this occasion, the length of which the Company disputes as being longer than the prescribed “day or so”. The Company relies on the

Grievor's discipline record which contains the assessment of demerits points for attendance issues.

The Union refers to the Company's "Attendance Management Policy for Canadian Running Trades Employees" (the "Policy"). It asserts that the Company manager was not entitled to information as to the nature of the Grievor's illness. The Union relies on the following from the Policy:

Company officers should not ask questions regarding the nature of an employee's illness or diagnosis and should restrict their information requests to functional limitations and/or restrictions of the individual, rather than medical information or diagnosis.

The Union further submits that the Company had no grounds to doubt that the Grievor was ill on the occasions when he said he was. It was only well after the absences, in March, that the Company issued discipline for the absences.

The Policy further provides that culpable absenteeism is "booking sick or unfit without a legitimate reason".

The Company accepted the Grievor's absences without requesting anything further from him. It did not require that he provide additional medical documentation or completion of a Functional Abilities Form. It did not dispute the absences when they arose. (See **CROA&DR 3921** where this Office held that there was no cause for the assessment of demerits where the grievor was absent from work due to illness.)

There was no evidence before me to suggest that the Grievor was not ill as he had stated. I therefore find his absences on these occasions was not culpable. Accordingly the assessment of demerit points was without justification and as a result the ten demerits issued are to be removed from the Grievor's record.

The Proficiency Tests

The Grievor was subject to a proficiency test on August 1, 2014. He made errors. First, he did not properly fill out his Tabular General Bulletin Orders (the "TGBO") and, second, he did not have with him on the train the updated versions of required documents (two Time Table Modules, a 2012 Emergency Response Guide Book and a Current Summary Bulletin).

The TGBO details the designation and limits of where the trains are permitted to run. The details of how the TGBO is to be completed are found in CRO Rule 157 which provides in part, as follows:

To indicate that the required verification has been completed, each must on their copy of the TGBO initial the designation, limits and each page, except the last page which must be signed.

The Grievor's error on the TGBO was that he had placed a check mark rather than his initials on the designation and limits. He had been told by the Locomotive Engineer of this.

As to the documents which the Grievor was to have had in his possession on the train, the Grievor's copies had not been updated to current standards. The Company contends that the Grievor's actions were negligent.

These documents and the manner in which the TGBO is to be completed are fundamentally important to the safe and efficient operation of the trains. The Union's position is that the Grievor acknowledged his mistakes, that the TGBO error was not substantive (as his check mark indicated that he had in fact verified the TGBO) and moreover, on a follow up proficiency test conducted shortly after, these mistakes were not repeated. In these circumstances the Union contends that the issuance of thirty-five demerit points resulting in discharge for accumulation is excessive. It relies on the stated purpose of proficiency testing as instructive and refers to the description contained in the "Canadian Pacific Proficiency Test Codes and Descriptions for Train and Engine Employees":

A proficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure proficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action. Proficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employees work history, education and mentoring will often bring about more desirable results.

In **CROA&DR 3902** relied upon by the Company, the issuance of fifteen demerits was upheld by this Office where an employee was in possession of an out of date rule book. I note that in that case the employee was aware of the deficiencies of the book he was using and indicated that he was using it for a limited purpose; a reason that the

Arbitrator did not find satisfactory. However, the material discloses that the Locomotive Engineer on the train had reminded the Grievor about the proper way to complete the TGBO and, when asked, the Grievor could not explain why he did not heed that advice. The Union referred to three cases where employees had received a caution for TGBO related incidents, although the precise nature of the incidents were not described.

The Grievor has nine years of service with the Company. In that time he has had one CRO Rule violation in 2010. In this case, the Grievor did not attempt to excuse his out of date documents but acknowledged his error. This does not evidence someone to whom the concept of progressive discipline has had no effect. By the time he was discharged, he had again been testing and passed.

The Company is entitled to ensure that the documentation, upon which the safe and efficient operation of the trains relies is up to date and completed as required. The circumstance of this case do not suggest an employee who is not willing and able to abide by the Company's instructions. The issuance of thirty-five demerit points was excessive and discharge for accumulation unwarranted. Ten demerits is an appropriate penalty in these circumstances.

Having regard to my finding, the grievance is allowed in part. The Grievor is to be reinstated to his employment forthwith with compensation for all wages and benefits lost and without loss of seniority. His record now stands at forty five demerits.

January 28, 2016

MARILYN SILVERMAN
ARBITRATOR