

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4446

Heard in Toronto, January 14, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination to Locomotive Engineer Dave Herbert of Thunder Bay, ON.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Herbert was discharged March 6, 2015 for the following reasons:

For conduct unbecoming and failure to comply with: General Rule A, specifically: iii, provide every possible assistance to ensure every rule, special instruction and general operating instruction is complied with and shall report promptly to the proper authority any violation thereof; and iv communicate by the quickest available means to the proper authority any condition which may affect the safe operation of a movement and be alert to the Company's interest and join forces to protect it; General Rule C, and CROR 106

The Union contends the arbitrary and extreme measure of discipline assessed to Engineer Herbert came as a result of a fatally flawed investigative process that was not administered fairly or impartially. The Union maintains throughout the investigative procedure multiple objections to the process were ignored. The grievance appeals further demonstrate that the investigation in itself was mishandled, and as a result of this biased process the subsequent dismissal should be considered void ab initio.

The Union contends that the Company has not met the burden of proof necessary to assess any discipline for conduct unbecoming for an employee. Mr. Herbert answered questions directed to him honestly and was forthright with the Company in regards to this. The discipline in the form of termination that arrived as a result of the investigation is arbitrary, unfair and not impartial and for this reason, the Union contends the discipline is null and void and ought to be removed in its entirety.

The Union further contends that the outright termination of Engineer Herbert constitutes wrongful dismissal, is a direct violation of Section 94 of the *Canada Labour Code* as is discriminatory. Alternatively the Union contends the discipline imposed in this case was excessive, extreme and unwarranted. Engineer Herbert is a long service employee with a positive work record and if any degree of discipline is warranted, outright dismissal is certainly extreme and excessive in the instant matter.

The Union requests that the discipline be removed in its entirety, that Engineer Herbert be ordered reinstated forthwith 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 has denied the Union's request.

FOR THE UNION:
(SGD.) G. Edwards
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Scudds – Assistant Director Labour Relations, Calgary

There appeared on behalf of the Union:

R. Church – Counsel, Caley Wray, Toronto
G. Edwards – General Chairman, Calgary
R. McCann – Local Chairman, Thunder Bay
H. Makoski – Senior Vice General Chairman, Winnipeg
D. Herbert – Grievor, Thunder Bay

AWARD OF THE ARBITRATOR

The grievor, Locomotive Engineer Dave Herbert worked for the Company for thirty-four years at the time of his discharge. He was terminated for what the Company alleges was a “cover up” that occurred pursuant to a derailment and subsequent investigation.

On February 21, 2015 the grievor was on yard assignment at Westfort service tracks. He was working with a yard helper, Trainee Petervic Tonolet and a foreman. The foreman was on the locomotive with the grievor. While shoving rail cars into the tracks, the train derailed.

Trainmaster Jeff Albanese attended at the derailment to inspect the site. He interviewed Locomotive Engineer Herbert, the foreman and Trainee Tonolet at the site. Unbeknownst to the Company at the time, the reason for the derailment was that

Trainee Tonolete had moved the switch before the movement had cleared, resulting in the derailment. Trainee Tonolete did not admit to having done so at the time. On inspection, Trainmaster Albanese noted that the switch was in the keeper position; that is restored to the intended route.

Later that evening, in a phone call, Trainee Tonolete admitted he had moved the switch from the keeper position and lifted the switch handle to normal the switch because he thought the movement had cleared the switch. That action was premature as the train had not cleared the switch and it caused the derailment. When questioned by Trainmaster Albanese, Trainee Tonolete did not know how the switch had been restored. Trainmaster Albanese found this suspicious since Trainee Tonolete admitted that he had placed the switch in one position and someone had restored the switch after the derailment. In the result, Trainmaster Albanese held both the grievor and the foreman out of service pending investigation.

In the course of the investigation meeting, Locomotive Engineer Herbert was asked to describe the events. In that recitation of events he disclosed that he had restored the switch to the normal position after the derailment because it was an impulse to line a switch that was not correctly lined. He agreed that the likely cause of the derailment was because the switch had not been properly lined or that the handle was lifted. He said he was not asked at the site investigation about the switch handle being left up and so did not mention that he had restored it. The grievor said it was not his intention to withhold the information about the position of the switch or the fact that

he had restored it at the time, but says he was simply not asked that question at the site.

The Company relies on General Rule A (iii) and (iv) :

A) Every employee in any service connected with movements, handling of main track switches and protection of track work and track units shall;

...

(iii) provide every possible assistance to ensure every rule, special instruction and general operating instruction is complied with and shall report promptly to the proper authority any violations thereof;
(iv) communicate by the quickest available means to the proper authority any condition which may affect the safe operation of a movement and be alert to the company's interest and join forces to protect it;

The Company's position is that the grievor engaged in an attempt to withhold and conceal information at the early stages of the derailment investigation. It argues that the grievor has destroyed the bond of trust between himself and the Company and relies on the decisions in **CROA&DR 3319, 3607 and 3004**. Further the Company cites the grievor's disciplinary record which contains some measure of discipline over his thirty-four years of employment. In fact, at the time of this incident he stood at ten demerit points and a five day suspension. In the seven year period from 2006 - 2013 he had no discipline at all. This disciplinary history does not support the Company's position.

Having carefully reviewed the material presented, I am not persuaded that the grievor intended to hide anything he knew about the derailment, nor intended to withhold or conceal the fact that he had restored the switch. He was a thirty-four year railway employee who automatically restored a switch to its proper position; likely

without giving that action much thought. At the investigation meeting when asked to describe the events leading to the derailment, he described having restored the switch. He had not been asked that question directly before. In fact he volunteered the information about restoring the switch when he was asked to describe his recollection of the specific events leading up to the derailment. Until the grievor said so, the Company knew someone had restored the switch, or at least Trainee Tonoleté had described the switch as being restored after he handled it, but the Company did not know who had done it. Had the grievor wanted to hide the fact that he had restored the switch, as the Company suggests, he would not have included that fact in his description of events. In these circumstances, I do not find that this was a deliberate act intended to thwart the Company's investigation or withhold information that could assist in the investigation. Discharge was unwarranted.

Having said that, the Company is entitled to have its employees provide accurate and detailed information as to incidents that occur and on matters pertinent to investigations. The grievor is hereby counselled that he should have brought the fact that he had restored the switch after the derailment to the attention of the Company in a more expeditious fashion.

Accordingly the grievance is allowed. Locomotive Engineer Herbert is to be reinstated to his employment forthwith with compensation for all wages and benefits lost and without loss of seniority.

Marilyn Silverman

January 20, 2016

MARILYN SILVERMAN
ARBITRATOR