

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

**CASE NO. 4448**

Heard in Montreal, February 9, 2016

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE  
RAIL TRAFFIC CONTROLLERS**

**DISPUTE:**

Appeal of the assessment of ten (10) demerits issued June 15, 2015 and 30 demerits issued on July 28, 2015 to Rail Traffic Controller Terry Phillips and his resultant dismissal for accumulation of demerits

**JOINT STATEMENT OF ISSUE:**

On June 3, 2015 Rail Traffic Controller Terry Phillips attended an informal investigation for his alleged violation of CROR Rule 132(b) and 136(c) for transmitting and receiving an incorrect engine number while issuing an OCS work clearance and for completing an OCS proceed clearance when the crew member didn't repeat each digit separately. Following this investigation, the company assessed Mr. Phillip's record with 10 demerits.

On July 16, 2015 RTC Phillips attended a formal investigation regarding the circumstances surrounding the protection of several reported defective public crossings at grade with automatic warning devices on the Newmarket Sub during his tour of duty on June 22, 2015. Following the investigation, the company assessed Mr. Phillips record with 30 demerits for violations of Rule 152, Rule 131, Rule 101, Forms of GBO, RTCM 1015 and 1026 resulting in Mr. Phillips dismissal for accumulation of demerits.

The Union contends that the assessment of discipline was unwarranted. The Union requests the removal of the 40 demerits from Mr. Phillip's file and that he be immediately returned to service with full seniority and be made whole for all lost wages and benefits.

The Company disagrees and denies the Union's request.

**FOR THE UNION:**  
**(SGD.) S. Brownlee**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.) C. Gilbert**  
Manager Labour Relations

There appeared on behalf of the Company:

C. Gilbert	– Manager Labour Relations, Montreal
D. Laurendeau	– Manager Labour Relations, Montreal
J. Wynne	– Officer, RTC, Montreal
F. Daignault	– Manager, Labour Relations, Montreal

And on behalf of the Union:

- S. Brownlee – General Chair, Stony Plain
- M. Boucher – Vice General Chair, Montreal
- G. Lapointe – Local Chairman, Montreal
- T. Phillips – Grievor, Montreal

### **AWARD OF THE ARBITRATOR**

This matter concerns two separate assessments of discipline against Rail Traffic Controller Terry Phillips (“the grievor”) stemming from two tours of duty on June 3 and 22, 2015 respectively. The first assessment relates to the Company’s imposition of ten demerits following an informal investigation. The second relates to the imposition of thirty demerits relating to the grievor’s alleged violations referenced in the Joint Statement of Issue (“JSI”) primarily dealing with his handling of defective crossings on the Newmarket subdivision approximately three weeks later. The latter issues came to light as a result of the grievor reporting to his supervisor that, although he verbally informed GO Train 805 of a defective crossing at Mile 41.96, he did not provide written confirmation of that defective crossing (though the train did receive a clearance issued with written instructions to call the grievor at Mile 41).

The grievor was dismissed for an accumulation of demerits on July 26, 2015.

By way of background, by decision dated October 14, 2013, in **CROA&DR 4248**, I exercised my discretion in a grievance involving the same grievor to alter the penalty of discharge imposed by the Company, and reinstated the grievor, who the Company admitted was a “focussed employee” at the time. The grievor had been discharged after

an assessment of thirty demerits for an infraction deserving of no more than fifteen demerits at most. At the time of the grievor's reinstatement in October 2013, his disciplinary record stood at fifty demerits. After twelve months of discipline free active service following his reinstatement, twenty demerits were removed from his record. With the exception of a minor infraction of Rule 571 issued February 27, 2015, which that infraction attracted a written warning, the grievor had been discipline free since his reinstatement until the incidents for which he was disciplined and ultimately discharged in this case.

At the hearing, with respect to the first disciplinary penalty of ten demerits for what the Company initially alleged were clear violations of Rules 132 (b) and 136 (c), the Company conceded, in reply, that there was, in fact, no violation of Rule 132 (b). The Company, however, maintained that the imposition of ten demerits for the grievor's admitted violation of Rule 136 (c) - a "minor incident" according to the informal investigation undertaken by the Company - is appropriate.

The facts surrounding the imposition of these demerits relate to the grievor having completed Occupancy Control System ("OSC") clearance No.1806 though the crew member of GO Train 806 did not repeat each digit separately. The grievor also voiced an incorrect engine number when issuing OSC clearance Nos. 1806 and 1807.

The Company says that, in reaching its decision to impose the ten demerits, it took into account the written warning on February 27, 2015, as in its view that infraction

was of a similar nature to the Rule 136(c) infraction. In the February 27, 2015 incident, the grievor had restored a signal to Stop without contacting the locomotive engineer as required by Rule 571. The Union disagrees that that incident is similar in nature to a Rule 136(c) violation. In my view, though the Rules apply to quite distinct circumstances, both are aimed at the same performance issue: the failure to pay attention to detail. I shall return to this later in the decision.

I turn now to the second incident. The grievor's alleged misconduct in that incident is considerably more serious than the lack of attention to detail evidenced by the grievor's admitted violation of Rule 136 (c).

The discipline imposed was primarily for the grievor's handling of two of the four defective crossings reported to him during the first few hours of his afternoon shift on the Newmarket Subdivision on June 22, 2015. There is no dispute that the Newmarket Subdivision is a busy one. Moreover, the grievor has admitted transgressions of the required procedure. In making the determination to assess thirty demerit points against the grievor, the Company references the grievor's discipline history and relies on the doctrine of the culminating incident.

The main responsibilities of a RTC are to ensure the safe movement of trains within specific assigned territories. The RTC's role in protecting the public cannot be overstated. Rules 152 and 101 (the more general rule about protecting a movement), CROR Forms of GBO and RTC Manual Item 1023 and 1026 must be complied with so

that train crews (as well as all other stakeholders) are made aware of hazards like defective crossings, so that steps can be taken to manually protect them.

Rule 152 dictates that the RTC must ensure that movements affected by a GBO are issued a copy of the GBO or are otherwise secured. The applicable form of GBO, Form V (4) states: "Automatic warning devices defective at public crossing at grade mile 10 Canada Sub. Stop before fouling and provide protection by crew member until crossing fully occupied ... EXCEPTION: When the defect is of a short term nature ... . Access by movements to the defective crossing must be protected by the RTC using blocking or other positive protection until all affected movements are advised to protect the crossing." RTC Manual Item 1023 refers to the following as one of the two forms of RTC protection: "Permissive (RTC-P and WAM) is used to remind the RTC to advise movements of track conditions or other information prior to the movement reaching the point of restriction." RTC Manual 1026 states in part that when a RTC receives a report of a defective crossing at grade the RTC "must secure all movements in the immediate area and input RTC protection on all tracks to protect the situation."

The relevant facts are as follows.

On June 22, 2015, at 15:57 hours the grievor received a report of two defective crossings at Mile 41.25 and Mile 41.39. Within minutes, he inputted Warning Alarm Message 1818 ("WAM") (or "permissive blocking") at Mile 41 – 42 in the Computer Assistant Manual Block System ("CAMBS") thereby securing a safeguard/reminder in

the system. GBOs were issued as required by the grievor at 16:23 hours to GO Train 801 for these defective crossings. The grievor handled these two reports according to procedure and the crossings were properly protected.

The next defective crossing, reported by Signals at Mile 41.96 was not handled as it should have been. This defective crossing was reported at 16:35 hours. Though GO Train 801 was issued a GBO in relation to this defective crossing at 16:44 hours, GO Train 803 was in possession of a clearance, which gave it authority between Machell and Painswick (from Mile 30.1 to 59.3) without restriction. At 16:57 hours GO Train 803 contacted the grievor to inquire about the crossings because the grievor had solicited GO operations to have the crew contact him as he was out of radio range.<sup>1</sup> When GO Train 803 did so, the grievor verbally advised the crew of the defective crossing and instructed the crew to call back for a GBO after contacting the Rule 42 Foreman.

At the time that the grievor verbally advised GO Train 803 of the defective crossing, he understood that the maintainer was at the location and that there was a possibility that the defective crossing would be repaired. A few minutes later, at 17:00 hours the grievor inputted WAM 1820 at Mile 41- 42 (twenty-five minutes after the report of the defective crossing). At 17:14 hours, once informed by the maintainer that he was still working on the crossing the grievor issued GBO 128 to GO Train 803.

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<sup>1</sup> The Company asserts that the grievor should have enlisted the assistance of another RTC or found an alternative way to communicate with the crew. The Union maintains that it is not uncommon for RTCs to enlist GO Operations to relay information on their behalf to the crew.

At 17:30 hours, in a similar approach to his handling of the defective crossing at Mile 41.96 with GO Train 803, the grievor contacted the crew of GO Train 805 and verbally informed them of the defective crossing. As was the case with GO Train 803, he also directed them to call back for the GBO after contacting the Rule 42 Foreman. In addition, the grievor issued OCS clearance 1822 with written instructions to call him at Mile 41.

As it turned out, the crew of GO Train 805 was unable to call the grievor between 17:39 hours and 18:02 hours due to a radio failure. At 18:04 hours GO Train 805 called the grievor and informed him that it was unable to contact him at Mile 41, that it had stopped at the crossing and had activated it. When the grievor became aware of this he immediately contacted his supervisor to inform him that GO Train 805 had passed the crossing without any written message or GBO issued concerning the defective crossing. The Union points out that the crew of GO Train 805 were neither investigated nor disciplined in the circumstances.

In addition, when the grievor was informed of a fourth defective crossing at Mile 34.16, while he did issue the GBO, he failed to input permissive blocking prior to doing so. Finally, with respect CROR Rule 131 pertaining to recording obligations and RTC Manual 1015, the Company alleges and the grievor recognizes that his bookkeeping and documentation was deficient in certain respects. He did not underscore GBO No. 128 to GO Train 807 or the complete times for several trains and he had not underscored the complete times for certain other trains when issuing GBO No.129.

In handling the report of the defective crossing with GO Train 803 in the manner described above, the Company asserts that the grievor should have issued the GBO to GO Train 803 sooner than he did. Even though the crossing was protected, the Company maintains that by his conduct, the grievor placed the safety of the public and the operating crew at grave risk, and created “a potential for disastrous consequences.” The Company also asserts that the grievor’s investigative statement reveals an attempt to shift blame to GO Operations for his failure to contact the crew of GO Train 803. It submits that the grievor tried to explain his failure to follow procedures in respect of GO Train 805 by “arguing that the radio was out.” The Company says that the grievor does not accept responsibility for his actions and fails to account for his shortcomings.

In addition, the Company directs me to the grievor’s unenviable disciplinary history, which, prior to my reinstatement of the grievor in 2013, includes several reprimands and the issuance of up to fifteen demerits marks for failing to follow proper procedures, as well as several offences related to unbecoming/insubordinate conduct. Considering the grievor’s history in conjunction with the most recent incidents, the Company asserts that the grievor has failed to preserve the bond of trust essential to the maintenance of the employment relationship.

The Company relies on a number of cases to support its position that the imposition of thirty demerits is warranted and that the grievor’s dismissal for an accumulation of demerits should not be disturbed. Among those cases cited by the



Company are **CROA&DR 3454, 3077, 3871** and **AH-329**. The Union, in its submissions, provided several examples of arguably recent similar situations (where crossings were not protected) that resulted in Company responses ranging from counselling of a RTC to the imposition of fifteen demerits. However, the lack of information on the circumstances surrounding these cases, or the employees involved, makes it difficult to ascribe much weight to the examples provided.

I have thoroughly reviewed the cases presented to me. They are of general assistance, but are all distinguishable from the case before me in significant ways.

In **CROA&DR 3454**, the RTC was prompted by the GBO system that certain trains did not have the Rule 42 GBO advising that a Foreman and his crew would be operating at the track. The RTC failed to inform a train that was not past the work site. The RTC had issued the Rule 42 confirmation to the Foreman without taking any step to prevent the train from entering the territory or issuing a GBO to the train crew advising of the relevant work limits. Beyond the contextual difference between **CROA&DR 3454** and the one before me, in **CROA&DR 3454** the RTC made no effort to communicate with the crew whereas in the case at hand the grievor verbally informed all crews of the defective crossings and issued GBOs to all trains with the exception of GO Train 805, to whom he had issued written instructions to call at Mile 41. In **CROA&DR 3454** the RTC did not report what the Arbitrator referred to as a “cardinal rule violation.” In this case the grievor reported the violation with respect to GO Train 805 immediately. Further, in **CROA&DR 3454**, the grievor had recently overridden a safety prompt and had entered

into a Leniency Reinstatement Agreement indicating that she had committed serious rule violations in the previous three years. The Arbitrator was significantly troubled by the then recent pattern of breaches evidenced by the RTC's disciplinary record, which contained "several cardinal rule violations."

The grievor's recent history is entirely distinguishable from the RTC's record in **CROA&DR 3454**. While the Arbitrator in **CROA&DR 3454** found that the grievor could not be trusted to perform her duties and that she had not been responsive to the Company's imposition of corrective discipline, I am not persuaded, on the facts outlined above, or on a careful review of the grievor's discipline history, that that is the case here.

In **CROA&DR 3077**, the employee was ultimately discharged for an accumulation of 105 demerits stemming from several assessments of discipline including a thirty-day suspension for having removed the wrong authority to a train. The final incidents referred to in the decision are not entirely dissimilar to the case before me. The RTC had been made aware of a crossing with defective signals and though he verbally informed two trains of the defective crossing, he did nothing more. One train went through the crossing at regular speed. The Company assessed the employee with thirty demerits for this misconduct and Arbitrator Picher ultimately upheld the employee's termination and referenced his unenviable disciplinary record. The Arbitrator found that corrective discipline had not had the desired impact on the RTC, noting that

his “inadvertence and laxity with respect to rules appears to have continued unchecked.”

The grievor’s record appears to reveal that the course of corrective discipline undertaken by the Company has had an impact. He worked without incident, with the exception of a minor violation in February 2015 for about eighteen months following his reinstatement in October 2013. I am not persuaded that, at this point based on the events of June 2015, coupled with the grievor’s disciplinary history, that he has reached the point where he can no longer be trusted to perform to the high standards the Company has the right to expect of him.

Though the Company referred me to **AH-329**, I do not find this case to be of assistance. In that case the Arbitrator did not find the discharged employee’s account of the alleged violations to have been credible. He also found that the grievor did not accept culpability. The grievor’s disciplinary record stood at fifty-five demerits at the time and his misconduct resulted in the issuance of a clearance in clear violation of Company regulations.

Finally, in **CROA&DR 3871**, the Company issued forty-five demerits to a RTC who gave a train authority allowing it to pass a stop signal and told the train that there was no equipment in the block when in fact another train was stopped in the block. A collision ensued, with injuries sustained to the locomotive engineer and very significant damage to property. The grievor denied responsibility for his actions and the Arbitrator

found the RTC was indifferent to the fact that he made no effort to inform the oncoming train of an obvious hazard in the block. That case cannot be equated with the case at hand.

Without diminishing the seriousness of the grievor's poor judgement in choosing to hold off on the issuance of the GBOs (and in the case of GO Train 805, not issuing a GBO at all), I do not agree with the Company's characterization of the grievor's investigative statement as a failure to take responsibility for his actions. Moreover, the grievor expressed how, in respect of GO Train 805, he could have done things differently, including short clearing that train.

Notwithstanding the grievor's failures, I think that that the Company has overstated the risk caused by the grievor's misconduct to the public in its brief. I note that the grievor continued to work the remainder of his shift on June 22, 2015, between June 22, 2015 and the time of his investigative interview held on July 16, 2015 and through to July 26, 2015, when the Company dismissed him for an accumulation of demerits.

I am troubled by the grievor's failures to follow proper procedures as evidenced by his conduct in this case. The RTC's constant focus and his or her attention to detail is absolutely necessary while he or she prioritizes tasks to be undertaken in the fast paced environment of Rail Traffic Control. In respect of the grievor's admitted violation of Rule 136(c), and in particular given the written warning issued on February 27, 2015

(as well as others), I am of the view that the application of the concept of progressive discipline justifies the imposition of ten demerits considering the lack of attention to detail evidenced by both mistakes, however “minor” they may be.

For all the reasons stated above in respect of the grievor’s handling of the defective crossings, and the violations associated therewith, together with the additional recordkeeping failings acknowledged by the grievor during his tour of duty on June 22, 2015, I am of the view that it is appropriate to give the grievor, an employee with approximately seventeen years’ service, a final opportunity to demonstrate that he is capable to carrying out his duties competently and reliably with the requisite attention to detail and in compliance with the applicable Rules commensurate with the trust the Company imparts to persons occupying this most critical role.

The grievor is to be reinstated to his position without compensation and without loss of seniority. The thirty demerits imposed for the infractions listed in the Form 780 associated with his tour of duty on June 22, 2015 is to be recorded as a suspension from the date of discharge until his reinstatement.

February 22, 2016



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**CHRISTINE SCHMIDT  
ARBITRATOR**