

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

CASE NO. 4450

Heard in Montreal, March 8, 2016

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the discharge of Iluliu Gemine for« CROR 104 violation on May 21, 2015, resulting in the derailment of car ACFX 67681 while working on YRPS01 assignment».

JOINT STATEMENT OF ISSUE:

On May 21, 2015, Mr. Gemine was assigned as the Foreman on Yard Assignment YRPS01 at RDP Yard. During the course of his tour of duty Conductor Gemine was switching cars on the lead at RDP Yard and a car (ACFX67681) derailed.

Mr. Gemine was required to attend a formal employee investigation, following which he was assessed an outright discharge for« *CROR 104 violation on May 21, 2015, resulting in the derailment of car ACFX 67681 while working on YRPS01 assignment*» (*translated from French*) and his employment was terminated.

The Union contends that the discipline assessed was unjustified, unwarranted and in any case excessive in all of the circumstances, including mitigating circumstances.

It is the Unions position that the Company violated Articles 82, 85, 85.5 and Addendum 124 of the 4.16 Agreement.

The Union requests that the Company reinstate Conductor Gemine without loss of seniority or benefits and all records of the discharge be removed. The Union further requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and declines the Union's request.

FOR THE UNION:
(SGD.) J. Robbins
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) A. Daigle
Labour Relations Manager

There appeared on behalf of the Company:

A. Daigle	– Manager Labour Relations, Montreal
D. VanCauwenbergh	– Director, Labour Relations, Toronto
D. Dobie	– Superintendent, Montreal
D. Loureiro	– Senior Manager Engineering, Montreal
O. Lavoie	– Manager Labour Relations, Montreal
C. Michelucci	– Director, Labour Relations, Montreal

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman,
J. Lennie	– Local Chairman,
I. Gemine	– Grievor, Montreal

AWARD OF THE ARBITRATOR

The Grievor, a foreman on yard assignment, had seven years of service with the Company at the time of his discharge. On May 21, 2015 he was involved in the derailment of a rail car while switching cars on the lead at the Rivière-des-Prairies (RDP) yard.

CRO Rule 104(b) provides that:

104. HAND OPERATED SWITCHES

...

(b) Except while being turned, each switch must be secured with an approved device. When a switch has been turned, the points must be examined and the target, reflector or light, if any, observed to ensure that the switch is properly lined for the route to be used.

On May 21, 2015 the Grievor was working on a beltpack assignment at RDP yard. The Grievor was switching on the front lead. While in the process of switching a cut of cars into a track, two of the wheels of a rail car derailed. The Grievor explained he was lining the track towards RU12, kicked four cars towards that track and was advised by the crew working on the front lead that two wheels of the rail car had derailed. The material discloses that the car, the switch and the track were all inspected following the derailment and no problems were found that would have resulted in the derailment. The Company concluded that “switch gapping” was responsible for the incident. The Grievor was the last person handling the switches related to this incident. Although the Union

suggests that the Grievor was not at fault, I am persuaded on the material presented that the switch was either not properly lined, or if lined properly not closed, resulting in the derailment. Given how the derailment occurred, and the information from the investigation conducted, I must conclude that the Grievor was responsible for the incident.

At the time of the incident the Grievor's disciplinary record stood at fifty demerits (thirty of which are being grieved separately), and included suspensions. However, the Company chose to discharge the Grievor on the basis of the incident itself and not to issue demerits and discharge for accumulation of demerits. The Company asserts that the derailment was a culminating incident and relies on the principles of progressive discipline to warrant discharge.

The Union asserts that if discipline is warranted outright discharge is not the appropriate disciplinary response for an infraction of this kind. It relies on the Award **AH 491** where the Arbitrator stated:

Significantly, the jurisprudence reveals that employers in the railway industry do not assess discharge as a normal response to a Rule 104 violation, although the assessment of demerits in that circumstance has sometimes led to discharge by reason of the accumulation of demerits. (See, e.g. **CROA 1583, 2487, 2659**). Thirty demerits has commonly been an employer response to a Rule 104 violation (**CROA 1583, 2487, 2659**) although one case reveals the assessment of 45 demerits, sustained at arbitration (**CROA 3097**) and 50 demerits reduced to 25 by the employer (**CROA 353**). On occasion demotion has been resorted to (**CROA 1332**) as well as suspensions of 30 days (**CROA 2487**), 60 days (**CROA 3097**) and 10 days, in ad hoc award No. 305, a decision of Arbitrator LaCharité, involving BC Rail and the United Transportation Union Locals 1778 and 1923. In that case the penalty was reduced by the board of arbitration to a five day suspension

The Grievor did engage in an infraction deserving of discipline. Attention to the critical switching rules is a crucial element of the Grievor's work and, as I have found, his failure led to the derailment. At the time of the incident his record stood at fifty demerit points (thirty of which are being grieved in a separate case), in addition to which he had two suspensions on his record in his seven years of employment. The Grievor's disciplinary record is unenviable. However, the Grievor's actions were not deliberate and he did respond to the Company's investigation as best he could. Given the specific facts of this incident, the principles of progressive discipline and the usual disciplinary response of this Office to incidents of this kind, I am prepared to mitigate the penalty of discharge.

The grievance is therefore allowed in part. The Grievor is to be reinstated without compensation or benefits and without loss of seniority.

March 30, 2016



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MARILYN SILVERMAN
ARBITRATOR