

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4470-B

Heard in Calgary, June 15, 2016

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Assessment of 20 demerits to Conductor Jenison Cudney of Edmonton, Alberta for failure of CROR 110 at Bailey, while working on M30451-07 October 9, 2015, and subsequent dismissal for accumulation of demerits in excess of sixty.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On October 9, 2015 the grievor was called as the Conductor for train M30451-07, Walker to Wainwright. During this assignment, while the grievor's train was in the siding at Bailey on the Wainwright Subdivision, three Company Officers observed that the grievor had not exited his train to perform the required inspection of passing train Q11131-07, as outline in CRO Rule 110.

The grievor was required to provide as employee statement with respect to the October 9, 2015 incident and was subsequently assessed twenty demerits. These twenty demerits, coupled with the forty-five active demerits on the grievor's discipline record, resulted in discharge for accumulation of sixty-five demerits.

The Union contends that while some discipline is warranted the twenty demerits assessed is excessive in all circumstances and should be mitigated to a much lesser degree. The grievor should be returned to work and he should be made whole.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) P. Payne for C. Michelucci
Director, Labour Relations

There appeared on behalf of the Company:

K. Morris	– Senior Manager Labour Relations, Edmonton
D. Brodie	– Manager Labour Relations, Edmonton
D. Crossan	– Manager Labour Relations, Prince George
D. Houle	– Labour Relations Associate, Edmonton

There appeared on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
R. S. Donegan – General Chairperson, Saskatoon

AWARD OF THE ARBITRATOR

On October 9, 2015 the Grievor was called as the Conductor for train M30451 07, Walker to Wainwright, operating eastward on the Wainwright Subdivision. The Locomotive Engineer on this assignment was Michael Frampton.

While the train was stopped at Bailey on the Wainwright Subdivision, three Company Officers observed that the crew of M304 had not exited their train to perform the required inspection of passing train Q111, as outline in Canadian Rail Operation Rule (CROR) 110.

During the investigation, the Grievor explained why he was not in a position to roll by train 111:

“After rolling by train 191 we were instructed to wait for the train 111. We heard 111 call the signal at Androssan and did not hear any other signals called. I was looking through my paperwork and getting things in order. When I looked up 111’s head end was just passing by and the trainmaster had already shown up the time the train went by.”

The Grievor also added:

“(…) I hold myself accountable in failing to roll by 110. It was a mistake that I made and I will continue to roll by trains as per rule 110, going forward. I take my job and safety very seriously.

Subsequent to the employee statement, the Grievor was assessed twenty (20) demerits points. As the Grievor had forty-five (45) active demerits on his discipline

record (including fifteen (15) demerits for failure of CN attendance policy), the Grievor was issued a second Form 780 for discharge, for accumulation of demerits in excess of sixty (for a total of sixty five (65)).

The Locomotive Engineer on this assignment, Michael Frampton, was issued fifteen (15) demerits for the same violation, as he had no prior operating and safety rule violations. The Company also considered that Mr. Frampton had no active demerits on his discipline record at the time of this incident and that this assessment of discipline was its second in his six years of service.

Upon a close review of the material, I am satisfied that the Grievor failed to comply with the operating rule 110, which he admitted at the investigation. The Grievor did not convince me that he had a valid excuse, as his statement concerning the number of signal calls was contradicted by his co-worker. Mr. Frampton reported that he heard two signal calls not only one. Nevertheless, like the Grievor, Mr. Frampton acknowledged his fault. Therefore, the only question left, is the disparity of five points between Mr. Frampton and the Grievor for the same violation. Any reduction of more than five demerits in this case alone will result in the Grievor's reinstatement.

Concerning pull-by inspections, arbitrator Silverman stated in part:

"Pull-by inspections are crucial to rail safety and the Company is entitled to rely on its employees to conduct them. In this case, the grievor could have expected to be more diligent and I am satisfied that his efforts or explanation in that regard are entirely sufficient. In the investigation material the grievor himself admitted that he did not plan ahead to find a proper inspection location. Discipline is warranted.

However, the grievor was treated more harshly than the other men on the crew. The jurisprudence from this Office is that discipline in the range of fifteen to twenty demerit points is appropriate for failure to perform a pull-by inspection, (see **CROA&DR 3711, 3712, 3924, and 4342**).¹

In another matter, where the pull-by inspection rule was involved, arbitrator Picher reinstated the Grievor without compensation and considered the following factors:

“The grievor has service with the Company which dates back to 1983, subject to one brief interruption. While the infractions assessed against him in this case at hand are not without significance, they are not cardinal rules infractions which would standing alone, justify the termination of an employee. On the other hand, the grievor knew, or reasonably should have know, that by reason of his current disciplinary record at the time, he should have scrupulously observed all operating rules.”

In **CROA&DR 3711**, arbitrator Picher also decided that there was room for mitigation. The Grievor had a long length of service and had demonstrated improvement in his performance. He also considered that in that particular case, the Company would in part terminate the grievor because he conducted a pull-by inspection of another train from aboard his locomotive rather than on the ground, as required by the rule. Finally, while satisfied that each of the incidents is subject to discipline, on the whole arbitrator Picher was not persuaded that the grievor should not be afforded a last chance opportunity to demonstrate that he can work in compliance with operating rules and Company regulations.

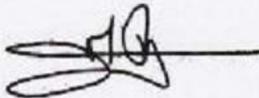
¹ **CROA&DR 4381.**

The issuance of twenty demerits points is slightly above the range of fifteen demerits points for a similar violation. Fifteen demerits were assessed to the Grievor's co-worker and the difference of five points was justified by the Company. Mr. Frampton had accumulated six years of service while the Grievor had one and a half years of service. Mr. Frampton had been disciplined twice and his record was clean at the time of the incident while the Grievor's record shows that he had been disciplined four times for failure to comply with operating and safety rules between March 2014 and November 2015.

Given the kind of violation for which the Grievor was assessed during the year prior to this last incident, the few years of service he has had, and the absence of any demonstration of improvement of the Grievor's performance, I do not see any grounds to mitigate the twenty demerits points that resulted in a discharge.

For all the forgoing reasons the grievance is dismissed.

June 21, 2016



MAUREEN FLYNN
ARBITRATOR