

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4492

Heard in Edmonton, September 14, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of discharge of Locomotive Engineer P.D. Gilks.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following two investigations on July 7th, 2015, Locomotive Engineer Gilks received to form 104's, both indicating his employment was terminated for the following:

After reviewing the statement taken on July 7, 2015 that commenced at 0925 hrs., it has been determined that the record as a whole contains substantial proof that you were observed sleeping while on duty while working as a Locomotive Engineer on Assignment TG31-23 on June 23, 2015. It has been determined that your actions were in violation of the following rules: CROR General Notice; CROR General Rules A and A (xi).

And;

Please be advised that you have been dismissed from Company service for the following reasons:

After reviewing the statements take on July 7, 2015 that commenced at 1450 hrs. and 1840 hrs., it has been determined that the record as a whole contains substantial proof that you exceeded the authorized speed on the Waterloo Subdivision while working as Locomotive Engineer on two separate tours of duty, Assignments TG31-22 and TG31-23 on June 22 and June 23, 2015. While speeding, you were endangering public safety by not allowing sufficient time for crossing protection activation. It has been determined that your actions were in violation of the following rules: CROR General Notice; CROR General Rules A (i), (iii), (iv) and (xi); CROR Rule 103.1(f); CROR Rule 106 and Timetable No.11 Waterloo Sub. Footnotes 4.1 Speeds.

The Union contends that Locomotive Engineer Gilks' dismissal is unwarranted and excessive in all of the circumstances, given the mitigating circumstances evident in this matter.

The Union has proposed to have to have Mr. Gilks reinstated as a Conductor until such time as he is determined suitable to re-qualify and work as a Locomotive Engineer.

Furthermore, the Union contends that Mr. Gilks and his crew, having worked through their lunch period as provided in the Collective Agreement, were merely taking it at the seventh hour, prior to the conclusion of their shift, which Mr. Gilks chose to take while on the locomotive.

The Union requests that Locomotive Gilks be reinstated 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 disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) J. Campbell
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Medd – Manager Labour Relations, Calgary

There appeared on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
J. Campbell – General Chairman LE, Peterborough
W. Apsey – General Chairman CTY, Smiths Falls
P. D. Gilks – Grievor, London

AWARD OF THE ARBITRATOR

Mr. Gilks worked for CP as a locomotive engineer in the London, Ontario area. He started with CP as a Trainman/Yardman trainee in 1990. He qualified as a conductor in 1993 and a locomotive engineer in 1994. During that time the grievor acquired a disciplinary record, reviewed below.

The events giving rise to termination began when the grievor was found sleeping in his locomotive at the end of his June 24 shift. This led to an investigation followed by his termination. Following that discovery the Company made further inquiries by pulling the black box from Mr. Gilks' locomotive and examining his running speeds and locations during the two previous tours of duty; June 22 and 23, 2015. Following two more formal investigations, this too led to a notice of termination, mostly for speeding.

The allegations of sleeping on the job is dealt with first. Mr. Gilks was working out of the Hagey Yard, located between Kitchener and Cambridge Ontario. That yard's prime function is to service Toyota Canada's automotive plants in the Cambridge area. Toyota is an important customer to CP, with trains placing empty car transport railcars, and pulling away loaded railcars, all according to fairly exacting time schedules.

Mr. Gilks and his crew began their tour of duty at 23:59 on June 23rd. In the early course of their shifts, while in Galt, Mr. Gilks and his crew were told by Trainmaster Johnson that they should stop what they were doing and head to Hagey to service Toyota. Mr. Johnson says Toyota had to be serviced between 0400 and 0515. They were late to achieve that target. The collective agreement provides that employees are entitled to a twenty minute break for lunch between their 4th and 5th hour. Mr. Johnson did not make any alternative arrangements for the crew's lunch nor did he even discuss the issue with them. The crew worked through what would normally have been their lunch break and completed the Toyota job, then returned, by about 07:00 hours to their home base.

At 07:25 two supervisors boarded the grievor's locomotive which was not moving, and according to the grievor, was shut down. They saw Mr. Gilks lying back in the conductor's seat with his legs and feet extended over the helper's seat and control stand. He had tinted safety glasses on and his hoody was covering his face. Road Foreman Hayes and Trainmaster Johnson both observed the grievor and confirmed that he was sleeping. They phoned their supervisor, and then Mr. Johnson opened the locomotive's

door and called the grievor's name, without getting any response. When he called again in a louder voice, the grievor woke up and responded.

CROR General Rule A (xi) provides:

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

(xi) while on duty, not engage in non-railway activities which may in any way distract their attention from the full performance of their duties. Except as provided for in company policies, sleeping or assuming the position of sleeping is prohibited. The use of personal entertainment devices is prohibited. Printed material not connected with the operation of movements or required in the performance of duty, must not be openly displayed or left in the operating cab of a locomotive or track unit or at any work place location utilized in train, transfer or engine control.

Asked if he had violated this rule the grievor replied, without referring to any exceptions within the rule, "I believe we were on our lunch break, on duty but not performing work, when I was relaxing on my break."

The speeding allegation arose from the data analysis conducted in relation to Mr. Gilks two prior tours of duty. The Union expresses considerable displeasure at the decision to undertake this review calling it a "witch hunt" precipitated by the sleeping incident. The Company, it argues, "put these records under an electron microscope". The Arbitrator cannot find this additional scrutiny to be unjustified. Supervisors found a locomotive engineer sleeping in his seat. It was not inappropriate to question whether that employee was perhaps fatigued or overtired in a way that might affect his attention while operating a locomotive.

The Union's position is that, while the grievor was indeed at times in excess of the speed limits, it must be remembered that the train was operating in a sparsely populated rural area after midnight where the terrain has hills and valleys that affect the train's speed. Be that as it may, the records show that on June 22, 2015 the train Mr. Gilks was operating exceeded the 10 MPH authorized speed for the Waterloo subdivision on nine occasions over the course of his shift.

- 00:40:24 – 00:41:14 – Reached a speed of 14.7 MPH
- 00:41:49 – 00:47:22 - Reached a speed of 13.6 MPH
- 00:50:47 – 01:00:41 - Reached a speed of 17.2 MPH
- 01:17:12 – 01:17:55 – Over 10 MPH but top speed not specified
- 05:59:13 – 06:01:12 - Reached a speed of 14.6 MPH
- 06:25:27 – 06:27:33 - Reached a speed of 14 MPH
- 06:27:33 – 06:28:35 - Reached a speed of 14.9 MPH
- 06:35:48 – 06:37:24 - Reached a speed of 15.7 MPH
- 06:48:55 – 06:49:59 - Reached a speed of 16.6 MPH

Three of these occasions constituted an “uncontrolled movement” under the following provisions, yet at no time were the emergency breaks applied.

WATERLOO SUBDIVISION TRAIN HANDLING PROCEDURES:

Any Movement descending a Heavy or Mountain grade that attains a speed 5 MPH above permissible speed is considered an uncontrolled movement and must be stopped immediately by whatever means available, including an EMERGENCY brake application.

The grievor was unable to offer any real explanation for his exceeding the speed limits except to say:

I don't have any explanation other than I thought I was operating in a safe manner even though the speeds did go over 10 miles per hour, taking into consideration the territory, keeping in mind fuel conservation and wear and tear on equipment.

The similar investigation into the June 23, 2015 showed ten incidents of speeds in excess of 10 MPH, although only two slightly in excess of 15. Again the grievor offered no real explanation.

The routes the grievor travelled on this shift involved six or seven crossings with sensor activated traffic warnings, programmed on the assumption the train is travelling at no more than 10 MPH. It is the locomotive engineer's responsibility under CROR Rule 103.1(f) to ensure there is a twenty second warning at each crossing. He told the investigator he believed this twenty second warning was given at each crossing, but could not say how he knew for sure except that he had seen the gates down and flashers working. I accept the Union's assertion that there is no proof that the speeding occurred in proximity of these crossings.

The Union's position is that Mr. Gilks' dismissal is unwarranted and excessive in all the circumstances including mitigating factors. It has suggested that he might be reinstated as a conductor as one possible alternative penalty.

The Union urges that, in respect to both the sleeping allegations and the speeding allegations, the Company has "thrown the book" at the grievor using every possible rule

violation that might be claimed over the alleged conduct. I accept the proposition that an arbitrator should look at the individual allegations as a whole and not treat each possible rule violation as a separate failure. That does not mean however that speeding is just speeding, ignoring the fact that speeding can have ancillary consequences such as the inability to stop in time in the case of a sudden emergency, potentially endangering the public or other employees, or rendering ineffective procedures such as crossing controls which depend upon adherence to the speed limitations.

The Union makes two points in respect to Mr. Gilks' co-workers on July 22 and 23rd. First, neither Trainman Kendal Hason nor Conductor Len Laford at any time felt the train was out of control or perceived any danger. Second, the two of them, following investigations, each received sixty day suspensions. In the Union's submission this is inequitable treatment that conflicts with **CROA&DR** cases **905** and **3581**. I am not satisfied that there is such an inequity here because Mr. Gilks is in primary control of the train and because Mr. Gilks' record is such that progressive discipline has already been afforded him for a very similar incident.

The grievor's record showed ninety-five career demerits while this system operated. The most significant discipline was issued on December 24, 2012. Mr. Gilks was initially dismissed, but his grievance was settled with a reinstatement on May 8, 2014.

This was a Cardinal Rule Violation for which the event description reads:

Please be advised that you have been DISMISSED from Company service for failing to ensure that your train was operated in a safe and controlled manner, an Event Based Cardinal Rule Violation, as

evidenced by your train exceeding the maximum permissible speed on numerous occasions (9 occasions), for your failure to ensure your movement complied with the requirement to stop prior to operating over public crossings at grade (2 crossings), for your failure to ensure your movement stopped short of a switch not properly lined, and for failing to ensure your fellow crew members remained vigilant, attentive and awake, resulting in “gross negligence” on your part, a violations of CROR General Notice, CROR General Rules (A)(i)(iii)(iv)(vi), CROR Rule 33, CROR Rule 105, CROR Rule 106, CROR Rule 114(b) and Time Table #11 Eastern Canada Region, Waterloo Subdivision Footnotes, Movement Handling Procedures Section 3, while working as Locomotive Engineer on assignment TK23-03 on December 3rd, 2012 in Galt, Ontario.

After his reinstatement, the grievor received a fifteen day suspension for Running Through a Switch.

Much of the grievor’s disciplinary record was acquired while CP still operated under the Brown point system of progressive discipline. On December 9, 2015, CP notified the Canadian Railway Office of Arbitration that, as of August 2015, it stopped assessing demerit points using this system. Its position was that, while it understood that arbitrators retained their remedial jurisdiction to modify discipline where appropriate, it would henceforth be inappropriate to do so using the discontinued Brown system.

The grievor is entitled to consideration of his point that, while he was sleeping on the train contrary to the Rules, he had finished his assigned work and had worked through his lunch break voluntarily. Were he grieving the termination for that matter alone it might well be a case where a lesser penalty would suffice. However, there is also the speeding infractions which are particularly significant given his prior record.

The grievor is a long-service (twenty-five year) employee and that is a weighty consideration. He is the father of young children. However, this has to be weighed against the seriousness of the infraction and the grievor's record, including a suspension for very similar speeding offence, the penalty for which was only finalized a year before these events. Regretfully, I find this is a case where the grievor's record does not justify a mitigation of the penalty and the grievance is dismissed.

October 12, 2016



ANDREW C. L. SIMS
ARBITRATOR