CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4498

Heard in Montreal, October 11, 2016

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of twenty demerit marks assessed to Locomotive Engineer W. Carson of Sioux Lookout, Ontario for violation of Form 8960 Section G2.4, G2.7, G2.12, G3.7 as well as placing your train into emergency while working as Engineer on M31331-30 on June 1, 2015 and his resulting discharge for accumulation of more than sixty demerits, effective June 17, 2015 and the Company's decision not to return Mr. Carson to the working board as provided pursuant to Article 86.9 of the Collective Agreement.

JOINT STATEMENT OF ISSUE:

On June 1st, 2015, Locomotive Engineer Carson was assigned as the Locomotive Engineer on train M31331-30 operating between Sioux Lookout and Winnipeg. Locomotive Engineer Carson when approaching the control location at Harvey, at mile 63.1 of the Allanwater Subdivision, placed his train into emergency, approximately fifteen car lengths away from a stop signal, resulting in train M31331-30 coming to a stop approximately seven car lengths short of the stop signal.

Following an investigation, Locomotive Engineer W. Carson was assessed discipline which resulted in his discharge due to an accumulation of demerits in excess of sixty.

The Union contends that the discipline was unwarranted under the circumstances, that the Company did not take into account the inexperience of Locomotive Engineer Carson and the recent passing of his mother. The Union further contends that the violations of train handling procedures under the circumstances, are minor offences as contemplated under Article 86.9 and Addendum No. 122 of Agreement 1.2 and that Mr. Carson should have been returned to the working board pending a decision of the matter by an Arbitrator, consistent with the provisions of Article 86.9 of the Collective Agreement.

The Union further contends that the discipline assessed is excessive, unwarranted and unnecessary to alter behaviour, and requests that Locomotive Engineer Carson be returned to active service and made whole for all loss of wages and benefits and without loss of seniority.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.) B. Ermet for B. Willows
General Chairman

FOR THE COMPANY:
(SGD.) O. Lavoie for D. Ryhorchuck
Senior Vice President

There appeared on behalf of the Company:

O. Lavoie	– Manager Labour Relations, Montreal
D. Larouche	– Senior Manager Labour Relations, Montreal
C. Michelucci	– Director Labour Relations, Montreal
S. Roch	– Manager Labour Relations, Montreal
W. Glass	– Senior Engine Service Officer,

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Willows	– General Chairman, Edmonton
B. Ermet	– Senior Vice General Chairman, Edmonton
W. Carson	– Grievor, Sioux Lookhout

AWARD OF THE ARBITRATOR

1. On June 17, 2015, the Canadian National Railway Company (CN) terminated locomotive engineer Mr. William Carson for an accumulation of more than sixty (60) demerit points. The Teamsters Canada Rail Conference (TCRC) argued the termination failed to respect a negotiated procedure in the collective agreement and was in any event unwarranted.

2. Three issues require determination: i) did CN have grounds to discipline Mr. Carson? ii) did CN fail to respect article 86.9 of the collective agreement when it imposed discipline? and iii) if discipline were warranted, should the arbitrator modify the penalty imposed?

3. For the reasons below, the arbitrator upholds the grievance in part. A suspension will be substituted for the termination imposed on Mr. Carson. While the arbitrator did not

find that article 86.9 applied to the instant case, the interpretation of that new article remains to be developed in future cases.

Did CN have grounds to discipline Mr. Carson?

4. CN satisfied the arbitrator that Mr. Carson failed to respect its train handling procedures (Form 8960) when operating train M31331-30 between Armstrong and Sioux Lookout, Ontario. It was his failure to plan appropriately which obliged Mr. Carson to put his train into emergency to avoid going through a stop signal.

5. The evidence was somewhat troubling in that Mr. Carson originally advised CN that the dynamic brake had “kicked out”, whereas he later indicated it “wasn’t holding”. That appears to be a different explanation and only arose after CN had reviewed the download of what precisely had transpired during the time leading to the emergency stop.

6. At the time of termination, CN did not allege that Mr. Carson violated any operating rules. However, discipline may still result from a failure to comply with Form 8960: **CROA&DR 3839**.

7. The TCRC did not persuade the arbitrator that other examples of discipline suggested discrimination in the penalty imposed on Mr. Carson. The discipline records in those other cases did not involve employees with records comparable to that of Mr. Carson.

8. The existence of grounds to impose discipline following the events of June 1, 2015 leads into the two other issues.

Did CN fail to respect article 86.9 of the collective agreement when it imposed discipline?

9. In article 86.9, the TCRC argued that the parties had agreed that a minor offence culminating in discharge would not be imposed until the conclusion of the arbitration process. CN, however, argued the offence was not "minor" and that Addendum 122 excluded the application of article 86.9 in the instant case.

10. Article 86.9 of the collective agreement reads:

> Article 86.9
>
> Locomotive engineers will not be discharged or suspended beyond 30 days for attendance issues or accumulation of demerits culminating from a minor offence until the conclusion of the arbitration process contained herein. In such circumstances, the General Chairman must, within 30 days of notice in writing by the Company of such intended discipline, notify the Company in writing that the Union intends to progress the matter to arbitration. If the General Chairman does not notify the Company that the General Chairman intends to progress the matter to arbitration within 30 days, then the discharge will be effective and implemented. In such circumstances, the Union is not prevented from progressing the grievance under the normal grievance procedure. For clarity on this article, see Addendum 122.

11. The parties have agreed that Addendum 122 provides further guidance on how to interpret and apply article 86.9.

> Addendum No. 122 – Discharge – December 9, 2011
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> This addendum is further to the language in the revised Article 86.9 to Collective Agreement 1.2. For clarity, except for attendance issues and/or the accumulation of demerits from a minor culminating offence, there is nothing in Article 86.9 of the 1.2 Collective Agreement that restricts the rights of the Company to discharge employees including but not limited to, safety concerns or offences of sabotage, harassment, fighting, violence, conduct unbecoming an employee, insubordination, theft, fraud, falsification of time claims, manipulation of funds, activities detrimental to Company interest, drug and alcohol policy violations, severe or flagrant improper performance of duty, gross negligence, statutory requirements, or violations of the Code of Conduct.

12. Was this a "minor offence" as that term is used in section 86.9? And, even if it is, how do the words "safety concerns" in Addendum 122 impact this analysis, if at all?

13. The parties referred to one prior decision which considered the recently revised article 86.9. **CROA&DR 4145** considered a dismissal due to specific rules violations, as well as violations of Form 8960. Arbitrator Picher noted:

> While I do not agree with the Union's submission that this is a case for the application of article 86.9 of the collective agreement, which keeps an employee in active service pending the outcome of arbitration for a discharge prompted by a minor offense, and agree with the Company that the speeding infractions here under examination are serious, I am not persuaded that the termination of the grievor was justified in all of the circumstances.

14. The instant case involves only allegations that Mr. Carson violated Form 8960. While CN referred to rules violations at paragraph 79 of its brief, the arbitrator could find no such grounds being raised in the underlying documentation.

15. During the give and take of collective bargaining, the TCRC obtained the right to proceed to arbitration prior to an engineer being terminated for a culminating “minor offence”. Several conditions exist for article 86.9 in cases not involving attendance issues.

16. Firstly, there would have to be an offence which allowed CN to impose demerits or other discipline. Secondly, the offence would have to be “minor”. And, thirdly, that minor offence would have to lead to discharge (or a suspension exceeding 30 days).

17. How does Addendum 122 (A122) impact article 86.9?

18. A122 first indicates what is not included through the use of this phrase: “For clarity, except for attendance issues and/or the accumulation of demerits from a minor culminating offence, there is nothing in Article 86.9 of the 1.2 Collective Agreement that restricts…”. A122 seemingly excludes “minor culminating offences” from its purview. It then continues to list various types of matters to which the parties have agreed the special process in article 86.9 will not apply. One of those matters is “safety concerns”.

19. Safety is an ever-present concern for the heavily-regulated railway industry. But too liberal an interpretation of the expression “safety concerns” could gut the protection the TCRC negotiated for its engineers.

20. Article 86.9 and A122 are new; the arbitrator is even newer. For current purposes, but subject to the parties continuing to argue how these provisions should be interpreted in future cases, the arbitrator is satisfied that the lack of compliance with Form 8960, which led Mr. Carson to putting his train into emergency, which in itself can have major consequences, took this case beyond the concept of a “minor offence”.

If discipline were warranted, should the arbitrator modify the penalty imposed?

21. Mr. Carson has nine (9) years seniority with CN, though he only qualified for and was promoted to the position of locomotive engineer in 2010. His career discipline record stood at 144 demerit points, 1 written reprimand and 1 suspension. His active discipline record had 49 demerits, 1 written reprimand and 1 suspension.

22. The TCRC noted that, aside from the imposition of ten demerits for a train handling violation on May 5, 2014, all of Mr. Carson’s other demerit points were attendance management related. CN took the position that the suspension it had imposed on Mr. Carson on October 4, 2014 for violation of CRO Rule 564 and speed compliance already represented a final chance, given that Mr. Carson’s demerits had stood at forty-nine at the time.

23. The TCRC suggested that Mr. Carson is a relatively inexperienced engineer. Moreover, the terrain presented certain challenges. The events of June 1, 2015 also

occurred on Mr. Carson's first day back from bereavement leave following the passing of his mother- in- law.

24. The arbitrator has decided to modify the penalty by substituting a suspension for the 20 demerit points originally imposed. Mr. Carson did not comply with Form 8960. His initial suggestion of the brake "kicking out" also raised concerns.

25. However, all the cases CN put forward in support of Mr. Carson's termination dealt with situations which also involved aggravating circumstances.

26. There was no train separation in this case, unlike in **CROA&DR 3839**. In that case, a suspension was substituted for a termination. In **CROA&DR 4416**, a train handling violation did lead to termination, but the case also involved another train separation. In **CROA&DR 4480-B**, an employee's termination was upheld after he was assessed 10 demerit points for a train separation.

27. Evidently, every case is different. An employee's disciplinary record can be helpful or harmful to any argument about the arbitrator's exercise of discretion.

28. The grievance is therefore allowed in part. Mr. Carson will be reinstated in his employment forthwith. The twenty demerit points will be removed from his record and a suspension will be substituted. The period between his termination and the date of this

decision will go onto his disciplinary record as a suspension. There will be no compensation for wages and benefits lost, though Mr. Carson will not lose any seniority.

29. The arbitrator retains jurisdiction for any related questions which may arise from this decision.

November 14, 2016

GRAHAM J. CLARKE
ARBITRATOR