CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4538

Heard in Calgary, February 8, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Conductor Anthony Clark for accumulation of demerits as a result of the investigation held on September 9, 2016.

JOINT STATEMENT OF ISSUE:

On August 31, 2016, Mr. Clark was working as the foreman on the 1700 Industrial Assignment. During his tour of duty, Mr. Clark was observed by Supervisor's performing a safety audit. As a result of observations made by the audit team, Conductor Clark was required to attend a formal employee statement.

The Company held an investigation on September 9, 2016. On September 14, 2016, Mr. Clark was issued two separate 780's. Mr. Clark was issued 30 demerits for his "non-compliance with the requirements of GOI Sections 8.4.3 Personal Protective Equipment (PPE) including table of basic requirements, 8.12.4 riding Equipment, and 8.12.6 Securing Equipment by Applying Handbrakes while working as the Foreman on the 17:00 Industrial Assignment (YINS30 31)". Mr. Clark was issued a second 780 for his discharge due to an "accumulation of demerits in excess of 60. The period of time from September 4, 2016 through to September 13, 2016 is in the form of a suspension (without pay and benefits)".

The Union's Position

The Union asserts that the Company is in violation of Articles 82, 85, 85.5 and addendum 124 of the 4.16 Collective Agreement.

The Union further asserts that the Company is in violation of arbitral jurisprudence when the Company assessed 30 demerits for "Your non-compliance with the requirements of GOI Sections 8.4.3 Personal Protective Equipment (PPE) including the table of basic requirements, 8.12.4Riding Equipment, and 8.12.6 Securing Equipment by Applying Handbrakes while working as the Foreman on the 1700 Industrial Assignment (YINS30 31)".

The Union's position is that the assessment of the suspension along with demerits was in violation of Article 82 and Addendum 124 of the 4.16 Collective Agreement.

The Union contends that the 30 demerits assessed to Conductor Clark was excessive, unwarranted, unjustified and discriminatory and in violation of Addendum 124 of the 4.16 Collective Agreement.

The Union further contends that the discipline was not assessed in a progressive manner as set out in the Brown System of Discipline. Conductor Clark was issued two penalties both a suspension and 30 demerits for the same offences, double jeopardy.

The Union alleges that the Company was in violation of Part II of the Canada Labour Code during their observations of Conductor Clark on August 31, 2016.

The Union seeks to have Mr. Anthony Clark made whole, reinstated with compensation for all wages and benefits lost from September 4, 2016 until the time of his reinstatement and without the loss of seniority.

The Company's Position

The Company disagrees with the Union's position. It is undisputed that Mr. Clark was observed in violation of several rules and safety procedures. Mr. Clark also acknowledged these failures during his formal employee statement. Given he placed himself in a position of some peril and considering his discipline history, the 30 demerits issued was reasonable, warranted and consistent with Addendum 124. The Company considers the Union's allegation that the Company is in violation of the Canada Labour Code and Articles 82, 85 and 85.5 to be without merit. In addition, the Company denies the Union's allegation that the reference to a period of suspension on Mr. Clark's 780 is double jeopardy. Past practice supports the Company's position.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) V. Paquet**
General Chairman	**Manager, Labour Relations**

There appeared on behalf of the Company:

L. Williams	– Manager, Labour Relations, Toronto
D. Larouche	– Senior Manager, Labour Relations, Montreal
S. White	– Trainmaster, Sarnia

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Senior Vice General Chairman, Port Robinson
A. Clark	– Grievor, Sarnia

AWARD OF THE ARBITRATOR

The Grievor, Anthony Clark, commenced his employment with the Company in March 2011. At the time of his discharge, on September 13, 2016, he was twenty-six years old and had been with the Employer/Company for five and one half years.

During a regular Safety Audit on August 31, 2016, he was observed in non-compliance with the following General Operating Instructions (GOI) Work Safe Procedures: Section 8.4.3 (failure to wear protective eye-wear); Section 8.12.4

(improperly riding equipment); and, 8.12.6 (3) (improperly securing equipment when applying handbrakes). At the time of the infractions the Grievor's previous record consisted of: 3 written reprimands, 35 demerits, and 1 suspension. Over his five year period with the Company, he accumulated more than 55 demerits.

Following an investigative meeting on September 3, 2016 the Grievor - considering his file and the seriousness of his infractions - was held out of service while the Company conducted its investigation. At the conclusion of the same, the Company, by virtue of letter dated September 14, 2016 (Company Ex. 6) assessed the Grievor 30 demerit points for the violations of the three GOI work safe procedures set out above. As a consequence, his total demerits exceeded the allowed accumulation of 60 demerits and the Grievor was issued a second "780" discharging him due to an accumulation of an excess of 60 demerits.

The Union grieved the dismissal. In its argument it asserted 2 general points: (1) that the Company failed to conduct a fair and impartial investigation; and, (2) that the Company failed to meet its burden of proof.

No fair and impartial investigation

Initially, the Union argued that the Company breached the mandatory requirements of Article 82.1 which requires that the Grievor be afforded 48 hours "written notice" of his investigatory interview to ensure that he was appropriately advised and aware of the disciplinary allegations that he faced.

While I accept that the relevant provisions of the Collective Agreement requires such written notice, it is nevertheless clear that in this case the Company followed a long standing practice of making the arrangements for the investigation meeting *via* telephone. A review of the transcript reflects that the Grievor waived the written notice requirement and that he did not raise any concerns related thereto either in advance of or during the Investigative meeting. In the result, the failure of the Company to comply with the strict language of the Collective Agreement does not operate so as to nullify the discipline imposed. (See: **CROA&DR 3610, 2910, 4341, 4233**)

Double Jeopardy

Following the investigative meeting the Grievor was held out of service for ten days while the Company investigated his conduct. The Union argued that his being held out of service for more than three days, as envisioned by Article 82, was in fact a suspension and therefore the dismissal here amounts to the Grievor being disciplined twice for the same offence. The short answer to the Union argument is that the circumstances do not amount to double jeopardy. While the cases cited in support (with which I agree) make it clear that an employee is not to be disciplined twice for the same offence, here the Grievor was held out of service for a period of ten days while the Employer investigated the circumstances of the discipline. Doing such did not amount to a formal suspension but rather an opportunity to conclude the investigation. This is anticipated by Article 82.7 of the Collective Agreement which allows that:

> "Employees will not be held out of service pending rendering of decision except in cases of dismissible offences".

Given the Grievor's previous disciplinary record and the proximity of his cumulative demerit points to the 60 point threshold, it was reasonable for the Employer to consider his conduct as constituting potentially dismissible offenses and to hold him out of service while it investigated the same.

Failure to meet the burden of proof

The Union asserted that the Employer was unable to adequately prove that the alleged breaches of the GOI's took place. I disagree. The only reasonable conclusion from the evidence adduced is that they did. The Grievor was observed committing the breaches by the Audit team monitoring rule compliance. Although the Grievor did not specifically recall some aspects of the violations, neither could he deny them. On other aspects (e.g. safety glasses; riding equipment and applying handbrakes) he admitted that he violated the safety rules and provided his, sometimes questionable, explanation for doing the same. In the circumstances I accept the Employers evidence that the violations occurred as alleged.

Discipline too severe

The parties provided various cases wherein adjudicators either sustained or reduced the demerit points assessed based on the circumstances and fact situations of each of the cases before them.

It is safe to say that the degree of assessment of demerit of points depends on the conduct and the violation at issue as well as the perceived effect that the imposition

of progressive discipline will have on an individual to ensure that the behaviour subject to discipline is both addressed and not repeated.

I accept the Union's position that the safety violations by the Grievor in this case would not ordinarily attract dismissal in and of themselves.

That said, I also accept the proposition that:

> "…safety is not negotiable and not optional; safety rules must be complied with 100% of the time" (SHP595)

and the Employer's point that the Grievor's disciplinary record is grave particularly given the fact that he accumulated the number of demerit points that he had during the short period of time that he was with the Company.

The above quote applies particularly to the Grievor, given his past record and his seeming inability to comply with the safety rules in spite of the repeated opportunities he has been given through progressive discipline prior to the present violations. In this vein, I am also mindful that he has already been provided with a "last chance" suspension by the Employer.

In **CROA&DR 4098**, the arbitrator stated:

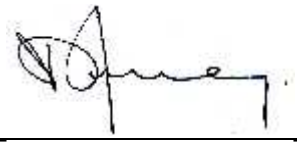
> I am satisfied that the discharge of the grievor is excessive given the relatively minor nature of each of the infractions here examined. As has been previously recognized in this Office, in substance the grievor's actions do not involve flagrant violations of safety rules and procedures so much as a failure to follow best practices. … .

I am similarly of the view, that the violations here are not so egregious – in and of themselves – to warrant dismissal. That said, I am given considerable pause by the Grievor's previous record and his casual attitude toward safety rules as exhibited by the failure of progressive discipline to stem his repeated violations. Nevertheless, notwithstanding his previous record and the Employer's generous "last chance" suspension, I will take the Grievor at his promise to pull up his socks if provided another opportunity.

The grievance is allowed in part.

The demerit points assessed to the Grievor should be reduced to 20. Ten demerits are to be removed from his disciplinary record. The Grievor shall be reinstated into his employment forthwith, without loss of seniority. The period between his termination and reinstatement is to be registered as a suspension for his safety procedural infractions.

March 30, 2017



RICHARD I. HORNUNG, Q.C.
ARBITRATOR