

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4543

Heard in Edmonton, March 14, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Conductor Matthew Taylor of the assessment of the discipline of a Written Reprimand assessed for "Non-compliance with CROR General Rules A."

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On October 15, 2015, the grievor was assigned as the Helper on the YCYS01 belt pack yard assignment in Sarcee. The Trainmaster on duty was performing an inspection of employee's Operating Manuals to ensure the updated CROR had been placed into the employee's manual. When the Trainmaster checked the grievor's manual he found the grievor had two CROR copies, the former one dated February 15, 2013, and the new one dated October 15, 2015, in violation of General Rule "A".

The Company conducted an investigation of the incident and determined that the grievor was deserving of the discipline of a Written Reprimand.

The Union contends that the discipline of a Written Reprimand is unnecessary and should be expunged. The Union also alleges a violation of Article 152 – Workplace Environment.

The Company disagrees with the Union's contentions and contends the Union's allegations of a violation of Article 152 is unfounded and without merit.

FOR THE UNION:
(SGD.)

FOR THE COMPANY:
(SGD.) D. Houle
For K. Madigan
VP Human Resources

There appeared on behalf of the Company:

D. Houle	– Labour Relations Associate, Edmonton
K. Morris	– Senior Labour Relations Manager, Edmonton
P. Payne	– Labour Relations Manager, Edmonton
M. Galan	– Labour Relations Manager, Edmonton
M. Dal Ponte	– Operations Supervisor

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
R. Donegan	– General Chairperson, Saskatoon
J. Thorbjornsen	– Vice General Chairperson, Edmonton
M. Taylor	– Grievor, Calgary

AWARD OF THE ARBITRATOR

The question to be decided here is whether CN was justified in giving Mr. Matthew Taylor a written warning for “Non-compliance with CROR General Rules A.” It raises three questions:

1. Was there cause to discipline the grievor for breach of General Rule A?
2. If there was cause, was the written warning appropriate?
3. Was the imposition of discipline in these circumstances harassment contrary to s. 152 of the collective agreement?

Employees like Mr. Taylor must keep a binder with them while working, containing the essential resource documents needed to do the job. That loose-leaf binder is updated from time to time.

Based on the facts outlined in the *ex parte* statement, the Union’s first argument is simple and straight forward. The Rule says the grievor must have a copy of the binder accessible while on duty. He had the new document accessible and he maintains that he was conversant with its contents.

The Union accepts that Mr. Taylor may not have complied (as of that moment) with the operating bulletin which said “please update your operating manual replacing

the old version dated February 15, 2013". However, a breach of the operating bulletin does not, in the Union's submission, constitute a breach of Rule A, and that is what the grievor was investigated for and what resulted in his written warning (Form 780). That warning reads "your Record has been Assessed [WR] for the following reasons: Non-compliance with CROR General Rule A".

On October 9th the Employer issued the following "operating bulletin":

New Canadian Rail Operating Rules (CROR)

The new CROR will come into effect at 0001 October 14, 2015
Please update your operating manuals replacing the old version dated February 15, 2013.

The following bulletin highlights "Significant Changes" contained within the new CROR. During the transition employees are to seek clarification from their local supervisor

A number of rules and System Special Instructions have been revised for clarity or to update references to rule numbers. Where the intent has not changed, the rule may not be listed below.

New rules and rules where the intent of the rule has been modified are explained below.

A complete review of the rule, beyond using this document, is still required as this may only carry portions of the rule.

A separate chart is included to show where rules references have changed.

The Employer uses a process called "Efficiency Testing". It involves a supervisor checking on an employee's work and related rule compliance. It is not a negotiated process. Mostly, it is used as a basis for giving advice and coaching when lapses in rule compliance and similar matters are noted. On October 15, 2015 Mr. Taylor was

working in the Calgary yard as a helper on a belt pack assignment. That same morning Trainmaster Chris Eliathamby was inspecting employee's operating manuals to make sure the updated rules had been placed into the binders as required by the bulletin. Mr. Eliathamby asked to look at Mr. Taylor's binder and he found that it contained the very recent revision to the Rule Book plus the same loose-leaf document in its earlier form.

It was the Trainmaster's view that this was contrary to the Rules in that the outdated pages should have been removed and because a failure to do so could result in confusion as to the current rule at any time it was necessary to consult the book. Mr. Eliathamby told Mr. Taylor as much at the time, and it might have been thought that would have been the end of the matter. However, no doubt because of Mr. Taylor's other employment issues (as referred to below) the Company decided to proceed further and one week later Mr. Taylor received a notice to attend on October 24th for an investigation.

The notice included the following memo from Mr. Eliathamby:

During routine inspection of employee operating manual to validate new CROR and GOI – 9 employee operating manual contained two CROR copy's.

CO Taylor operating manual had the current CROR dated October 14, 2015 along with old CROR dated February 15, 2013.

Removed the old CROR dated February 15, 2013.

The Rule in question reads:

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

(i) be subject to and conversant with applicable CROR rules, special instructions and general operating instructions.

(ii) have a copy of this rule book, the general operating instructions, current time table and any supplements and other documents specified by the company accessible while on duty.

...

(vi) be conversant with and governed by every safety rule and instruction of the company pertaining to their occupation.

At the investigation, Mr. Taylor was asked the following questions and gave the following answers:

Q. Please describe in your own words, the circumstances leading up to the alleged non-compliance with CROR General Rule A on October 15th, 2015.

A. As soon as the new rule book came out, I added it into my operating manual, along with the old one, with the intention to bring it home to find any changes in the rules, highlight the same things that were in my old rule book to be proactive. Somewhere along the line I forgot to remove my old rule book. I did not realize I still had two copies until TM Eliathamby inspected my operating manual. It was my intention to leave the now outdated CROR at home.

Q. On the date in question, had you read system operating bulletin 016?

A. Yes

Q. Had you read page two, where it very specifically instructs employees to replace the old version of the CROR with the new one on October 14th?

A. Yes.

Q. Do you understand that having the expired copy of the CROR could lead to confusion or misapplication of the rules?

A. I suppose it could, however they are printed in different fonts with the correct date at the bottom left of each page.

Q. System Operating Bulletin 016 was issued on October 9, 2015. You state that you had both copies of the CROR in your book for you to review rules changes. Your alleged non-compliance occurred on October 15th. Are you claiming it took you one full week to review the changes, despite the fact that changes are highlighted in the bulletin?

A. As I did not receive a copy of the new CROR until just prior to my 0600 shift on October 14th, I was being proactive by bringing my new operating manual home with both copies of the CROR with the intention of finding changes, and moving highlighted sections of the old CROR to the new CROR as these are rules that I frequently reference and want to pay extra attention to.

Q. Why did you not review the changes prior to your shift on October 15th, 2015?

A. I did, I reviewed them on October 14th. Unfortunately I simply forgot to remove the old CROR prior to the start of my shift.

...

Q. Do you have anything further to add to this employee statement?

A. Yes. This was an unfortunate mistake. I was attempting to be proactive by moving over information I had previously highlighted and underlined as I deemed it important for reference. I take the rule book very seriously. I strive to work safely and within the rules. Moving forward I will take extra care to ensure my operating manual is up to date and will remove expired sections in a timely manner.

No contradictory evidence was tendered, so I accept that, despite the October 9th date of the bulletin, and the October 14th date set for compliance, Mr. Taylor only received his copy just prior to his October 14th shift, I also accept that he read this right away but did not remove the old copy from his binder when he inserted the new copy.

The Employer provided proof that the grievor worked his regularly scheduled yard assignments on October 9, 10, 11, 14 and 15, and that he gets 10 minutes at the start of each shift to do things like read bulletins of this kind. However, it has not

disproved the grievor's statement that he only got his update the day before, or that if that was so, that it was his own fault in not getting it earlier.

The Employer refers to two prior cases to justify its discipline. In **CROA&DR 3902**, the grievor had two rule books; an up-to-date one in his bag, and an outdated book he had found, belonging to another employee that he was using at the time. The arbitrator found the one he was working with was the only one that was "accessible while on duty" and that he was therefore in violation of the rule. The difference here is that the current book was with the grievor and "accessible". In **CROA&DR 4443**, the grievor failed to have with him an updated version of two documents required for his binder. He had negligently failed to update his copies to current standards. The decision notes that "these documents and the manner in which the TGBO [the document in question] is to be completed are fundamentally important to the safe and efficient operation of the train". The same can be said here. The grievor acknowledged that his documents were out of date. Thirty five demerits were reduced to ten, with the observation that:

The Company is entitled to ensure that the documentation, upon which the safe and efficient operation of the trains relies is up to date and completed as required.

Again, however, the grievor had no current copy accessible "while on duty". I do not disagree with the Company's assertion that keeping an old version of the CROR, along with the new, is poor practice. I similarly agree that the grievor failed to follow the direction in the operating bulletin to update the binder by replacing the old with the new. On the other hand, I have no reason to doubt the grievor's assertion that, having only

just acquired the new version, he intended to compare the one to the other and simply failed to remove the old version from his binder until he did so; a matter of one day.

That said, I find the Union's argument is well taken. He was not investigated or disciplined for these things, he was disciplined for not having the up-to-date CROR accessible while on duty. It is stretching Rule A(vi) beyond its purpose to bring in a failure to remove the outdated version of the Rule under that section. I conclude that the Company has failed to establish a violation of the Rule in the manner for which it issued discipline. The grievance therefore must succeed. Given that result, it is unnecessary to address the appropriateness of the penalty, which is to be expunged from the grievor's record.

At the time of this incident the grievor was 25 and had three years' seniority. The grievor alleges a breach of Article 152 which reads:

Article 152
Workplace Environment

152.1 Management agrees it must exercise its rights reasonably. Management maintains it ensures a harassment free workplace environment. An employee alleging harassment and intimidation by management may submit a grievance to the General Chairperson to be progressed by the General Chairperson at his or her discretion. An employee subject to this agreement may, without prejudice, elect to submit a complaint under CN's Harassment Free Environment Policy.

The discipline that is the subject of this case is said to have followed a series of exchanges which, if read together, color this conduct as harassing conduct. Starting in August 2015 the grievor began raising concerns about safety at the Calgary terminal

through emails to two HR Managers, Ms. Mary Jane Morrison and Ms. Donna Poburan. He also contacted someone at Transport Canada. These emails included references to allegedly threatening statements by Calgary Trainmaster Eliathamby. The complaints also concerned what Mr. Taylor described as a “pre-firing speech” (due to his then demerit point status) by Assistant Superintendent Mark Kimacowich.

These emails were not ignored; rather Ms. Morrison replied to the concerns and invited telephone contact. It is clear from reading Mr. Taylor’s emails that he felt Mr. Eliathamby was targeting him. However, those concerns have to be seen in light of Mr. Taylor’s disciplinary record, which was not enviable. For example, the “pre-firing” speech complained of appears to have been the routine cautionary comments given to all employees when they reach 40 points on the Brown points system; a level that makes them vulnerable to strong discipline in the event of further misconduct.

Having reviewed Mr. Taylor’s record prior to this incident, as well as his emailed complaints, I find a breach of Article 152 has not been established. A good portion of the supervisory attention Mr. Taylor received was due to his past unsatisfactory performance. That aspect of the grievance is dismissed.

March 29, 2017



ANDREW C. L. SIMS
ARBITRATOR