

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4547

Heard in Montreal, April 11, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNIFOR COUNCIL 4000

DISPUTE:

The assessment of thirty (30) demerits that resulted in the subsequent discharge of Mr. Joshua Klaassen (Chris Rogers) based on the accumulation of demerits in excess of sixty (60) for not complying with blue flag protection rules on April 7, 2016 at the Calgary Logistics Park and Intermodal Terminal.

JOINT STATEMENT OF ISSUE:

The Union contends that the imposition of 30 demerits, which caused the grievor to be discharged from his employment with the Company, is arbitrary, excessive and unwarranted. The Union further contends the Company officers whom observed the grievor not following the proper protocols regarding blue flag protection failed to properly follow the procedures set out in the Company's 'Performance Monitoring and Rules Compliance' (PMRC) process when addressing this incident.

The Union requests that Mr. Klaassen (Rogers) be reinstated to employment with the Company with full seniority and service, including compensation for all lost wages and benefits for the duration he was discharged and held out of service.

The Company disagrees with the Union's allegations and denies their request.

FOR THE UNION:
(SGD.) B. Kennedy
President

FOR THE COMPANY:
(SGD.) R. Campbell
Labour Relations

There appeared on behalf of the Company:

R. Campbell	– Manager, Labour Relations, Winnipeg
D. Laurendeau	– Manager Labour Relations, Calgary
K. Carroll	– Assistant General Manager Intermodal Operations, Toronto

And on behalf of the Union:

B. Kennedy	– President, Edmonton
R. Shore	– Regional Representative, Langley
D. Judge	– President Local 4001, Grande Prairie
J. Klaassen	– Grievor, Calgary

AWARD OF THE ARBITRATOR

Nature of the Case

1. In April 2016, CN imposed 30 demerit points on 15-year employee Mr. Joshua Klaassen for failing to comply with Blue Flag protection rules. Since Mr. Klaassen already had 40 demerit points on his record, CN terminated his employment due to the accumulation of more than 60 demerit points. Unifor contested both the Blue Flag rules violation itself, as well as the termination.

2. For the reasons below, the arbitrator has determined that CN had grounds to impose discipline. However, the arbitrator agrees with Unifor that the 30 demerit points which led to Mr. Klaassen's termination were excessive, given all the circumstances.

Facts

3. On April 7, 2016, Mr. Klaassen, a Heavy Equipment Operator (HEO) in Calgary, was loading containers onto a railcar. The HEO position is safety sensitive; Blue Flag protection is required when loading containers. The Blue Flag system ensures that workers in a rail yard remain aware that potentially dangerous loading work is in progress.

4. On the day in question, three CN managers were conducting a safety audit. Before a Blue Flag goes down, every employee must confirm that they and their equipment are clear. The managers heard Mr. Klaassen confirm on the radio that his crane was clear of the railcar, when in fact the crane's spreader head remained foul of the track in question.

5. Mr. Klaassen indicated he was clear, but he was still in the process of backing up his crane after having placed his last container. On April 11, 2016, Mr. Klaassen confirmed to the terminal manager that he understood that he could not announce himself clear of a track until he was physically clear.

6. During CN's subsequent investigation under the collective agreement, Mr. Klaassen eventually agreed that he had cleared himself while part of his crane remained over the railcar.

Did CN have grounds to impose discipline?

7. CN clearly demonstrated the importance of the Blue Flag safety system to prevent accidents. Railway yards can be extremely dangerous places, especially if workers believe a Blue Flag has been lowered when in fact loading operations continue. CN also demonstrated that Mr. Klaassen was not as forthright as he might have been when confronted with the evidence about his crane's position.

8. CN had grounds to discipline Mr. Klaassen for advising a fellow employee he was clear, when he was not, since that other employee would lower the Blue Flags based on this confirmation.

Did CN have sufficient cause to impose 30 demerit points and terminate Mr. Klaassen?

9. CN did not convince the arbitrator that the circumstances merited the imposition of 30 demerit points and Mr. Klaassen's termination.

10. The use of an employee's prior discipline record, as part of an argument based on a culminating incident, has long been recognized by this Office: [CROA&DR 4523](#).

11. Mr. Klaassen's discipline record (Company Submission C-2; Tab 13) indicated that in July 2015 he had had 20 demerit points removed from his record because of 12 consecutive months of active service free of discipline. Therefore, as confirmed by CN at the hearing, he had 5 demerit points on his active record as of July 2015. His overall record referred to two earlier disciplinary incidents for safety matters, but those dated from more than a decade earlier in 2004 and 2001 respectively.

12. In February 2016, CN imposed 10 and 25 demerit points for damage to a rail car and Mr. Klaassen's failure to report that damage. In March 2016, CN imposed a 5-day suspension for Mr. Klaassen's driving not using crossovers and driving across a swell. These were the incidents in Mr. Klaassen's disciplinary record at the time of the Blue Flag violation.

13. Clearly, Mr. Klaassen, through his own actions, had brought himself to the cusp of being terminated by his conduct within a short three-month period in 2016. But the arbitrator is satisfied that he ought to be provided with a final opportunity.

14. Mr. Klaassen is not a short service employee given his hiring date of August 21, 2001. An employee with 15 years' service is almost at a career midpoint. Similarly, while Mr. Klaassen clearly erred when he advised he was clear, he would have been clear a few seconds later. This finding does not discount CN's legitimate observation that one cannot claim to be clear in advance, since one never knows when a mechanical problem might occur.

15. Nonetheless, while any safety violation is serious, there remains questions of degree. As Unifor pointed out (Union Submission U-1; Paragraph 37), one of CN's observing audit managers indicated that Mr. Klaassen cleared the foul point within 5-6 seconds of his call. They did not intervene at that time because there was no imminent danger. When viewing the culminating incident from this perspective, the arbitrator was not persuaded that Mr. Klaassen was beyond rehabilitation.

16. The arbitrator similarly finds [CROA&DR 1877](#) persuasive, since it also addressed a situation where a large number of demerit points were imposed within a very short period of time. That decision emphasized that demerit points, initially at least, are designed to correct employee behaviour, if possible.

17. The arbitrator accepts Unifor's alternate argument that the incident merited something in the range of 10-20 demerit points. In the circumstances, the arbitrator has decided to substitute 15 demerit points for the 30 CN imposed. Since Mr. Klaassen would not have been terminated if 15 demerit points had been imposed, he shall be reinstated in his employment with full compensation.

18. Mr. Klaassen would be well advised to consider this award as a final chance. While CN did not convince the arbitrator about the degree of the safety violation, Mr. Klaassen will still find himself on somewhat thin ice under the Brown System when he returns to work. He alone will be responsible should any further safety violations of sufficient degree occur.

19. The arbitrator remains seized for any issues arising out of this award, including any relating to the calculation of the compensation owing to Mr. Klaassen.

April 12, 2017



**GRAHAM J. CLARKE
ARBITRATOR**