

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4554**

Heard in Calgary, May 9, 2017

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Conductor Brad Fleischhacker of Saskatoon, Saskatchewan, appealing discipline of 15 demerit marks assessed for “Your failure to comply with GOI 5.3 (Wayside Inspection Systems Malfunctions) while operating as Conductor on train M302 passing HBD at mile 223.8 of the Watrous Subdivision on January 13, 2016,” and his resulting discharge for accumulation of 60 demerit marks.

THE UNION’S EXPARTE STATEMENT OF ISSUE:

On January 13, 2016, Conductor Fleischhacker worked on train M30251-11. After passing the Hot Box Detector location at mileage 223.8 on the Watrous Subdivision, he was advised by radio that he had been subjected to a PMRC test, and failed to comply with GOI 5.3.

The Company investigated the incident and determined that Mr. Fleischhacker had violated Company instructions, and was deserving of the discipline of 15 demerit marks, which resulted in his discharge for accumulation of 60 demerit marks.

The Union contends that Mr. Fleischhacker complied with GOI 5.3, and that the Company’s standard for testing rule compliance was arbitrary and unreasonable. The Union requests that the discipline be expunged, Mr. Fleischhacker reinstated, and his record made whole.

FOR THE UNION:
(SGD.) R. Donegan
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

K. Morris	– Senior Manager, Labour Relations, Edmonton
M. Galan	– Manager Labour Relations, Edmonton
W. Manning	– Transportation Supervisor, Saskatoon

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
R. S. Donegan	– General Chairperson, Saskatoon
J. Thorbjornsen	– Vice General Chairperson, Saskatoon
B. Fleischhacker	– Grievor, Saskatoon

AWARD OF THE ARBITRATOR

The grievor was called to work on January 13, 2016 as a Conductor on train M30251-11 from Wainwright, Alberta, back to his home terminal of Saskatoon. The grievor, the locomotive engineer (“LE”) and locomotive engineer trainee (“LET”) were not aware that two company officers were conducting efficiency tests for rules compliance (PMRC) that day. The grievor’s train passed the hotbox detector site at mile 223.8 on the Watrous subdivision. One of the two company officers, Trainmaster Komoda, was located inside the hotbox detector site trackside bungalow at the time.

In his investigative statement, Supervisor Miscavish, the other company officer, detailed his involvement with the incident.

On January 13, 2016 Supervisor Komoda and myself turned [the] down the talker at 223.64 hotbox detector on the Watrous sub on train M30251-11. At 22:43 the tail end train past the HBD location 20 seconds later and the talker broadcasted and another 2 minutes and 19 seconds until the crew attempted to tone the RTC on the regular tone.

Total time of tail end of train and crew toning RTC was 2 minutes and 39 seconds.

I called the crew on channel 1 and asked the crew to come over to channel 17 for feedback. I advise the crew of the times and the non-complaints and also advise the crew to use the priority tone with a hotbox malfunction. In addition I instructed the crew to go and see the DOC upon arrival.

The Company maintains that the grievor, who has responsibility for the crew, did not initiate proper communication with the RTC pursuant to the rules. Specifically, the grievor did not use the proper DTMF Code *5711# in violation of GOI 5.3 which reads:

5.3 WAYSIDE INSPECTION SYSTEMS MALFUNCTIONS

Instructions for hotbox, dragging equipment and hot wheel detectors which are listed in WIS column of Time Table:

(a) WIS not working

The crew must consider an in-service WIS to be malfunctioning when the talker reports "NOT WORKING", or when a message from the talker is garbled, unintelligible, or not heard. In these circumstances, the crew on movements operating in excess of 35 MPH must immediately reduce speed to 35 MPH and advise the RTC of the malfunction using DTMF radio code *5711# on the RTC standby channel.

Normal track speed must not be resumed unless the movement is provided one of the following:

- an inspection by wayside or train crew employees (no speed limit for inspection); or
- an inspection by a working Wayside Inspection System detector; or
- RTC advice, after a check of office systems, that no defects are present.

The evidence of the grievor is that he followed the rules by immediately instructing the LE and the LET to reduce speed once he failed to hear the detector broadcasts-which was at the point where he estimated the tail end of the train had passed the hotbox detector. The grievor then immediately instructed the crew to go to channel 2 (the standby channel) to tell the RTC. After hearing a ring-back from the RTC radio system, the grievor asked the LET if he had dialed the tone sequence to alert the RTC of the hot box detector malfunction.

The LET responded by alerting the grievor that he had erroneously entered a different code than the proper code number *5711#. As they had already received a ring back, and could hear the RTC talking to another train, the grievor decided not to re-tone using *5711#. The crew during that time tried to reach the RTC three times while she was speaking to another train. Once the crew was able to speak to the RTC, the

grievor reported that the hotbox detector had not broadcast the results of the inspection. The RTC responded that there were no recorded alarms. The grievor then received a call from Supervisor Miscavish that his record would show a failed PMRC test. All three crew members, including the grievor, were disciplined with 15 demerits.

The Company notes that the grievor, as a conductor, has the responsibility and charge of the train. In this case he failed to immediately react to the absence of the talker message after the tail end of the train passed the hotbox detector and then again failed to prioritize the call using the proper DTMF code. Bearing in mind the grievor's failure to accept any personal responsibility for the incident and noting the grievor's own significant disciplinary history, the 15 demerits assessed to the grievor (and to his crew members) was fully justified.

The Union submits that the grievor was never in control of the radio transmitter keypad, which is located on the LE's control stand on the other side of the engine away from the conductor's station. Nor does a conductor usually make calls from this radio transmitter. In addition, the failure of the grievor's crew to use the proper tone sequence to initiate the RTC call did not cause any significant delay or prejudice to the reporting of the hotbox detector malfunction. The crew simply had to wait until the RTC was ready to speak to the LET. The Union submits that the Company has failed to prove that a rule violation occurred; or, in the alternative, any rule violation that did occur was minor and technical in nature.

There is no dispute that the call to the RTC was initiated some 2 minutes and 39 seconds, at the latest, after the tail end of the train passed the hotbox detector. The evidence of the grievor is that he immediately instructed his crew to slow down to 35 mph and to initiate the call to the RTC after the crew failed to receive a broadcast transmission from the hot box detector.

Pictures of the engine cab show how the conductor's station is located on the other side of the cab where the LE and LET are located. The LET in fact sits right next to the key pad where he is responsible to press the keys and dial in to the RTC. As the Union pointed out, the grievor would have had to get up and reach over the wall separating his cab area from the LET in order to try and dial the key pad numbers. It is common sense that this responsibility fell on the person closest to the keypad, as LET Staats-Binder himself admitted at the investigation when questioned about the alleged rule violation:

17. Q: Mr. Staats-Binder, did you comply with this rule?

A: Not fully

18. Q: Mr. Staats-Binder, how did you not fully comply with this rule?

A: Did not tone the RTC using *5711#

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

A: As an SLE, being in this particular situation for the first time, I dialed the normal RTC tone out of inexperience. I regret this occurred and have learned from this error and will be prepared to deal with the situation in the future.

The grievor was aware and took immediate steps once he failed to receive a broadcast from the hot box detector, as set out in GOA 5.3. The evidence is undisputed

that he slowed down to 35 mph and then communicated with the RTC. It was not the grievor's mistake that caused the delay in communication with the RTC but rather the LET who mistakenly dialed the wrong number. Had the LET dialed the proper number *5711#, a light on the RTC's panel would have alerted the RTC that there was an urgent call which required an immediate response. Instead, the grievor dialed a number which did not provide the necessary alert to the RTC. That was clearly not the grievor's fault. Although he maintains overall charge of the train operation, there was no misunderstanding that it was left in the hands of the LET to dial the number and communicate with the RTC once instructed to do so.

The only part of this incident that merits some disciplinary response is the way the grievor allowed the LET to wait for the RTC on the line to finish her call. The grievor, as the person in charge, should have instructed the LET to hang up and then redial *5711#, as per rule GOA 5.3. Although there was no undue delay in this case, the grievor under the circumstances should have followed the requirements of GOA 5.3 to the letter, particularly where the rule sets out the precise number to call under such circumstances. But I consider this to be a minor breach and, despite the grievor's lengthy disciplinary records, merits only a warning to the grievor to follow the required dialing rules at all times, as specified in GOA 5.3.

The 15 demerits will be replaced with a warning letter to the grievor noting that he should have ensured the proper radio code *5711# was used by the LET once he was alerted by the LET that he had dialed the wrong number. The letter should indicate

that the grievor should not have waited as he did for the crew to speak with the RTC on the regular radio channel.

The grievor's record now falls below 60 demerits with the penalty substitution of a warning letter in lieu of 15 demerits in this case. It is understood by agreement of the parties that the grievor is awaiting a further arbitration hearing over other discipline imposed by the Company over his Facebook comments. The parties have agreed that the issue of the grievor's reinstatement will be held in abeyance until after a decision has been rendered by the CROA Arbitrator assigned to the case involving the grievor's Facebook comments.

I will retain jurisdiction should any issue arise with respect to the implementation of this award.

May 16, 2017



JOHN MOREAU
ARBITRATOR