

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

CASE NO. 4571

Heard in Montreal, July 12, 2017

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of three heads of discipline in the amount of 10, 15 and 15 demerit points, respectively, to Conductor Douglas Couturier of Winnipeg, Manitoba, resulting in his discharge for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On February 21st, 2016, the Grievor's train departed Symington yard with four added cars that were not intended to depart on the train. The Grievor was initially assessed discipline in the amount of 15 demerit points, later reduced by the Company to 10 demerit points.

On March 8th, 2016, the Grievor was observed walking without the use of anti-slip footwear, in violation of General Operating Instructions 8.4.11. The Grievor was assessed 15 demerits.

On March 25th, 2016, the Grievor was observed improperly lining a switch, in violation of General Operating Instructions 8.12.7, by failing to use both hands. The Grievor was assessed 15 demerits.

On April 1st, 2016, the Grievor was discharged for accumulation of more than 60 demerits, as a result of the aforementioned heads of discipline.

The Union's position is that the discipline in each case was excessive in all of the circumstances, and should be expunged or reduced. The Grievor should be reinstated into employment, with no loss of seniority and with compensation for all lost earnings and benefits.

The Company disagrees with the Union's position.

FOR THE UNION:
(SGD.) R. S. Donegan
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) D. Brodie for K. Madigan
VP Human Resources

There appeared on behalf of the Company:

K. Morris	– Senior Manager Labour Relations, Edmonton
M. Galan	– Manager Labour Relations, Edmonton
C. Michellucci	– Director Labour Relations, Montreal
M. Boyer	– Senior Manager Labour Relations, Montreal

S. Roch – Manager Labour Relations, Montreal
L. Williams – Manager Labour Relations, Toronto

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
J. Thorbjornsen – Vice General Chairman, Saskatoon
D. Couturier – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

This arbitration concerns the dismissal of Conductor Douglas Couturier for accumulation of demerits.

Mr. Couturier was hired by the Company on April 28, 1984. The Grievor had accumulated 31 years of service with the Company at the time of this dispute.

Prior to February 2016, Mr. Couturier had, throughout his career, accumulated a total of 295 demerits, three written reprimands and a suspension, most of which were for poor work record or missed calls. The latest measure of discipline assessed was a seven days' suspension in November 2015 for improper training and detrainning of a locomotive. Over his career, the Grievor was disciplined six times for rules violations, the latest of which was the aforementioned suspension.

There are three incidents for which the Grievor received discipline in the case at hand, each of which will be reviewed in chronological order to determine if the measure was required. I shall dispose of the grievance as a whole at the end of the individual reviews, without making any precise determination regarding the appropriate degree of discipline until the conclusion.

10 Demerits for Adding Cars Not Intended for his Train – February 21, 2016

On February 21, 2016, the Grievor was assigned to work on train Q11531-19, from the Transcona Yard to Fort Rouge Yard, passing through downtown Winnipeg.

When he arrived at Fort Rouge, the Company noticed that Mr. Couturier's assignment was carrying four extra cars which were not meant to be on his train. The Company, however, did not require Mr. Couturier to bring the four cars back to Transcona yard, as he offered to do.

During the following investigation, the Grievor explained that when he came to pick up his train journal, he had to separate it from four other ones. He further indicated that while he did not read his train journal entirely, he thought he had picked up enough information to proceed. He added that at no point until he reached Fort Rouge did anyone tell him that a cut had to be made or that he was carrying four extra cars.

During the investigation, Mr. couturier admitted to the following:

"I made sure that the important parts were there. I didn't really have time to go through it. I made sure the dimensional were there but I did not check any of the numbers to make sure that all car numbers were in check, I leave that to the yard crews. I just verified the head end car to my track. It has been my experience being assigned to this train Q115 that it is not always the same in its instructions, one day a double over, one day a triple over, one day a cut, the next day not a cut. I felt that I had enough info there to make sure that the train was in order."

The Union asserts that the Company did not update the Grievor's train until an hour after he had commenced his work assignment and that, on the balance of probabilities, Mr. Couturier's work journal did not include a specific instruction to leave four cars behind in Transcona Yard.

However, material evidence adduced by the Company shows that the Grievor's journal was updated at 1:46 a.m. and that it was printed at 1:48 a.m., some two minutes later. Indeed, the Grievor's claim is based upon the Work Order Message that indicated 2:46 a.m. as the update time, corresponding to the eastern time zone, while the Grievor was operating in the central time zone, which explains the confusion.

Article 23 of the Collective Agreement allows for the payment of 15 minutes of preparation time before an employee begins his assignment.

The right assembling order of train cars is important so as to respect marshalling regulations and ensure, for example, that a dangerous commodities car is not put next to a heat source, such as a locomotive. Additional cars that do not appear in the journal will affect the train's length unbeknownst to the crew. The extra weight also presents risks, since it affects the maneuvering of the train, including braking distance which is greatly affected by the train's length and weight.

Finally, beyond safety concerns, it goes without saying that getting the correct cars to their intended destination is primordial for the Company's business operations.

In **CROA&DR 3400**, Arbitrator Picher substituted 10 demerits for the grievor's discharge for having unintentionally removed two cars from a train journal. The Arbitrator stated that the grievor's near exemplary discipline record – only a written reprimand in 14 years of service – and the company's inadequate training had both been considered mitigating factors.

In **CROA&DR 1025** and **4126**, the grievors were assessed 10 demerits for failing to report the spotting of cars. Both grievances were dismissed. In the latter case, Arbitrator Picher reaffirmed the importance of following work orders and instructions from the Company to ensure that the proper cars are delivered to the correct destination.

On the whole of the evidence, and based on the jurisprudence of this Office, I am satisfied that the Grievor did commit a violation worthy of some discipline by failing to ensure his train journal was complete and that his train consisted of the right cars.

15 Demerits for Walking Without the Use of Anti-slip Footwear – March 8, 2016

On March 8, 2016, the Grievor was observed detraining by Assistant Superintendent Gerald Guest, who witnessed Mr. Couturier not wearing his anti-slip footwear even though the conditions required it.

During the investigation that ensued, on March 30, 2016, the Grievor gave the following explanation as to why he did not wear his anti-slip footwear on March 8:

“On that given day it was a super nice spring day contrary to what Mr. Guest said in his Memo, and that can be fact found. Also, it was at the end of my tour of duty and all the equipment was stopped. The taxi to pick us up to go to the hotel was literally 10 feet away. There was no slippery conditions between the unit and the taxi, mostly just mud, and I felt it was prudent not to wear spikes to just exit the unit. I told Mr. Guest this in the conversation I had with him and I told him I did not feel it was reasonable or with the lines of common sense, that I was not out there switching or performing moves.”

General Operating Instructions (“GOI”) 8.4.11 mandates that employees “[...] wear approved anti-slip footwear when slippery conditions exist and ensure boots are in good condition and laced to the top”.

Slips, trips and falls are one of the leading causes of injury among Conductors. Therefore, in the Fall of 2015, the Company issued a Division Notice to inform its employees that anti-slip footwear would become mandatory. An Operating Bulletin, in effect between February 1 to April 30, 2016, stated that anti-slip footwear was now required in accordance with the Division Notice.

In **CROA&DR 4150**, the grievor had failed to wear the proper footwear in winter, fell due to icy conditions, resulting in a three days’ injury. He was then assessed 30 demerits, leading to his dismissal as this was a recurring offence despite supervisors’ warnings in the past. Given the grievor’s length of service, Arbitrator Picher ordered his reinstatement and substituted the 30 demerits with a 319 days suspension.

In **SHP 595**, a Car Mechanic was assessed 15 demerits for not wearing his face mask while grinding. Arbitrator Jones wrote:

“I am not inclined to alter the 15 demerits imposed by the Company on the Grievor for this infraction of the safety rules. There is no doubt that the relevant rule required the face shield to be in place whenever any grinding took place. There is no doubt that the Grievor knew this rule—he had been counselled on this very rule shortly before this incident, and had been taken through the safety manual earlier in the summer. As I have noted before, safety is not negotiable and not optional; safety rules must be complied with 100% of the time.”

These cases must be contrasted with others where circumstances called for a milder measure.

In **Ad Hoc 595**, Arbitrator Picher substituted a written reprimand to a 15 demerit penalty for the grievor’s departure from proper radio protocol and deemed that the long service and the fact it was a first occurrence justified such a reduction.

In **CROA&DR 4523**, the grievor had taken off his safety glasses for a brief moment. The Arbitrator deemed that this momentary lapse deserved a written reprimand only.

After reviewing the evidence and the relevant jurisprudence, I find that the present case is akin to the decisions in **Ad Hoc 595** or **CROA&DR 4523**. Whether the 10 feet separating the locomotive and the Grievor’s taxi was icy or not, the assessment of 15 demerits for such a trivial infraction was simply overzealous and unreasonable in the present circumstances.

15 Demerits for Improperly Lining a Switch – March 25, 2016

On March 25, 2016, Trainmaster Michael Belanger observed Mr. Couturier improperly lining a switch in the Transcona Yard. He reported the following:

“At approximately 02:55 2016/03/24 I observed Mr. Couturier lining the TC07 west switch. He had paperwork in his left hand and reached down with his right hand to lift the handle then positioned his body to the right of the switch on an angle and began to one arm pull the switch over. When 5 5 he was no longer able to make headway performing the action this way he tucked the paperwork he was holding under his arm and used both hands to finish lining the switch. Spoke with Mr. Couturier regarding his actions to advise him what he did wrong, advised him he failed a PMRC, and confirmed he was aware of the failed PMRC. Went through proper mechanics of lining a switch with Mr. Couturier and advised him that next time he should be putting his paper work away in a pocket so he is able to use proper body mechanics and able to concentrate in his actions to avoid possibly injuring himself.”

In the following investigation, the Grievor gave a different account of how he proceeded:

“**A6.** I would like to refute the Memo to File from Trainmaster Belanger. As to that it is not the way it occurred. I do not feel that Mr. Belanger was in any position to fully observe my actions. Putting my lists under my arm as he stated which is not physically possible. Also, I do not confirm that I felt I failed anything. In fact I said nothing.

Q11. Mr. Couturier, can you please describe how you threw the TC07 switch?

A 11. I proceeded to the switch, bent over to take the keeper out. Used my left foot to release the locking mechanism, proceeded to pull up the handle with both hands (I was holding my lantern with my right hand). At aprox 90 degrees I experienced more resistance than I expected. I then held up the handle with my left hand and bent over to place my lantern on the ground so I could effectively use both hands to overcome the resistance, get a firmer grip and line the switch.

Q15. Why would you not place your lantern on the ground before throwing the switch?

A15. Normally I don't have a problem lining the ergonomic switch with my lantern in my hand.

Q16. Where did you place the paperwork you were holding?

A16. In my hand the whole time.

Q17. Is this common practice for you to hold paperwork and your lantern in your hand when throwing switches?

A17. As long as it doesn't deter me from having a firm grip.

A21. I would like to add that I am a long service employee of 32 years plus. I have never sustained an injury lining switches. [...] On that given day, I lined several switches and this was the only one that Trainmaster Belanger felt I did incorrectly. I feel this was a misunderstanding. [...]"

The procedure for properly lining an ergonomic switch is outlined in GOI 8.12.7 (Ergonomic Switch): "Directly align yourself with the handle of the switch, and grasp the handle with both hands."

The Company concluded that the testimony of Trainmaster Belanger was to be preferred, as it deemed impossible that Mr. Couturier would be able to line the ergonomic switch while holding two separate items in each hand.

After reviewing both accounts of what transpired on March 25, 2016, I find that the Grievor's version of the events should be preferred to Trainmaster Belanger's one. I find it probable that Mr. Couturier would have been able, as he stated, to use both hands to line the switch while still holding his paperwork and lantern. Contrary to the Company's assertion, this is not impossible, as opposed to the Trainmaster's account of Mr. Couturier putting his paperwork under his arm to finish lining the switch, as such a movement cannot be accomplished without having some space between one's arms and torso.

Thus, I am not inclined to consider the Grievor's technique to be a violation of GOI 8.12.7. Mr. Couturier was using both hands and, even though they were not empty. No

evidence has been adduced so as to convince the undersigned that his method would be risky and contrary to GOI 8.12.7.

Even if that were to be the case, the assessment of 15 demerits for such a minor deviation from the GOI would certainly not warrant such an excessive measure of discipline. In **CROA&DR 4098**, where the grievor was assessed 20 demerits for improperly detrainning a locomotive and for lining up a switch singlehandedly, Arbitrator Picher stated: “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.”

While I can appreciate the Company’s concerns over the well-being of its employees and its desire to maintain an injury-free work environment, I find that the assessment of 15 demerits in the present circumstances was unreasonable and unwarranted. Considering the Grievor’s technique could, at worst, only be considered a very minor mistake and, at best, a somewhat different variant of what the GOI prescribes, a lesser measure or a coaching session would have been sufficient to draw the Grievor’s attention to any potential safety hazards involved.

Discharge for Accumulation of Demerits – April 1st, 2016

The Company has argued that each assessment of discipline was justified, as was their quantum, and that, therefore, dismissal was justified for accumulation of demerits.

As I have determined above, I am satisfied that the Grievor lacked diligence on February 21, 2016, which justified the Company in imposing a measure of discipline.

However, I cannot reach the same conclusion regarding the other two cases. While Mr. Couturier displayed behavior that, perhaps, did not perfectly fit within the strict interpretation of the GOI, it did not warrant anything more than a written reprimand or a coaching session in each case. In any event, a combined assessment of 30 demerits for the two events was clearly excessive and did not respect the principal of progressive discipline.

Accordingly, the present discharge must be contemplated as resulting solely from the February incident. As such, I find that the discharge of a 32 years of service employee, for a relatively mild violation, worth 10 demerits at most, to be unreasonable and unjustified.

It has been long recognized by this Office that extensive years of service with the Company should be considered a substantial mitigating factor, as I have stated in **CROA&DR 4478** and other decisions. Indeed, I concluded in **CROA&DR 4473**:

“A careful review of this Office’s jurisprudence regarding the violation of safety rules by long-time employees shows that terminations were only upheld in very severe cases. Ones, where, for example, the Grievor violated a Cardinal Rule more than once, or where a single violation was accompanied by aggravating factors made retaining an employee unsustainable for the employer.”

Concerning Mr. Couturier's discipline record, which stood at 295 demerits prior to February 2016, some important remarks should be made. While, the Grievor has accumulated a substantial number of demerits over his 32 years with the Company, only 70 of those were assessed for rules violations, the most serious of which was the 2015 speeding infraction treated in **CROA&DR 4570**. During his career, the Grievor was never disciplined for a Cardinal Rule violation.

While the Grievor's record, in respect to attendance issues, is certainly appalling, it is nonetheless at a reasonable level regarding rules infractions, especially when considering the extensive length of his employment with CN.

Indeed, arbitrators of this Tribunal, including myself, have consistently reinstated long service employees with similar, if not worse, records of rules violations, including instances where the culminating incident invoked by the Company was a much more serious safety rule violation than the present one.¹

Even if all three measures of discipline had been upheld, I find that the cumulative effect of the three assessments of demerits, in the present case, would have been cause for concern. In fact, it demonstrates a pattern that is inconsistent with the principal of progressive discipline, as Arbitrator Picher had outlined in **CROA&DR 3930**:

"The issue then becomes the appropriate measure of discipline. In the Arbitrator's view concern arises with respect to the flurry of disciplinary activity visited against the grievor over a thirteen day period. The record discloses that Mr. Serediak was assessed twenty demerits for improper detrainment on May 19, 2009. He was then assessed fifteen demerits for

¹ See: CROA 4535, 4533, 4473, 4397, 4302, 4098

crossing tracks between them on May 26th. Only days later, on June 2, 2009, he was then assessed twenty demerits for the infraction which is the subject of this award. As he previously had twenty demerits for arising from a side collision in early 2009 Mr. Serediak placed himself in a dismissible position by reason of accumulation of demerits.

The Arbitrator shares the Company's perspective of concern for what appear to be repeated safety infractions on the part of the grievor. However, consideration must be given as to whether the cumulative impact of these measures of discipline over such a short period is inconsistent with the application of rehabilitative principles which are meant to underline the Brown system of industrial discipline. While I recognize that the grievor cannot invoke lengthy service as a mitigating factor, as a relatively junior employee he should nevertheless be entitled to the opportunity to benefit from the assessment of discipline and the corrective value it can have.²

However, at the risk of repeating myself, the Grievor's disciplinary record is very much substandard, even for an employee of his length of service. Despite the fact that the vast majority of the demerits he received were for poor work records and missed calls, such a number of demerits underlines a certain pattern of nonchalance on the Grievor's part. This constitutes an aggravating factor which weighs heavily in favor of a long suspension, the relative minor nature of the February 2015 incident notwithstanding.

Considering his poor record, especially as he was standing at 55 demerits at the time of the February 2016 incident and had been suspended for seven days in November 2015, the Grievor should have been more careful. His long time with the Company cannot dispense Mr. Couturier from acting with the degree of diligence and assiduity that is expected from a Conductor of his tenure.

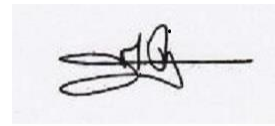
² See also CROA 4478

Thus, for all of the above-mentioned reasons, the grievance is allowed, in part. The Grievor is to be reinstated forthwith, without loss of seniority. The three counts of discipline, totaling 40 demerits, are to be removed from his record and half the period between his termination and reinstatement shall be registered as a suspension. The grievor will be compensated for one half his wages and benefits lost.

Mr. Couturier shall be reinstated on the condition that he enters a last-chance agreement with the Company concerning his poor work record and missed calls issues. This agreement shall be in effect for a period of time deemed appropriate by the parties or, alternatively, for the remainder of his career at the Company.

I shall remain seized of any difficulty arising from the present decision.

July 20, 2017



**MAUREEN FLYNN
ARBITRATOR**