

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

CASE NO. 4586

Heard in Montreal, October 10, 2017

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of twenty-five (25) demerits to Conductor K. Dahl of Vancouver, B.C., for “Violation of CROR 113, GOI 3.5 and GOI 6.5.4 which resulted in the derailment of two cars during his tour of duty on the 2330 East Lead Beltpack assignment on February 24, 2017, and subsequent discharge for accumulation of demerits in excess of sixty (60).

JOINT STATEMENT OF ISSUE:

On February 23, 2017, the grievor was assigned as the Foreman on the YTES61 belt pack assignment in Thornton Yard. During this assignment, while in control of the movement and shoving westward to tie onto two cars, the grievor’s movement failed to stop prior to coupling two cars on non-tangent track, resulting in the derailment of BCOL-60841 and WC-37824.

The Company conducted an investigation and determined that Mr. Dahl had violated the above CRO Rules and General Operating Instructions and was deserving of the discipline of 25 demerit marks.

The Union contends that the Company failed to provide the grievor with a fair and impartial investigation. The Union submits that the discipline assessed was unwarranted and, in any case, excessive and should be expunged, or in any case, reduced and the grievor brought back to work, and be made whole.

The Company disagrees with the Union’s contentions.

FOR THE UNION:
(SGD.) R. Donegan

General Chairman

FOR THE COMPANY:
(SGD.) D. Crossan for K. Madigan

Vice-President, Human Resources

There appeared on behalf of the Company:

D. Crossan – Manager, Labour Relations, Prince George
K. Morris – Senior Manager, Labour Relations, Edmonton
C. Michelucci – Director, Labour Relations, Montreal

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto

J. Thorbjornsen
K. Dahl

– Vice General Chairman, Saskatoon
– Grievor, Vancouver

AWARD OF THE ARBITRATOR

Nature of the Case

1. On March 9, 2017, CN assessed Conductor Ken Dahl 25 demerit points for a February 24, 2017 incident involving the derailment of 2 cars and further terminated his employment due to his accumulation of 75 demerit points. Mr. Dahl's service at the time of his dismissal was 3 years and 4 months.

2. The TCRC raised three independent grounds in Mr. Dahl's defence: i) the lack of fairness and impartiality in CN's investigation, ii) the lack of any justification for discipline and iii) the severity of the penalty.

3. For the reasons given below, the arbitrator concludes that CN conducted a fair investigation and demonstrated it had cause to impose discipline. Due to Mr. Dahl's significant discipline record, which already stood at 50 demerit points, plus a suspension, CN's discipline, even if modified, would not have reduced his demerit points to a level which would have resulted in reinstatement.

Facts

4. The parties did not dispute the facts to any significant degree. On February 24, 2017, Mr. Dahl was in control of the movement when making a joint coupling between

railcars on non-tangent (curved) track. CROR 113(e) provides that the cars must be stopped prior to coupling. The stop allows the operator to ensure that the drawbars are aligned. However, the cars did not stop, the couplers bypassed each other, and this caused two rail cars to derail.

Analysis and Decision

5. Three issues arose for determination.

i) Did CN's investigation render the discipline void ab initio?

6. During the investigation meeting, a question arose about the location of the railcars. CN called in a trainmaster who had been involved in the matter to answer questions. During his testimony, the trainmaster confirmed the rail cars had been on a curve and mentioned that another employee had shown him pictures.

7. TCRC alleged that CN had violated its duty to conduct a fair and impartial investigation by failing to produce these pictures so that the union would have been aware of them. The investigating officer indicated that he had had no knowledge of these photos, as they did not form any part of his evidence (Q&A 29).

8. The parties' collective agreement contains article 117.2 which sets out their rights and obligations during investigations. Article 117.2(a) refers to evidence:

At the outset of the investigation, the employee will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the employee and his representative to review the evidence.

9. Article 117.2(a) makes it clear that evidence on which CN intends to rely will be provided to the employee. If such evidence is relied upon, but is not produced, then the remedy is to declare any discipline null and void: see, for example, [CROA&DR 3322](#) and [CROA&DR 3452](#).

10. In the instant case, however, the facts do not demonstrate that CN intended to rely on the photos. The investigating officer had no knowledge of the photos, the existence of which only came to light when the trainmaster testified.

11. This differs from the situation in [CROA&DR 3452](#) where the employer has relied on a document in coming to its conclusion, but failed to produce that document prior to the arbitration:

Given that there is no issue that the Reasonable Cause Report Form was not disclosed to the Union prior to the arbitration, and given that the form was a document material both to the decision taken by the Employer and the rights of the grievor, and given that this Office has found consistently that as basic element of a fair and impartial investigation the grievor be provided with all material documents, the discharge must be held to be null and void ab initio.

12. The parties have negotiated an obligation to produce “all evidence the Company will be relying upon”. Evidence about which the investigator remains ignorant when starting an investigative interview would not fall into this category.

13. The arbitrator dismisses TCRC’s objection to the fairness of the investigation.

ii) Did CN have grounds to discipline Mr. Dahl?

14. The [Canadian Railways Operating Rules \(CROR\)](#) at [Rule 113\(e\)](#), entitled “Coupling to Equipment”, addresses by-pass couplers:

(e) To prevent by-pass couplers when coupling to equipment on other than tangent track, a stop must be made not less than 6 nor greater than 12 feet from the coupling and extreme caution must then be used, ensuring couplers are properly aligned prior to coupling being made.

15. CROR 113(e) is clear that a stop must be made before the coupling and that “extreme caution” must then be used.

16. CN’s General Operating Instruction (GOI) 3.5 references CROR 113 and requires that the rail cars’ speed cannot exceed 1 mph during the coupling exercise. Mr. Dahl had used 4 mph, though the TCRC explained that sometimes a higher speed is commonly used to start cars moving.

17. CN noted that the GOI mandates that speed be reduced gradually. In its view, Mr. Dahl did not properly control his movement by going directly from 4 mph to stop.

18. CN has satisfied its burden that Mr. Dahl failed to respect CROR 113 and that this failure caused the derailment of two rail cars. CROR 113 specifically addresses the dangers of coupling on non-tangent track. CROR 113 mandates both a stop and “extreme caution” given the risks associated with this exercise.

19. The arbitrator has considered TCRC’s observations that Mr. Dahl did not intentionally cause the derailment. Moreover, he was forthright in answering questions following the derailment and expressed remorse. These factors, while important, especially for the issue of penalty, do not militate against the imposition of any discipline in this area of railway safety.

20. CN had grounds to impose discipline.

iii) Was CN’s decision to terminate Mr. Dahl excessive in the circumstances?

21. CN justified its imposition of 25 demerit points and related dismissal because of Mr. Dahl’s relatively short service, the fact the incident constituted Mr. Dahl’s fourth rules violation, the fact that this was a second incident leading to a derailment and that this incident constituted a second violation of Rule 113.

22. The previous Rule 113 violation had resulted in a sideswipe for which CN imposed 15 demerit points. CN had also imposed 20 demerit points for another CROR violation which had resulted in a derailment.

23. At the time of his termination, Mr. Dahl had a total of 50 demerit points. Following Mr. Dahl's accumulation of 50 demerit points, CN further suspended him for another separate incident.

24. TCRC has not persuaded the arbitrator that the demerit points issued, given all the circumstances, and considering Mr. Dahl's short service and record, warrant significant intervention. Even if the authorities presented and Mr. Dahl's remorse convinced the arbitrator to reduce the 25 demerit points down to 20, or even the 15 given for an earlier sideswipe, his past record would still put him over the 60-demerit point threshold.

25. TCRC did not persuade the arbitrator that 9 demerit points or less ought to have been imposed for this most recent incident. The arbitrator can find no principled basis on which to do that, given the facts in this case.

26. Mr. Dahl's dismissal did not result solely from this recent rule violation and derailment. His significant disciplinary record considering his short service demonstrated that CN's efforts at progressive discipline could not correct the level of care and attention he gave to his position: [CROA&DR 3000](#). Despite TCRC's best efforts, it is Mr. Dahl's

previous record, coupled with the most recent rule violation, which demonstrates that his continued employment at CN is no longer viable.

27. As a result, the arbitrator must dismiss Mr. Dahl's grievances.

November 2, 2017



GRAHAM J. CLARKE
ARBITRATOR