

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

**CASE NO. 4600**

Heard in Montreal, December 12, 2017

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Discharge of Michael Kettela for accumulation of demerits following the assessment of 40 demerits for the CROR Rule 42 violation on March 15, 2017 while working as a Locomotive Engineer on M37231-15.

**JOINT STATEMENT OF ISSUE:**

On March 15, 2017, at 17:00, Mr. Kettela was ordered to work M37231-15 as a Locomotive Engineer from MacYard to Belleville.

On that particular day, Mr. Kettela was required to tie into track E03 and cut the DP remote in the east end of the track. Mr. Kettela, then coupled on the headend portion of his train in track E04 and doubled back onto the DP remote in track E03. After completing these maneuvers, he was required to go in the C Yard to pick up the tail end of his train.

In order to complete this task, he was required to pull on into York #3 for headroom. While pulling into the York #3, Mr. Kettela did not see the red flag located just after the yellow over red flag at mile 25 of the York Subdivision. He passed the red flag by one (1) engine.

Mr. Kettela was required to attend a formal investigation for circumstances surrounding the alleged CROR Rule 42 violation. As a result of this investigation, he was assessed with 40 demerits and subsequently discharged for accumulation.

**UNION POSITION**

The Union contends this is a case of discriminatory discipline as the Conductor was not assessed discipline, especially in light of discipline resulting in discharge for accumulation of demerits.

Notwithstanding, the Union submits that the Company did not follow the progression of discipline under the Brown System of Discipline in this instance.

In the alternative, the Union argues there are mitigating factors which warrant the removal of discipline, such as but not limited to, Mr. Kettela being a long service employee

The Union contends the discipline assessed is unwarranted, and in any event, excessive, in all of the circumstances. The Union requests that Mr. Kettela be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

### **COMPANY POSITION**

GBO 4093 of TGBO addressed to train M37231-15 shows that there was a Rule 42 located at mile 25 to mile 21 of the York Subdivision between the hours of 07:00 March 15, 2017 to 07:00 March 16, 2017.

Mr. Kettela did not comply with GBO 4093 and as a result entered into the Foreman's limits without obtaining his authorization in violation of CROR Rule 42.

It is the Company's position that the assessment of 40 demerits in the circumstances is not excessive. In addition to the 49 demerits appearing on his active disciplinary file, Mr. Kettela was discharged for accumulation of demerits.

**FOR THE UNION:**  
**(SGD.) P. Boucher**  
General Chairman

**FOR THE COMPANY:**  
**(SGD.) O. Lavoie** for **M. Farkouh**  
Senior Vice-President Eastern Region

There appeared on behalf of the Company:

- |           |   |
|-----------|---|
| O. Lavoie | – Manager, Labour Relations, Montreal       |
| V. Paquet | – Manager, Labour Relations, Montreal       |
| S. Roch   | – Manager, Labour Relations, Montreal       |
| M. Boyer  | – Senior Labour Relations Manager, Montreal |

And on behalf of the Union:

- |              |   |
|--------------|---|
| M. A. Church | – Counsel, Caley Wray, Toronto          |
| R. Caldwell  | – Retired General Chairman, Bancroft    |
| C. Wright    | – Senior Vice General Chairman, Toronto |
| M. Kernaghan | – Vice General Chairman, Belleville     |
| J. Robbins   | – General Chairman, Sarnia              |
| J. Lennie    | – Local Chairman, Port Robinson         |

### **AWARD OF THE ARBITRATOR**

#### **Nature of the Case**

1. CN imposed 40 demerit points when Locomotive Engineer (LE) Michael Kettela violated a cardinal rule, [CROR 42](#) (Planned Protection), and terminated his employment

due to an accumulation of 89 demerit points (including the most recent incident), 3 suspensions and 4 written reprimands.

2. The TCRC satisfied the arbitrator that the 40 demerit points CN imposed should be reduced, given the circumstances surrounding the Rule 42 violation. However, due to Mr. Kettela's active disciplinary record, and despite his long service, the arbitrator was not convinced that a suspension should be substituted for the demerit points imposed under the Brown System.

### **Facts**

3. The parties did not contest the facts to any great extent. The issue separating them concerned the appropriate penalty.

4. Mr. Kettela, who CN hired in April 1990, had over 26 years service. On March 15, 2017, Mr. Kettela and his conductor printed their TGBO (Tabular General Bulletin Order) and had a job briefing about, among other things, GBO 4093 which indicated that a Rule 42 existed at mile 25 of the York subdivision. There would be both a yellow over red flag and a red flag at that location.

5. Rule 42 is a planned protection to allow maintenance of way employees or contractors to work safely on or beside the tracks. No train can pass a red flag without

first receiving specific instructions from a Rule 42 foreman. The parties agree that Rule 42 is one of the cardinal rules in the railway industry.

6. Mr. Kettela saw a yellow over red flag at mile 25, but did not see the red flag directly behind it. Once he saw the red flag, he placed the movement into emergency and stopped the train one engine length (roughly 80 feet) past the red flag. Mr. Kettela reported the incident to the conductor and to the RTC (Rail Traffic Controller).

7. During his interview, Mr. Kettela admitted violating Rule 42, suggested that if the yellow over red had not been there he would have seen the red flag, apologized for his error and expressed his thankfulness that no one was hurt, and no damage occurred (QA27).

8. CN assessed Mr. Kettela 40 demerit points for this cardinal rule violation which led to his termination under the Brown System based on an accumulation of 89 demerit points.

9. The TCRC highlighted certain mitigating factors, including Mr. Kettela's many years in the running trades and his candour. While he had a discipline record, the TCRC noted most incidents occurred when working as a conductor. He had been qualified as an LE since 2011.

10. The TCRC submitted the violation was technical and differed from those situations often found in other Rule 42 cases. The incident took place on a pullback track which was still inside the MacMillan Yard and shortly before where crews would enter the mainline.

11. The TCRC also noted that the train's conductor received no discipline. CN indicated this resulted from the fact that the conductor was 5000 feet away at the other end of the train during assembly.

12. At the time of the March 15, 2017 incident, Mr. Kettela had 49 active demerit points on his record; 3 suspensions, one of which is described as "deferred" depending on the exhibit considered (compare U-1; Union Brief; Tab 2 (April 5, 2017 email) vs. U-1; Union Brief; Tab 5 (Form 780); and 4 written reprimands. Under the Brown System the parties follow, the threshold for termination is 60 demerit points.

13. Over the course of his entire career, Mr. Kettela had accumulated 199 demerit points, 3 suspensions and 9 written reprimands. An employee will have 20 demerits removed from his/her record for every 12 consecutive months of active service without discipline. This happened 5 times over Mr. Kettela's career, the last instance of which occurred in 2011 (U-1; Union Brief; Paragraph 19 and Tab 2).

## **Decision and Analysis**

14. The parties follow the Brown System, which seeks to add additional clarity to the progressive discipline process. In [CROA&DR 3592](#), Arbitrator Picher described the Brown System:

As stressed by the Company's representative, the case at hand truly tests the meaning of progressive discipline and the application of the Brown System. That system is intended to give the employee, without the imposition of suspensions, a basis to understand the severity of any infractions which he or she may commit and the clear understanding of the vulnerability of his or her employment as the demerits on the employee's record accumulate towards the fatal total of sixty.

15. The Brown System's use of demerit points provides progressive discipline guidance to employees, their trade unions, employers, as well as to CROA arbitrators. The latter group, of course, as in any progressive discipline system, retains the discretion to substitute a different penalty.

### **i) Was 40 demerit points the appropriate penalty in these circumstances?**

16. The arbitrator agrees with the TCRC that the special circumstances of this case do not warrant the imposition of 40 demerit points. Given the facts, the demerit points should have been at the low end of the scale which some cases suggest begins at around 30: see, for example, [CROA&DR 2377](#). Depending on the circumstances, other Rule 42 cases have imposed a suspension, rather than demerits.

17. In [CROA&DR 2356](#), Arbitrator Picher summarized the case law up to that point in 1993:

The circumstances of this case, and the submissions of the parties, have caused the arbitrator to review the prior awards of this Office with respect to violations of UCOR 292 and CROR 429. As the cases disclose, allowing a train movement to proceed through a stop signal has always been viewed as a serious offense. It has not, however, been treated by employers as meriting automatic dismissal. In the earliest years of this Office the most common response of a violation of Rule 292 appears to have been a lengthy suspension, generally in the order of six months, although not always necessarily of that length. The suspensions recorded seem to have varied between forty-five days and nine months. (See CROA 48, 168, 270, 303, 388, 439, 467, & 725.) For a time the tendency was to assess demerits for violations of UCOR 292. Generally, the demerits assessed fall within the high range, between thirty and fifty-five demerits. (See CROA 350, 374, 743, 1031, 1116, 1306, 1328 [nullified at arbitration], 1372, 1674, 1696, 1710 & 1778.) A small number of the cases involving the assessment of demerits also resulted in discharge for the overall accumulation of demerits.

18. While confirming in [CROA&DR 2356](#) that passing a stop signal was a serious offence, Arbitrator Picher overturned the dismissal of a 7-year employee with a clean discipline record and substituted a substantial suspension, due to certain aggravating factors:

The grievor is an employee of some seven years' service, whose disciplinary record was clear at the time of the incident. If his actions had involved only the passing the stop signal, and the immediate stopping of his train thereafter, precedent would suggest the assessment of a substantial number of demerits or a suspension to have been an appropriate disciplinary response. In light of the aggravating actions pursued by the grievor, it is not inappropriate to view the whole of his actions as deserving of a serious sanction, up to and including a significant period of suspension. (sic).

19. In [CROA&DR 3472](#), Arbitrator Keller refused to intervene when 45 demerit points were imposed for a similar infraction, though, unlike Mr. Kettela, the grievor had lacked candour:

The grievor was imposed 45 demerits which the employer acknowledges is at the high end of the scale for a violation of CROR Rule 42. The grievor (since retired) was a long service employee at the time of the incident. He had been free of discipline for some twelve years prior to the incident. As the Union points out, these are mitigating circumstances that should be considered and could result in a reduction of the 45 demerits. However, in the instant case they do not. Rule 42 is a cardinal rule. Violations of this rule can result in significant danger not only to the train crew but to those working within the limits. That there were none at this time does not exclude the possibility. As well, in the instant case, the situation caused a potentially serious hazard to the passengers aboard the train. The above, coupled with the lack of candour of the grievor and his failure to accept responsibility for the situation causes me to reject the argument that the penalty should be mitigated.

20. The TCRC referred to a recent Rule 42 violation involving a Mr. Leasa who, despite having 55 demerit points, received a 90-day suspension for a Rule 42 violation. However, unlike Mr. Kettela, Mr. Leasa's active record did not contain any suspensions or written reprimands.

21. In [CROA&DR 4250](#), Arbitrator Schmidt overturned a termination resulting from a Rule 42 violation, but for an employee with 29-years of service and no active demerit points at the time of the dismissal:

In all the circumstances, this is an appropriate case to substitute a penalty short of discharge. Mr. Zmaeff is to be reinstated without compensation and without loss of seniority, with the period of his discharge and his reinstatement to be recorded as a suspension for the infractions listed in the notice provided to Mr. Zmaeff on September 25, 2012, and I so order.



22. In [CROA&DR 4583](#), Arbitrator Sims reviewed various cases in this area and replaced a dismissal by a lengthy suspension for a Rule 42 violation, in part due to the employer's failure to prove one of its key allegations regarding a cover up:

Having weighed all these factors I conclude the penalty of termination would only be justified in this case had the employer established its allegation that the grievor and Mr. Maggio had deliberately failed to report this incident in an effort at cover-up. The evidence convinces me that they did not. However, the incident was a very serious cardinal rule violation involving an incorrect assumption which Ms. Bujold failed to double check against the documentation as well as missing the red flag. Ms. Bujold's record over the prior year was poor. In these circumstances the termination is set aside and the grievor will be reinstated without compensation. She has been remorseful and has accepted full responsibility which convinces me that this is a working relationship that can be successful in the future.

23. The case law does not support CN's decision to award 40 demerit points, given the facts of this case. As noted, the proper number would be around 30. 30 demerit points for a Rule 42 violation is still halfway to termination under the Brown System. This reflects the seriousness of the offence and the potentially severe consequences for employees working on the tracks if Rule 42 is violated.

24. But even 30 demerit points would still place Mr. Kettela well above the 60-demerit threshold under the Brown System. The question becomes whether a suspension ought to be substituted for those demerit points, as has happened in certain cases.

**ii) Should the arbitrator substitute a suspension for the termination?**

25. Various cases have imposed a suspension to provide an employee with another, possibly last, chance where demerits would be fatal to their continued employment: see, for example, [CROA&DR 4498](#). This also occurred for Mr. Leasa recently.

26. Unlike in the Leasa situation, however, the arbitrator has concluded that Mr. Kettela's pre-existing active discipline record does not justify the substitution of another suspension instead of demerit points. There are several reasons for this conclusion.

27. With a record of 49 demerit points before the Rule 42 incident, Mr. Kettela already knew his employment was vulnerable. The Brown System provides this important notice to employees whose records contain multiple disciplinary incidents. The way to lower those demerit points is to complete 12 month periods with no discipline, which results in the removal of 20 demerit points for each such period. Mr. Kettela, however, had been unable to reduce his demerit points since 2011.

28. Mr. Kettela had already received suspensions rather than demerit points. For example, CN imposed a 10-day "deferred" suspension on August 23, 2014. Mr. Kettela later had to serve that suspension due to receiving a new 2-day suspension on January 23, 2015. CN gave Mr. Kettela a third suspension on December 29, 2015.

29. These suspensions, given in lieu of adding further demerit points, have already insulated Mr. Kettela from the consequences associated with the 60-point threshold. The arbitrator might have been persuaded to substitute a last chance suspension, had multiple suspensions not already been imposed in the relatively recent past.

30. Given Mr. Kettela's 49 demerit points and his previous suspensions, CN persuaded the arbitrator that the Brown System should apply as intended in this case. The Rule 42 violation, which was a serious offence, albeit unintentional, placed Mr. Kettela significantly beyond the 60 demerit points which the parties have agreed constitutes the threshold for termination.

31. The arbitrator accordingly dismisses the grievance.

January 8, 2018



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**GRAHAM J. CLARKE**  
**ARBITRATOR**