

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

CASE NO. 4608

Heard in Montreal, January 10, 2018

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of discharge to Locomotive Engineer M. Madubeko for his “439 violation on the Edson subdivision while working W90551-19 on May 19, 2017”.

THE COMPANY’S EXPARTE STATEMENT OF ISSUE:

On May 19, 2017, the grievor was called as the Locomotive Engineer on W90551-19, Edson to Edmonton. After setting off loads of ballast cars along the Edson Subdivision, the crew was released at Wabamun, Mile 44.2 on the Edson Subdivision. While travelling eastward light engine from Wabamun to Walker Yard, the grievor’s movement passed signal 128S, displaying a Stop signal, generating a CRO Rule 439 alarm.

The Company conducted an investigation of the incident and determined that the grievor had violated CRO Rule 439 and subsequently assessed discharge.

The Union contends that the assessment of a discharge is excessive, it is suspected that fatigue played a factor, and that the grievor was not afforded his right to a fair and impartial investigation.

The Company disagrees with the Union’s contentions.

THE UNION’S EXPARTE STATEMENT OF ISSUE:

On May 19, 2017, the grievor was called as the Locomotive Engineer on W90551-19, Edson to Edmonton. After setting off loads of ballast cars along the Edson Subdivision, the crew ran light engines from Wabamun, Mile 44.3 on the Edson Subdivision to Edmonton. While travelling eastward light engine from Wabamun to Walker Yard, the grievor’s movement passed signal 128S, displaying a Stop signal, generating a CRO Rule 439 alarm.

The Company conducted an investigation of the incident and determined that grievor had violated CRO Rule 439 and subsequently assessed discharge.

The Union asserts the Grievor was not afforded his right to a fair and impartial investigation as a result of the bias of the investigating officer who failed to remain impartial during questioning and denied the grievor procedural fairness including but not limited to the manner in which objections and requests for recesses were addressed. The Union requests that the discipline be found void “ab initio”.

In the alternative, the Union contends that the assessment of a discharge is excessive, disproportionate, and that fatigue played a factor. The Union asserts the Company has failed to consider all mitigating factors.

The Union requests the dismissal be expunged and the Grievor be reinstated and made whole with no loss of benefits, wages or seniority. In the alternative, the Union asks this Board to mitigate the discipline as it sees fit.

The Company disagrees with the Union's contentions.

FOR THE UNION:
(SGD.) K.C. James
General Chairman

FOR THE COMPANY:
(SGD.) P. Payne
Director, Labour Relations

There appeared on behalf of the Company:

- D. Houle – Labour Relations Associate, Edmonton
- K. Morris – Senior Manager, Labour Relations, Edmonton
- J. Thompson – General Manager, Alberta Division, Edmonton

And on behalf of the Union:

- A. Stevens – Counsel, Caley Wray, Toronto
- K.C. James – General Chairman, Edmonton
- M. King – Senior Vice General Chairman, Edmonton
- T. Russett – Vice General Chairman, Edmonton
- K. Czorny – General Secretary Treasurer, Jasper
- G. Buckley – Local Chairman, Division 105, Vancouver
- M. Madubeko – Grievor, Edmonton

AWARD OF THE ARBITRATOR

Nature of the Case

1. CN terminated the employment of locomotive engineer Mako Madubeko due to a Rule 439 (Stop Signal) violation. CN also relied on his existing disciplinary record in support of the termination, a record which included three recent suspensions for other safety-related violations.

2. The TCRC alleged that CN had failed to conduct a fair investigation, a factor which rendered the discipline null and void. On the merits, the TCRC did not dispute the facts to any great extent, but argued that the penalty of discharge, given the facts and this Office's case law, was excessive.

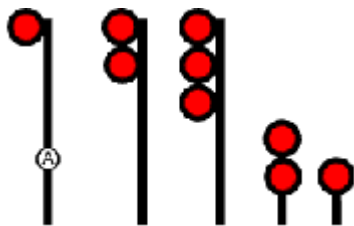
3. The arbitrator has decided to dismiss the grievance. The investigation process demonstrated that any potential irregularities had been remedied almost immediately. Moreover, the violation of a cardinal rule, when considered with LE Madubeko's short service and disciplinary record, indicated that the discharge fell within a range of reasonable alternatives.

Facts

4. CN hired Mr. Madubeko as a conductor trainee in September 2008. In July 2012¹, Mr. Madubeko qualified as a locomotive engineer (LE). CN terminated Mr. Madubeko effective June 9, 2017 following its investigation into a Rule 439 violation.

5. Rule 439 of the [Canadian Rail Operating Rules](#) (CROR) illustrates mandatory stop signals and requires a movement to stop 300 feet in advance of the signal:

439.



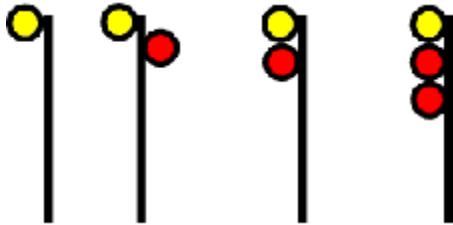
Stop - Stop.

OPTIONAL: Unless required to clear a switch, crossing, controlled location, or spotting passenger equipment on station platforms, a movement not authorized by Rule 564 must stop at least 300 feet in advance of the STOP signal.

¹ The TCRC suggested in its brief it was in 2011.

6. CROR Rule 411 (Clear to stop) advises crews that they need to be prepared to stop at the next signal:

411.



Clear to Stop - Proceed, preparing to stop at next signal.

7. On May 19, 2017, LE Madubeko, along with conductor Thomas Lemoine and brakeman Johnson Truong, had been assigned to set off cars of ballast at various locations to assist engineering with track roadbed maintenance. Once finished, the crew ran “light engines”, meaning there were only two engines and no railcars, back to Edmonton.

8. The crew passed a “Clear to stop” Rule 411 signal at Mile 14.8. This meant that LE Madubeko was obligated to stop his train at Mile 12.8. Despite the Rule 439 “Stop Signal” at mile 12.8, LE Madubeko failed to stop, but instead passed the signal at 25 mph². LE Madubeko was able to stop his train 300 feet past the signal, since there were only two engines and no attached cars. Under Rule 439, LE Madubeko ought to have stopped his train 300 feet prior to the stop signal.

² The TCRC stated it was 24 mph.

9. The Rule 439 stop signal was in place due to train Q112 being stopped up ahead of them.

10. The crew all passed drug and alcohol testing following the incident. During the subsequent investigation, LE Madubeko explained the situation in part by his mistake about the signal. He thought the stop signal was instead a restricting sign. He did not however call out the restricting signal to his colleagues (QA25). He noted that eventually it was he who stopped the train, even though the conductor and brakeman had also seen the stop signal.

11. The conductor and the brakeman also have the duty to stop a train if an LE fails to do so: [CROR 106](#). The crew have a mutual obligation to call out signals to one another and to confirm them orally.

12. CN initially also terminated Brakeman Truong and Conductor Lemoine, but later changed the penalties to suspensions in their disciplinary records (U-2 and U-3). Brakeman Truong noted in his investigation that he had seen the stop signal and had yelled at LE Madubeko to stop the train (QA 12). In answer to a question from the TCRC during his investigation, Brakeman Truong noted he had never believed that the signal had a restricting sign.

13. Conductor Lemoine indicated in his investigation that both he and Brakeman Truong had told LE Madubeko to stop (QA 23). They both thought based on sounds they

heard that he was stopping, which was their explanation for not engaging the emergency brake (E-1; Company Brief; Tab 10).

14. LE Madubeko had been on duty for over 12 hours; the TCRC suggested fatigue was a factor. The TCRC candidly acknowledged in its grievance that Federal regulations limiting tours to 12 hours did not apply to the work train on which LE Madubeko was working. Work train service can go up to 16 hours.

15. The parties agreed that LE Madubeko had 35 demerit points at the time of the incident. In addition, CN had suspended LE Madubeko on three previous occasions for different rule violations (E-1; Company Submissions; Tab 11): i) 8 days in 2014 for running through a switch with a restriction; ii) 14 days in January 2016 for failure to comply with CROR 157; and iii) 17 days in December 2016 for failure to comply with CROR 114 and 115.

16. After the 4th rule violation (Rule 439) on May 19, 2017, CN decided to terminate LE Madubeko's employment.

17. The arbitrator must decide whether CN's investigation respected its obligations under the collective agreement and whether the facts justified CN terminating LE Madubeko's employment.

Analysis and Decision

18. The arbitrator will first review the TCRC's procedural objection regarding CN's investigation. Secondly, the arbitrator will examine CN's decision to terminate LE Madubeko's employment given the contradictory case law the parties filed regarding the appropriate sanction.

i) Did CN conduct a fair and impartial hearing?

19. The TCRC alleged that the Investigating Officer (IO) conducted an unfair and biased investigation, contrary to article 86.1 of the parties' collective agreement. Specifically, the TCRC argued that the IO i) did not allow LE Madubeko to consult with his advisor at the beginning of the interview; ii) did not allow objections to be put on the record until after the answer had been recorded; and iii) did not produce a completed incident form, but rather only a blank version of it.

20. The arbitrator has reviewed LE Madubeko's interview (U-1; Union Submission; Tab 4). LE Madubeko at QA 5 answered "yes" to the question "Have you had sufficient time to review the evidence and are you ready to proceed?".

21. QA 14-15 illustrates the TCRC's concern about how the IO handled objections:

14.Q. Mr. Madubeko, can you please explain why you went by a red signal displaying "stop"?

R. I mistook it for a restricting signal.

15. Q. Mr. Madubeko, you have previously stated that you worked on the Edson Subdivision prior to this incident. Why would you have mistaken a red signal as a Restricting Signal?

A. That was a mistake, I took it as a restricting signal.

Note: The union is objecting to this question as it is misleading and self incriminating. Also the investigating officer would not note the objection before the question is asked.

The company has noted the objection and will continue with the questions.

22. At QA 16, the TCRC contested the IO's suggestion she would only write down an objection after LE Madubeko had answered the question. The TCRC further contested the IO's decision not to grant the TCRC representative a recess to obtain advice about how objections should be noted in the transcript.

23. The transcript also indicates at QA 16 that a recess did take place at that time in the interview following a bathroom break request. The IO also advised the TCRC when the interview resumed that she would henceforth note the objection immediately following the question.

24. The arbitrator agrees with the TCRC about the importance of a fair and impartial hearing: [CROA&DR 4591](#). But the TCRC did not convince the arbitrator that LE Madubeko was denied a fair hearing. A review of the transcript, especially at QA 16, demonstrates that the IO almost immediately remedied her way of proceeding by agreeing to record any objections before the answer. Similarly, the TCRC did receive a recess at the time it asked for one, albeit on different grounds.

25. The arbitrator finds as well that, unlike the other objections, the objection relating to the drug and alcohol testing was not particularized in any helpful detail either during

LE Madubeko's interview or in the TCRC's August 23, 2017 grievance (U-1; Union Submissions; Tab 4 QA 26 and Tab 9). The results of those drug and alcohol tests were negative for all crew members.

26. An investigation under the parties' expedited arbitration regime is intended to be more informal than the process which might take place before an administrative tribunal. It is neither a criminal investigation nor a process conducted by experienced legal counsel.

27. It is rather an opportunity for both parties to ensure this Office's record contains the material facts should a later hearing be necessary. As a process designed to eliminate to a large extent the need for this Office to hear oral evidence, it allows each party to ask questions and to have the employee answer those questions³. The TCRC posed questions to Mr. Madubeko near the end of the interview to ensure the record contained other facts it considered essential.

28. While not identical to the questioning of a witness in a labour arbitration or in an examination for discovery, the common goal of an employee's interview is to have him or her answer proper questions about the matters in question. Objections can be made, including, for example, to contest "loaded questions" which assume facts not in evidence. At the extreme ends of the investigation spectrum, this Office has overturned unfair

³ The parties are similarly entitled to pose questions and receive answers from witnesses.

investigations ([CROA&DR 4591](#)) and has also commented on attempts to obstruct a proper investigation ([CROA&DR 3157](#)).

29. In virtually every case, the parties coming before this Office have collectively demonstrated their success in applying their investigation process. This has allowed them to resolve cases themselves, or to receive multiple arbitration awards within 30 days, at a fraction of the cost compared with regular labour arbitration.

30. In this case, CN provided LE Madubeko and the TCRC with the documentary evidence (QA5). While it makes sense for an IO to consider an objection before an employee answers, the IO changed her procedure almost immediately (QA16). The issue of a recess for the advisor to seek instructions on process became moot, since a bathroom break took place.

31. The arbitrator considers the investigation met the requirements of the collective agreement and accordingly dismisses the TCRC's objection.

ii) Should the arbitrator substitute a different penalty for the termination?

32. Rule 439 is one of the cardinal rules in the railway industry given the potential consequences of a train failing to respect a stop signal. But a violation does not automatically result in termination. Instead, this Office has consistently examined the entire context surrounding a Rule 439 violation, along with an employee's service and disciplinary record, when considering the discipline imposed.

33. The TCRC noted that neither Conductor Lemoine nor Brakeman Truong had operated the emergency brake when they ought to have known LE Madubeko was not stopping. They instead waited for him to stop the train. Conductor Lemoine had received confirmation from Brakeman Truong of the stop signal, but not from LE Madubeko. Brakeman Truong had also received confirmation of the stop signal from Conductor Lemoine but not from LE Madubeko.

34. CN argued that LE Madubeko committed several significant errors. He failed to take steps to stop, despite the Rule 411 signal at mile 14.8. Moreover, Rule 439 required the movement to stop 300 feet before the stop signal, yet LE Madubeko did not stop until 300 feet after the signal. This resulted in exceeding the stopping point by roughly 600 feet or 10-12 car lengths.

35. LE Madubeko indicated that he did not call out the stop signal when his crew members did, since he thought it was only a restricting signal. CN argued that even if one had thought there was a restricting signal, even though no such signal existed, then the train ought to have been going no faster than 15 mph. LE Madubeko's train had gone through the stop signal at 24-25 mph.

36. In CN's view, LE Madubeko must have known a stop signal was coming up, since the crew had all recognized the Rule 411 (Clear to Stop) at mile 14.8. Moreover, both the

conductor and the brakeman had communicated the stop signal and not a restricting signal.

37. The facts show a restricting signal never existed at mile 12.8. That type of signal would have had a plate with an “R” on it. Moreover, LE Madubeko was familiar with the subdivision and had travelled on it 16 times between February and May 2017. CN argued that LE Madubeko’s suggestion of a non-existent signal was an attempt to lessen his responsibility for the incident.

38. The arbitrator starts with the proposition that the violation of Rule 439, a recognized cardinal rule, is extremely serious. The range of demerit points for this type of infraction could range from 30 to 55: [CROA&DR 2356](#). Had demerit points been in issue, the number would have fallen towards the middle to higher end of that scale. Mr. Madubeko already had 35 demerit points at the time of this incident.

39. The arbitrator has reviewed the cases submitted by the parties. The facts in each case are crucial. The TCRC’s cases either involved long service employees and/or those with relatively discipline free records. LE Madubeko had neither of these attributes.

40. For example, in [CROA&DR 2356](#), the employee had 7 years service with a clean disciplinary record. Arbitrator Picher, who noted there were aggravating factors, described the usual discipline: “(i)f 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” (sic).

41. In [CROA&DR 2625](#), Arbitrator Picher lowered the initial 90-day suspension to 45 days. The facts indicated that the employee was dependent on a yard foreman for key signal information. The employee also had 16 years service with just 10 demerit points and no suspensions. LE Madubeko, on the other hand, found himself well positioned to prevent the movement from going past the stop signal and had both of his crew members noting the stop signal.

42. In [CROA&DR 3866](#), the employee had 29 years of service. The only blemish on an otherwise pristine disciplinary record was an earlier Rule 439 violation. In the circumstances, including by finding that the case was not one of “inattention or indifference to their responsibilities”, Arbitrator Picher substituted a time served suspension for the original termination.

43. In [CROA&DR 3972](#), the employee had 35 years of service. An earlier Rule 439 violation had occurred 17 years previously. Arbitrator Picher again substituted a time-served suspension.

44. The lower discipline handed out to Conductor Lemoine and Brakeman Truong did not demonstrate unequal treatment. This Office has often differentiated discipline between crew members depending on the situation: [CROA&DR 4499](#) and **CROA&DR**

4610. The conductor and the brakeman both communicated the stop signal. Their subsequent actions were not perfect, hence the imposition of suspensions, but that did not exonerate LE Madubeko from running through stop signal.

45. The arbitrator found more appropriate the cases examining situations of a short service employee with an unenviable disciplinary record. [CROA&DR 1674](#) and [CROA&DR 3628](#) better reflect this Office's analysis for a cardinal rule violation like Rule 439, short service for the employee and previous attempts at progressive discipline.

46. While CN could have decided to give LE Madubeko another chance, the circumstances do not persuade the arbitrator to lessen its choice of penalty. Even if one accepts LE Madubeko's explanation that he thought there was a restricting, rather than stop, signal, something which contradicted his fellow crew members' communications, he still failed to slow his movement down to the required 15 mph.

47. Coupled with LE Madubeko's 3 previous suspensions for rules violations, CN's decision fell within the range of reasonable responses for this type of incident: [CROA&DR 4249](#).

48. The grievance is accordingly dismissed.

January 31, 2018



**GRAHAM J. CLARKE
ARBITRATOR**