

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4640

Heard in Calgary, May 10, 2018

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of twenty-five (25) demerits to Conductor Eric Nyberg of Vancouver, BC, for “Violation of CROR 104.5, GOI 8, 12.15 and GOI 8, 12.3 resulting in the derailment of GATX 24205 while working as Conductor on L51051 21 on July 21, 2017” and subsequent discharge for accumulation of demerits in excess of sixty (60).

THE COMPANY’S EXPARTE STATEMENT OF ISSUE:

On July 21, 2017, Conductor Nyberg was called for his regular assignment, the local road switcher, L51051 21 at 07:55. During this assignment, Conductor Nyberg picked up two loaded propane cars destined for track YH70 and gave his engineer instructions to back up eight (8) cars. Conductor Nyberg failed to line the YH36/70 switch for his intended route and didn’t realize that he hadn’t until he was less than two (2) car lengths from the derail. Conductor Nyberg communicated to his Engineer to stop but given the distance his movement was unable to stop in time which resulted in the derailment of GATX 24205.

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

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.)

FOR THE COMPANY:
(SGD.) D. Crossan (for) **K. Madigan**
Vice President, Human Resources

There appeared on behalf of the Company:

D. Crossan	– Labour Relations Manager, Prince George
K. Morris	– Senior Labour Relations, Edmonton
J. Thompson	– General Manager, Edmonton
M. Galan	– Labour Relations Manager, Edmonton

B. Kambo – Labour Relations Manager, Edmonton
 D. Houle – Labour Relations Manager, Edmonton

There appeared on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
 R. Donegan – General Chairperson, Saskatoon
 J. Thorbjornsen – Vice General Chairperson, Saskatoon
 M. Anderson – Vice General Chairperson, Edmore
 E. Nyberg – Grievor, Vancouver

AWARD OF THE ARBITRATOR

The facts are not in dispute. On July 21st, 2017, during his assignment, Conductor Nyberg picked up two loaded propane cars destined for track YH70 and gave his engineers instructions to back up (8 cars). Prior to doing this, he failed to line YH36/70 switch for his intended route and did not realize that he had not done so until he was less than two car lengths from the derail on YH36. He communicated with his engineer to stop but, given the distance, his movement was unable to stop in time and it resulted in the derailment of propane cars (GATX-24205). Following an investigation, it was determined that Conductor Nyberg had violated *CRO 104.5, GOI 8, 12.15 and 12.3*. The Company concluded that, in the circumstances, the Grievor was deserving of discipline and he was assessed 25 demerits. The demerits resulted in him being in excess of sixty demerits and he was accordingly, dismissed.

The Union argues that the discipline assessed was excessive and unwarranted in the circumstances. According to the Union, part of the problem was the fact that the derail was controlled by the customer who had set it to derail. There is no dispute, as confirmed by the Grievor's statement at the investigation (*Question 17*), that the derails are restored to the derailing position by the customer after a train has cleared the line.

It argues that: had it been CN's responsibility to restore the derail, the Grievor would have been more aware of it and lined the YH36/70 switch away from it. He would also have benefitted from "peer to peer" communications reminding him to do so. Nevertheless, the fact is that the derail was on track YH36 which the Grievor had just vacated. His movement should have been lined toward track YH70. Irrespective of the fact that the derail was set to default by the customer, there would have been no derailment had the Grievor been on the correct track.

The Union suggests that I should consider that this was the Grievor's first week on L510 and that he had limited experience. As well, it points out that the Grievor accepted full responsibility for the incident, had limited knowledge of the track, and that the derail was put back into position by the customer. Because of the above circumstances, it urges that the penalty to be mitigated down to a demerit number that will allow the reinstatement of the Grievor. Frankly, his acceptance of "full" responsibility is somewhat disingenuous considering the argument that his responsibility should be diminished by the fact that he ran across a derail while he was on the wrong track.

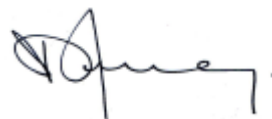
The Grievor is 41 years old. He has been with the Company since October 21, 2013. His disciplinary record (Company Exhibit; Tab 8) reflects that at the time of this incident, in addition to three non-disciplinary letters related to safety issues, he had accumulated 55 active demerits (including **CROA 4639**); 2 suspensions, and 3 written reprimands.

Having assessed the 55 demerits points thus far, it is reasonable to conclude that the Company complied with the principles of progressive discipline and engaged in multiple teaching opportunities to improve the performance and conduct of the Grievor. It is clearly apparent that in Mr. Nyberg's case, progressive discipline has not had the desired effect.

Taking into consideration his unacceptable disciplinary record; his short service with the Company; the lack of compelling mitigating circumstances; and the seriousness of the incident, I cannot disagree with the Company's assessment that the Grievor can no longer be relied upon to work safely in an environment that demands the high level of compliance that it does. In the circumstances I can find no reason to reduce the penalty imposed.

The grievance is dismissed.

June 4, 2018



RICHARD I. HORNUNG, Q.C.
ARBITRATOR