

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

CASE NO. 4651

Heard in Edmonton, September 11, 2018

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the assessment of 45 demerits to Conductor S. DeBlaere of Winnipeg, Manitoba for the violation of Canadian Rail Operating Rules 42.

JOINT STATEMENT OF ISSUE:

On July 24, 2017, the Grievor's train entered a foreman's work limits without first obtaining authorization. The Company conducted an investigation and determined that the grievor violated CROR 42. The grievor was assessed discipline in the amount of 45 demerits.

The Union's position is that the discipline of 45 demerits was excessive in the circumstances and should be reduced.

The Company disagrees with the Union's position and maintains that the discipline assessed was appropriate given the severity of the Cardinal Rule violation, the disregard for the limits listed in the TGBO's, which the crew reviewed during the trip, and the complete disregard for the warning flags. The Company further submits there are no mitigating factors that warrant a reduction in the discipline assessed.

FOR THE UNION:

(SGD.) R. S. Donegan

General Chairperson

FOR THE COMPANY:

(SGD.) M. Galan (for) **K. Madigan**

Vice President, Human Resources

There appeared on behalf of the Company:

M. Galan	– Manager, Labour Relations, Edmonton
K. Morris	– Senior Labour Relations Manager, Edmonton
B. Kambo	– Manager, Labour Relations, Edmonton
T. Dunn	– Nurse, Case Manager, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairperson, Saskatoon
M. Anderson	– Vice General Chairperson, Edmonton
R. DeBlaere	– EFAP Peer, Winnipeg
S. DeBlaere	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

The grievor was the conductor on a train, running eastbound from Rivers Manitoba into Winnipeg. A track maintenance crew was actively working on the line between mile 13 and mile 8. The crew's foreman had put protections in place to ensure no trains passed the crew without permission; the railroad equivalent to an industrial lockout procedure. Rule 42 provides that no train can enter the specified work area during the specified time without the explicit permission of the foreman. To do so is a cardinal rule violation.

In addition to the documentation, which it is admitted the train crew had and reviewed, the procedure involves both a yellow over red flag to mark the protected area at the two mile point, and a second red flag at the start of that area.

The grievor's train went right through the specified area at about 30 miles per hour and only came to a stop, after a radio call, beyond mile 8. The incident was identified because the work crew foreman saw the train's approaching headlights. Fortunately no one was injured. The locomotive engineer and the grievor as conductor, both received a 45 demerit point penalty. Only conductor DeBlaere grieved, on the bases that 45 demerits was too harsh a penalty.

In the investigation the grievor acknowledged knowing, in advance, of the work limits. It was daylight with clear visibility, in a populated area of the City of Winnipeg.

When asked why they had not sought permission from the foreman and not observed either the yellow over red or red warning flags, the grievor replied:

We were preoccupied with the alarm in the cab and I was focussed on the inspection of another train. Regrettably we must have been [sic] missed the flags and it was never our intention to enter the foreman's limits.

The alarm was coming from the train's second locomotive. The passing train was on the north track.

The grievor has six years and three months seniority and is 28 years old. The Union emphasizes that he took responsibility for this mistake, made no effort to deflect blame, and apologized.

It argues that the distractions going on at the time with the passing train and the alarm are mitigating factors to be taken into account in assessing penalty. It refers to **CROA 2588** where 30 demerits were reduced to 20 for a similar infraction. However, there the lesser demerits were combined with a 14 day suspension. In **CROA 4600**, Arbitrator Clarke considered 40 demerit penalty for a similar Rule 42 infraction. He opined that, given the special circumstances of the case "the demerits should have been at the low end of the scale, which other cases suggested to him began at around 30. He went on to consider a variety of Rule 42 decisions, and dismissed the alternative approach of using a suspension, particularly to avoid a cumulative Brown point termination, something not involved here, although a subsequent issue, dealt with in **CROA 4652**, did result in termination.

The Employer discounts the grievor's distraction argument on the basis that duties in the cab of a moving train always involve the two person crew having to divide their responsibility and to multi-task.

The grievor's record does not include any prior cardinal rule violations. In early January 2017 he finished a discipline free year which reduced his Brown system points by 20, saving him from termination as a result of this violation. This gives some support to the Union's argument that he does not exhibit recidivist tendencies. Nonetheless, his record still involves some significant although varied offences.

The Employer argues that prior cases support the imposition of this 45 point penalty and the grievor's contrition is insufficient, when considered along with his record, to justify any mitigation. It refers to **CROA 4583** which involved a similar infraction and an analogous employee record. Termination was set aside, but only replaced with an unpaid suspension of over one year. Termination was upheld for a Rule 42 violation in **CROA 4593**, although for an employee with a prior record of cardinal rule infractions. **CROA 3961** also involved a Rule 42 violation and the points imposed resulted in termination. Arbitrator Picher said of the infraction:

Moving through the track occupancy limits of a work crew is a cardinal rule infraction of a kind which can have catastrophic consequences.

I agree that this is so. In **CROA 3255** the assessment of 45 demerits, with a consequent termination, for a Rule 42 violation was upheld, but it is different in that it was the grievor's second cardinal rule violation. In **CROA 3255** a maintenance employee

received 45 demerits for operating equipment in a protected area where a train might pass, again contrary to Rule 42. Arbitrator Schmidt said in that case.

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.

While I accept that the grievor regrets the incident, this does not distract from the seriousness of the violation or the potential that it might have caused catastrophic harm. The crew were given proper notice, which is acknowledged. They failed to observe the notices they had reviewed as well as missing two flags. They failed to call for permission. While Mr. DeBlaere cites distractions, this is an insufficient reason to justify this conduct, particularly as there were two persons in the cab, each with shared responsibility. The penalty of 45 points is justified in the circumstances and the grievance dismissed.



November 29, 2018

ANDREW C. L. SIMS, Q.C.
ARBITRATOR