

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

**CASE NO. 4656**

Heard in Montreal, October 16, 2018

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the assessment of 30 demerits leading to the discharge for accumulation of demerits to Locomotive Engineer C. Serson of Sioux Lookout, ON., for violations of CROR 33 and train handling violations of CN Form 8960, while working on trains M30241-13 on January 14, 2017, X31842-15 on January 15 and M31731-15 on January 16, 2017.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

On January 14, 2017, Mr. Serson operated train M30241-13 from Sioux Lookout to Armstrong. When meeting a train at Station Robinson, Mr. Serson placed his train into emergency, stopping well short of the stop signal displayed. Mr. Serson recovered his emergency brake without delay, and continued to Armstrong, where he returned to Sioux Lookout on the train M31751-13.

On January 15, 2017, Mr. Serson operated train M31842-15 and returned on train M31751-15. As a result of an engineer-initiated emergency (EIE) on train M30241-13 the Company elected to review the download of three of the four trains operated since it became aware of Mr. Serson's EIE.

The Company performed an audit on his train speeds and train handling on three of the four trains and has determined that Mr. Serson was guilty of speeding and certain train handling policies on these trains.

The Union contends that the Company failed to conduct a fair and impartial investigation where it sat in the weeds and then conducted a post review analysis of Mr. Serson's operating practices, contrary to the principles of natural justice, and inter alia, notably causing a deleterious ability to defend his actions.

The Union asserts that the presiding office for the Company failed to remain unbiased and conducted an investigation that was not fair, nor impartial to Mr. Serson and should be considered void ab initio.

In the alternative, the Union contends that the decision to assess 30 demerits and subsequent discharge for accumulation for Mr. Serson's alleged operating violations is

excessive and that Mr. Serson should be reinstated immediately without loss of wages or benefits.

### **THE COMPANY'S EXPARTE STATEMENT OF ISSUE:**

On January 14 2017, Mr. Serson was assigned as the Locomotive Engineer on train M30241 13 operating between Sioux Lookout to Armstrong. Upon entering and exiting mile 111.5 to 109.67, Mr. Serson was travelling in excess of the permissible speed of 45 MPH. Mr. Serson placed his train into emergency and came to complete stop at mile 109.20 at Robinson station, where train M313 was occupying the switch points at Robinson West.

On January 15-16 2017, the Company conducted a speed and train handling audit on the Allanwater Subdivision. The audit results revealed numerous train handling violations were noted during Mr. Serson's tours of duty on trains M31731 15 and X31842.

On January 23, 2017 an investigation was conducted and Locomotive Engineer Clifford Serson was assessed discipline, resulting in his discharge due to an accumulation of demerits.

The Company's position is that the investigation into both infractions was fair and impartial, in line with the provisions of the collective Agreement and the discipline assessed not excessive.

#### **FOR THE UNION:**

**(SGD.) M. King** for **K.C. James**  
General Chairperson

#### **FOR THE COMPANY:**

**(SGD.) S. Roch** for **K. Madigan**  
Vice President Human Resources

There appeared on behalf of the Company:

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|-------------|--|
| S. Roch     | – Manager, Labour Relations, Montreal                          |
| M. Boyer    | – Senior Manager, Labour Relations, Montreal                   |
| S. Mumby    | – Assistant Superintendent Great Lakes North Division, Capreol |
| J. ElShamey | – Manager, Labour Relations, Montreal                          |

And on behalf of the Union:

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|-------------|--|
| M. Church   | – Counsel, Caley Wray, Toronto           |
| M. King     | – Senior Vice General Chairman, Edmonton |
| K. C. James | – General Chairman, Edmonton             |
| C. Serson   | – Grievor, Sioux Lookout                 |

### **AWARD OF THE ARBITRATOR**

The facts are not in dispute. On January 14, 2017, the Grievor was the Locomotive Engineer on train M30241 13 operating between Sioux Lookout to Armstrong. Upon entering and exiting mile 111.5 to 109.67, he was travelling in excess of the permissible speed. He put his train into emergency (EIE) and came to a

complete stop at mile 109.20 at Robinson station, where train M313 was occupying the switch points at Robinson West.

The EIE was flagged by the Company's WiTronix system. As a result, the Company was motivated to conduct a speed and train handling audit on the Allanwater Subdivision on January 15-16 2017. The audit revealed numerous train handling violations by the Grievor during his tour of duty on trains M31731 15 and X31842. (*Union Document 5*)

Following an investigation on January 23, 2017, Mr. Serson was assessed 30 Demerits as discipline which resulted in his discharge due to an accumulation of demerits.

There is no issue that the Grievor committed the train handling violations as alleged. Those violations are apparent from a review of *Union Document 5* and a transcript of the Grievor's investigation statement on January 23, 2017 (*Union Document 6*). To his credit, Mr. Serson admitted to his conduct during the investigation.

Given the number and the nature of the operating violations (including those involving a Key Train), and his previous similar transgressions, I am satisfied that the Grievor's conduct was such that it warranted discipline.

The Union argues that the Company's investigation was not conducted in a fair and impartial manner based on questions number 63 - 69 in the Grievor's statement (*Union Document 6*). In that regard, I agree with the proposition set forth in **CROA 2934** that:

*"...as a general rule the process of questions and answers must be open-minded and conducted in such a manner as to reflect the general impartiality and a withholding of judgment",*

I am frankly given pause by the questions, and the manner in which they were posed. However, in this case, the questions themselves do not represent convincing evidence of a biased investigation which grounds the voiding of the Grievor's discipline *ab initio*. Nor can I agree that the circumstances, as set out in the cases referred to me by the Union (*Union Documents 10, 11 & 12*), are sufficiently similar to those in the present case so as to assist in establishing a dismissal of the grievance *ab initio*. While the questions themselves provide justifiable cause for concern, it does not follow that discipline will be void *ab initio*. As noted in **CROA 4590**, it is the evidence arising from the interview that will determine whether such a result might flow.

*The arbitrator has not been persuaded that discipline will always be void ab initio if all members of a crew are not interviewed following every incident. Rather, it is the evidence arising from the investigation which will determine when this result might follow.*

In the present case, irrespective of the manner in which the questions were posed, the data-based facts provided *via* WiTronix are immutable. They are clearly disclosed in *Union Document Tab 5*. As importantly, the recorded information and his conduct are confirmed by the Grievor. The evidence on which the Grievor's discipline is based does not arise from the interview. Nor do the questions posed and answers

given alter the immutable facts or cast them in a different light. Although arguably biased in nature, the questions posed in the circumstances of this case do not, in and of themselves, ground a finding that the investigation is biased and therefore void *ab initio*.

The Union also argues that the discipline is excessive in the circumstances and that mitigating factors ought to be taken into consideration in reducing the same and preserving the Grievor's position, particularly having regard to his long service with the Company.

The Grievor is fifty-five years old. He has been with the Company for thirty-three years. During this time, his disciplinary record has been abysmal (*Company Document 2*). At the time of the current grievance his Demerit Points totaled 30. A dismissal of this grievance, and consequent application of 30 Demerits, would effectively result in his dismissal.

His record reflects that he had a speeding violation in 2014 and another in 2015. The previous Demerit Points for the speed violations were 10 demerits and – following the normal principles of progressive dismissal - would have been higher in the 2015 offence but for the fact that he was clearly given a break to avoid further demerits which would have led to his dismissal then.

Understandably the Company relies on the comments of Arbitrator Sims in **CROA 4492**, wherein he states:

*“...that does not mean that speeding is just speeding, ignoring the fact that speeding can have ancillary consequences such as the inability to stop in time in the case of a sudden emergency, potentially endangering the public or other employees, or rendering an effective procedure such as crossing controls which depend upon adherence to the speed limitations.”*

I adopt those comments and agree that speeding is a serious matter from which serious consequences might flow. Nevertheless, mitigating circumstances, if any, must be weighed in arriving at the appropriate discipline to be imposed.

Since 2014 alone, the Grievor's record includes: 10 Demerit Points for speeding a Key Train; 40 Demerits for assignment delay and conduct unbecoming; a written reprimand for speeding (March 2015); and, the current discipline of 30 Demerits. All things considered, 30 Demerits for the Grievor's breach (considering his record) is within the realm of reasonable discipline. This is particularly so since the Conductor he served with on that trip, was disciplined 15 Demerits for his action, or inaction (as the case may be), during the period of time that the Grievor operated the train in the fashion he did.

Any substitution of penalty must take into consideration the reality that the Grievor has neither benefitted nor learned from the multiple progressive disciplines imposed or the concessions provided to him by the Company. However, while the Grievor has a lamentable record, due consideration must be given to his thirty-three

years of experience with the Company. In addition, he was contrite and candid during the investigation.

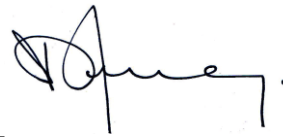
Taking all of the above into consideration, I am of the view that the imposition of 25 Demerit Points, combined with a significant suspension and a last chance directive, is a reasonable alternative disciplinary response. Accordingly:

1. The discipline of 30 Demerits imposed will be substituted with one of 25 Demerits;
2. The Grievor will be reinstated to his position with a suspension equal to time served;
3. Prior to returning to work the Grievor must:
  - a) Submit to a Health Services directed Safety Sensitive medical assessment, which may include a return to duty substance test, and any other medical assessment deemed necessary under the terms and conditions directed by the Occupational Health Services Department (HS). Arrangements for these assessment(s) will be made as soon as possible through HS;
  - b) Comply with any medical requirements HS determines to be necessary; and
  - c) Complete a screening interview with his local manager, the purpose of which will be to review the Company's ongoing performance expectations and to provide full understanding/clarity regarding these expectations.

- d) Any violation of, or failure to comply with, any of the terms of the Collective Agreement or the Company's Operational Policies that leads to discipline being imposed during the first two years following this reinstatement will result in the Grievor's dismissal, with recourse to arbitration only for the purposes of determining whether the Grievor's conduct warranted discipline.

I will retain jurisdiction with respect to the application, interpretation or implementation of this award.

December 14, 2018



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**RICHARD I. HORNUNG, Q. C.  
ARBITRATOR**