

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

**CASE NO. 4664**

Heard in Montreal, January 9, 2019

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the assessment of discharge to Locomotive Engineer J. Carson of Winnipeg, MB for a violation of train handling procedures resulting in an emergency brake application.

**THE JOINT STATEMENT OF ISSUE:**

On April 21, 2018, Mr. Carson was the locomotive engineer on train Q11251-17 operating between Winnipeg, MB and Sioux Lookout, ON. During the tour of duty, after cresting a hill, the grievor's train picked up speed and while attempting to control the train's speed, the grievor decided that the train was not reacting as he expected it to, leading to an emergency brake application. Following an investigation, the Company determined that the emergency brake application was the result of improper forward planning and violations of CN's Locomotive Engineer Operating Manual Form 8960. Mr. Carson was investigated for the incident on June 6, 2018 and subsequently assessed an outright termination.

The Union's submits that the Company failed to provide a fair and impartial investigation. The Union also submits that, in all of the circumstances, discipline is unwarranted and inappropriate and that, if discipline is warranted, a lesser amount than the ultimate penalty of discharge ought to be substituted and that the grievor be reinstated and made whole.

The Company disagrees with the Union's position.

**FOR THE UNION:**

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

**FOR THE COMPANY:**

**(SGD.) M. E. Galan** (for) **K. Madigan**  
VP Human Resources

There appeared on behalf of the Company:

M. Galan – Labour Relations Manager, Edmonton  
K. Morris – Senior Manager Labour Relations, Edmonton  
J. Lucifora – Engine Service Officer, Toronto  
S. Roch – Labour Relations, Manager East, Montreal

And on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto  
M. King – Senior Vice General Chairman, Edmonton

K. C. James – General Chairman, Edmonton  
K. Ilchyna – Local Chairman, Winnipeg  
J. Carson – Grievor, Winnipeg

## **AWARD OF THE ARBITRATOR**

### **Nature of case**

1. On June 25, 2018, CN terminated locomotive engineer (LE) John Carson's employment following an April 21, 2018 train handling incident. The TCRC argued that the incident itself did not warrant discipline or, if it did, that the penalty of dismissal should be mitigated. It further contested the fairness of CN's investigation.

2. CN argued that it had provided LE Carson with numerous opportunities to improve but the use of demerit points and suspensions had failed to change his behaviour. Termination was therefore appropriate given all these efforts.

3. For the reasons which follow, the arbitrator concludes that i) CN's investigation remained fair and impartial; ii) the April 21, 2018 incident warranted some discipline and iii) intervention was not warranted when considering all the circumstances of this case.

### **Facts**

4. LE Carson started working for CN in September 2005 and had almost 13 years service at the time of his termination. He qualified as an LE in July 2007.

5. On April 21, 2018, LE Carson initiated an emergency brake operation when operating train Q11251-17 which had just crested a hill at mile post 143 on a route

between Winnipeg and Sioux Lookout, Ontario. The investigation took place on June 6, 2018. Neither party made an issue of the delay, the reasons for which were not entered into evidence during the hearing.

6. The TCRC emphasized that the incident occurred over a short period of just 79 seconds. During that time, LE Carson attempted to slow his train using throttle manipulation, the dynamic brake and the automatic brake. When those manoeuvres did not sufficiently slow down his train, LE Carson used the emergency brake. In the TCRC's view, the overriding principle is to stop the train. LE Carson respected this principle when he used the emergency brake.

7. CN focused on LE Carson's inadequate trip planning which it argued deprived him of sufficient time to take the required gradual measures to slow down his train. This made it necessary to use the emergency brake, which, unlike the other manoeuvres, is not a tool designed to control train speed. LE Carson was not able to follow the guidelines for the various manoeuvres but instead applied each of them quicker than was recommended. As a result, LE Carson violated the Locomotive Engineer Operating Manual (Form 8960) which governed train handling.

### **Analysis and decision**

8. The arbitrator must decide three issues:

1. Did CN respect its obligation to conduct a fair and impartial investigation?

2. Did CN have grounds to discipline LE Carson? and
3. Should the arbitrator modify the discipline imposed?

### **1. Did CN respect its obligation to conduct a fair and impartial investigation?**

9. The TCRC alleged that the short investigation transcript demonstrated that CN failed to conduct a fair and impartial investigation which violated article 86 of the collective agreement. The TCRC took issue with i) the parties' opening remarks on the transcript, ii) the Investigating Officer's (IO) leading questions and iii) the IO's comment regarding poor planning.

10. This Office has recently commented on some of the principles underlying the parties' negotiated investigation process in article 86. In [CROA&DR 4608](#), it was noted (footnote omitted):

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

11. Both parties on the record made extensive opening comments about how investigations should be conducted (E-1; Employer Brief; Tab 6; QA6). Nothing mentioned therein suggested to the arbitrator that the investigation ceased to be fair and impartial. The arbitrator must focus on what actually occurred during an investigation, not on what might have occurred: [CROA&DR 4591](#).

12. The TCRC disputed the IO's use of leading questions to argue that he had already determined culpability. It is true that the phrase "is that correct?" suggests more of a cross-examination approach than an investigative one. But the IO is entitled to direct the employee's attention to something specific, such as the wording of item 2.3 in Form 8960, in order to set the context for a question (QA12). This then led to legitimate questions about what LE Carson had done and why (QA 13-14).

13. Laypeople, including inexperienced lawyers, seem to have difficulty formulating open ended questions. They often fail to start questions with words like "who", "what", "when", "where" and "why". But this frequent challenge, absent more, did not convince the arbitrator in this case that the investigation ceased to be fair and impartial.

14. Similarly, while QA26 did involve a leading question about "better forward planning", the phrasing did not suggest the IO was biased. Rather, LE Carson, who was honest and forthright throughout the interview, first raised the issue of "better forward planning" himself in QA14.

15. This arbitrator dismisses the TCRC's objection regarding the fairness of the investigation.

## **2. Did CN have grounds to discipline LE Carson?**

16. CN satisfied the arbitrator that it had grounds to impose some discipline in the circumstances of this case. While LE Carson performed his actions within a short 79 second window and had to perform them on an accelerated basis, the evidence confirmed that this resulted from inadequate planning.

17. An LE is paid to review both the train journal and the track profile when planning for the upcoming train operation. Form 8960 describes various tools including the throttle and the dynamic brake to control train speed. They must be employed gradually to minimize in-train forces. The emergency brake is not listed as one of the train's speed control tools; rather, it is listed for unplanned stops.

18. CN's evidence satisfied the arbitrator that proper planning would have eliminated the need to use the emergency brake in this particular case.

19. This issue then becomes the appropriateness of CN's decision to terminate LE Carson's employment.

### 3. Should the arbitrator modify the discipline imposed?

20. The arbitrator agrees with the TCRC that if this incident had been an isolated event, then termination would not follow automatically. The event, by itself, differs significantly from those in some of the cases CN put forward. Similarly, LE Carson had been experiencing some serious family challenges in recent years. Moreover, he displayed candour and honesty during his investigative interview.

21. However, against that backdrop, comes LE Carson's discipline record (U-1; Union Brief; Tab 1). CN argued that it had already tried on multiple occasions to modify LE Carson's train handling behaviour, but without success.

22. Since 2014, CN had disciplined LE Carson on six separate occasions for train operation incidents. Not all incidents were identical. For example, there was no allegation of speeding for the April 21, 2018 incident. But all incidents related to how LE Carson operated his trains.

23. LE Carson's discipline record shows the following:

**Mar 19, 2014:** 10 demerits: Violation of CROR 33 and speeding;

**Jan 7, 2015:** 20 demerits: Train handling violations Form 8960;

**May 8, 2015:** 7-day suspension: Violation of CROR 33 and Form 8960;

**Aug 23, 2015:** Written Reprimand: Violation Form 8960;

**May 11, 2016:** 30-day suspension: EIE and CROR 33; and

**Nov 11, 2016:** 4.5-month suspension: train handling procedures resulting in an undesired emergency brake application.

24. Following the 4.5-month suspension, which had resulted from a CN-TCRC written agreement, CN provided LE Carson with a classroom session on train handling, additional simulator time and three familiarization trips.

25. Despite these efforts, the most recent event still occurred.

26. Given this overall context, which differs, for example, from that found in [CROA&DR 4498](#), CN satisfied the arbitrator that it had followed progressive discipline in attempting to change LE Carson's actions. It had already given LE Carson multiple chances to improve his train handling. As Arbitrator Picher once noted, "If employees are to have the advantage of a system of progressive discipline, so must employers": [CROA&DR 3314](#).

27. That conclusion necessarily applies to the facts of this case.

28. The grievance is accordingly dismissed.

January 24, 2019



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