

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

**CASE NO. 4671**

Heard in Calgary, March 6, 2019

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Assessment of a 3-day suspension to Locomotive Engineer R. Alsop for failure to comply with CROR 44 at mile 282.20 Kingston Subdivision while working as the locomotive engineer on M376371-10 on August 10, 2016.

**THE JOINT STATEMENT OF ISSUE:**

On August 10<sup>th</sup> 2016, Mr. Alsop was ordered to work M37631-10 as a locomotive engineer from Toronto to Belleville.

On that particular day, Mr. Alsop was subject to dynamic efficiency test for CROR 44 (Unknown Yellow Flag) at mile 282.2 on the Kingston Subdivision. While going through this location, Mr. Alsop did not reduce his speed to 10mph.

Mr. Alsop was required to attend a formal investigation for an alleged failure to comply with CROR 44 at mile 282.2 Kingston Sub while working as the engineer on M37631-10 on August 10, 2016. As a result of this investigation, he was assessed with a 3-day suspension.

**Union Position**

The Union contends that this type of efficiency test was not performed in a proper location.

The Union submits that the efficiency test was performed at a location whereby employees are set up for failure. This is a case where a locomotive engineer was being efficiency tested for an unknown flag at a Public Crossing at Grade whereby the bell and whistle must be given.

In the alternative, the Union argues there are mitigating factors which warrant the removal of discipline. Mr. Alsop has had positive efficiency test record for the previous twelve months from September 3<sup>rd</sup> 2015 until August 9<sup>th</sup> 2016 whereby he had been efficiency tested 60 times without failure for various Rules compliance. The TCRC submits that this in itself shows Mr. Alsop's ability to follow the rules and operate safely.

In addition, but not limited to, Mr. Alsop is a long service employee who was remorseful and took responsibility for the failure.

The Union contends the discipline assessed is unwarranted, and in any event, excessive, in all of the circumstances. The Union requests that discipline assessed be removed in its entirety and he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees with the Union's contentions. It is the Company's position that there are no mitigating factors in the present case that could explain this rule violation. There is no doubt that Mr. Alsop missed the yellow flag located at mile 282.20 of the Kingston Subdivision.

This incident could have been avoided if Mr. Alsop had been more vigilant. It was the third incident in less than 18 months where Mr. Alsop's lack of vigilance leads up to a rule violation.

At the time of the incident, Locomotive Engineer Alsop's disciplinary record stood at 50 demerits. Considering the gravity of this incident as well as his disciplinary file, there was no room to assess demerits. The assessment of a short suspension of 3 days in the circumstances is justified and in line with arbitral jurisprudence.

**FOR THE UNION:**  
**(SGD.) P. Boucher**  
 General Chairperson

**FOR THE COMPANY:**  
**(SGD.) J. El Shamey** (for) **M. Farkouh**  
 Senior Vice-President Eastern Region

There appeared on behalf of the Company:

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|-------------|--|
| V. Paquet   | – Labour Relations Manager, Toronto              |
| M. Boyer    | – Senior Manager Labour Relations, Montreal      |
| J. Elshamey | – Labour Relations Manager, Montreal             |
| S. Madigan  | – General Superintendent Transportation, Toronto |

And on behalf of the Union:

- |              |                                     |
|--------------|-------------------------------------|
| K. Stuebing  | – Counsel, Caley Wray, Toronto      |
| P. Boucher   | – General Chairperson, Trenton      |
| M. Kernaghan | – Vice General Chairperson, Trenton |
| R. Alsop     | – Grievor, Oshawa                   |

### **AWARD OF THE ARBITRATOR**

There is no dispute that on August 10, 2016, Locomotive Engineer, Robert Alsop (the Grievor), and his crew, working on M37631, were subjected to a dynamic efficiency test for CRO Rule 44 (Unknown Yellow Flag) in the Kingston subdivision. The Grievor and his crew failed to notice a yellow flag and ran through it without reducing their speed to 10 mph.

By virtue of CRO Rule 44 (e):

*“... a movement that encounters a yellow or green signal without a GBO requirement replacement of such signal, must reduce speed to 10 MPH and immediately communicate with the RTC....”*

At the time of the incident, the Grievor had accumulated an active count of 50 demerits with a cumulative total of 160 career demerits. A review of the same reflects an abysmal record.

The crew members on the train (the Conductor and student Locomotive Trainee) were both issued 10 demerits. The Grievor, because of his record standing at 50 demerits, was issued a 3-day suspension.

The Union grieved the suspension, arguing, *inter alia*, that the yellow flag in question was difficult to see and that the efficiency test was unfairly performed in that the location where it was placed was at a point where the crew was exceptionally busy tending to their regular duties.

While the photographs presented by the Union at the hearing suggest that the flag may have been difficult to see, neither the Union nor the Grievor raised that as an issue at the time of the investigation. In fact, at the investigation, the crew was provided a video from their train which confirmed the flag was evident.

The second aspect of the Union's argument, i.e., that the crew was too busy completing its duties at the point where the flag was placed, was addressed in **CROA 3889** and **3887** wherein the Arbitrator notes:

*"The only explanation that the Grievor was able to give was that he was too busy at the time and simply did not notice that the hot box, of which he was aware, had not made a report. It was obviously his duty then to acknowledge and report what appeared to be box failure, and to take*

*whatever steps might be necessary to ensure the integrity of his own train.”*

In effect, it can hardly be a defense of the kind of breach raised by this grievance, that the Grievor was too busy doing his job to recognize the existence of the flag in question.

The Grievor was assessed a 3-day suspension in lieu of demerits. To assess the same demerits to him as the Company did for the Conductor and Trainee, would have led to his dismissal.

While a lesser suspension might have been considered, having regard to: the principles set out in *Wm. Scott [1977] 1 Can. L.R.B.R. 1*; the grievor's previous record; the assessment of discipline on his co-workers; the circumstances of the conduct leading to the grievance, and the fact that the suspension was, in fact, an accommodation to preserve the Grievor's career, I am satisfied that the 3-day suspension issued is fair and reasonable in all the circumstances.

The grievance is dismissed.

April 11, 2019



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