

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

CASE NO. 4672

Heard in Calgary, March 6, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of R. Alsop for accumulation of demerits following the assessment of 30 demerits for failure to follow instructions issued by a Company Officer to take train to Napanee while working as a Locomotive Engineer on M37721-21 on March 21, 2018.

THE JOINT STATEMENT OF ISSUE:

On March 21st, 2018, Mr. Alsop was ordered to work M37721-21 as a Locomotive Engineer from Montreal to Belleville.

On that particular day, Mr. Alsop's train consisted of a 50-mph speed restricted car and Special Dangerous Commodities key train. In addition, Mr. Alsop had issues with his lead locomotive commencing in Taschereau Yard while building his train and continuing on the road.

Mr. Alsop submitted his rest message while en-route with the RTC while was due to commence at 21:00. Subsequent to filing his rest message, Mr. Alsop was required to stop at Leeds to meet train M306, and as such, due to the delay would be recrewed at Napanee.

Mr. Alsop informed the Chief RTC that it would be better to stop at Queens and be recrewed at that location. The Chief RTC informed Mr. Alsop he was to proceed to Napanee for the recrew. Mr. Alsop did not stop his train at Napanee as instructed by the Chief dispatcher.

Mr. Alsop stopped at Queens East and continued with the conversation related to being recrewed. Mr. Alsop was relieved at Queens by the outgoing crew.

Mr. Alsop was required to attend a formal investigation for circumstances surrounding the failure to follow instructions issued by a Company Officer. As a result of this investigation he was assessed with 30 demerits and subsequently discharged for accumulation.

Union Position

The Union submits that Mr. Alsop stopped his train due to his concern for safety.

In the alternative, the Union argues there are mitigating factors which warrant the removal of discipline, such as but not limited to, Mr. Alsop took responsibility, was remorseful, and is a long service employee.

The Union contends the discipline assessed is unwarranted, and in any event, excessive, in all of the circumstances. The Union requests that Mr. Alsop be reinstated without loss of seniority and benefits, and that 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 does not agree with the Union's contentions. On March 21st, 2018, Mr. Alsop had decided to disregard the instructions of the RTC, therefore stopping his train, without authorization at Queens, instead of Napanee. Based on his disciplinary history and the seriousness of this offence, he was assessed 30 demerits for failure of following the instructions of a Company Officer. This event led to his dismissal.

It is the position of the Company that the discipline is warranted.

FOR THE UNION:
(SGD.) P. Boucher
General Chairman

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

There appeared on behalf of the Company:

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

On March 21, 2018, Robert Alsop, the Grievor, was operating train M37721 during which time he:

“Fail(ed) to follow instructions from a Company Officer to take (his) train to Napanee...”

On the day in question, the Grievor was operating train M37721 from Montreal to Belleville. The crew consisted of himself and the Conductor. The Grievor began his duties at 11:00 and, after having encountered some mechanical difficulties with his

locomotive, he contacted the RTC at approximately 17:54 to both inform of the locomotive issues and, at the same time, of his desire to book rest (commencing at 21:00) in accordance with Article 29.

After reviewing the train's performance, the Company determined that it could not make it to Belleville before the Grievor's rest became due. It so advised the Grievor's train and immediately arranged both for their hotel accommodations and called another crew to take over the train at Napanee, approximately 20 miles east of Belleville.

While enroute to Napanee, the crew was contacted and advised that they would be meeting an east-bound train (M306) at Leeds. While proceeding to the meet location, train M306 passed over a hot box detector which failed to send a signal. In accordance with CROR, M306 was required to restrict its speed. This resulted in a delay for the Grievor's train in departing the Leeds meet location. Had this not occurred, the Grievor's train would have arrived at Napanee prior to his booked rest time coming due.

After their train finally left the Leeds meet location, the Grievor's crew contacted RTC and suggested that it would be better, in the circumstances, to have the crews change off at Queens rather than Napanee. After some discussions, the Chief RTC contacted the Grievor and advised that there was no change in the plans since all arrangements had already been made for the Napanee change-over. During this discussion, the Grievor indicated that he could see that an argument was going to ensue over the matter and - as he first stated in his investigation - he concluded that it would be

unsafe for him to continue operating the train in that frame of mind. Accordingly, he advised the RTC that he would stop the train at Queens and terminated the conversation.

In a subsequent call the Chief RTC spoke to the Conductor who advised that, although he had instructed the Grievor otherwise, he could not get the Grievor to take the train through to Napanee. The Grievor confirmed this fact. As a result, the Company was compelled to redirect the relief crew to a location at Queens where they relieved the Grievor and the Conductor.

Following an investigation, the Grievor was issued 30 demerits which, when added to the active 50 demerit marks he had on his file at the time, resulted in his discharge due to the accumulation of more than 60 demerits.

There is no dispute that if the Grievor continued to take his train to Napanee he would necessarily exceed the rest period which he had requested pursuant to Article 29. Article 29.8 (Company Tab 6) recognizes that there may be unforeseen circumstances which may arise and interfere with the Company's ability to comply with the employee's rest request. It provides:

"Except in circumstances beyond the Company's control, such as accidents, impassable track, equipment malfunction, plant failure, etc., Locomotive Engineers will be relieved of duty by the time rest booked is due to commence."

The Company argues that the hot box mechanical failure which compelled M306 to reduce its speed was one of the "*equipment malfunctions*" alluded to in Article 29.8.

There is no dispute that failing the equipment malfunction, M306 would have reached the Leeds meet location and allowed the continuation of the Grievor's train to Napanee on time for the rest period exchange.

The Union acknowledges that the requested rest period may be exceeded in the circumstances set out in Article 29.8 but argues that the Grievor's concern that an argument would ensue - which would distract him and make it unsafe for him to continue to drive the train - represented safety concerns which override the application of Article 29.8. It asserts that having concluded that an argumentative conversation would ensue with the RTC that would distract him, the Grievor was both entitled and correct to conclude that it was necessary to stop the train at Queens for safety purposes.

With respect, I do not accept the Grievor's argument that he was unable to obey the directive from the Chief RTC to take the train to Napanee for safety reasons. It is apparent that this is an excuse contrived by the Grievor after he made the decision to stop the train notwithstanding the direct order to do otherwise. There was no safety issue involved which motivated the Grievor's conduct. Had there been, it was surely incumbent on him to explain what that issue was while he was in discussions with the Chief RTC. Instead, he chose to terminate his conversation and stop the train at Queens in order to satisfy his personal preferences.

There is a long-standing practice between these parties - and in labour relations generally - that an employee is expected to "*work now, grieve later*". The suggestion now

that the Grievor was concerned that an argument would ensue which would create a safety issue for him, is self-serving at best. Even if it were a credible reason, all that was required of him to avoid that argument was to accept and obey the instruction from the Chief RTC, proceed with his duties and grieve later if he wished. He failed/refused to do so. Similar to the observations in **CROA 2479**, I conclude that:

“The conduct of the Grievor during the course of the ... exchange of conversation suggests a degree of intransigence, if not combativeness on his part, which tends to lead him into situations of undue confrontations with persons in authority.”

That the above applies to the Grievor is reflected in his abysmal disciplinary record which includes a suspension, less than three months earlier, for failing to follow instructions to take train M36921 to Napanee. The offense was almost identical and he professed – at the time – that he would learn from his mistakes and follow his directives going forward.

The Union’s second argument in support of the Grievor was that there are:

“... mitigating factors which warrant the removal of discipline, such as, but not limited to, Mr. Alsop took responsibility, was remorseful, and is a long-serviced employee.”

In addressing the issue of the Grievor’s remorse I cannot ignore the comments he made to his fellow employee after the incident, which were inadvertently captured on the RTC voice mail. (Company Tab 4; Audio Tape #7). The tape reflects that when he undertook the impugned conduct, the Grievor knew: that there would be an investigation; that there would be an assessment of discipline; and, he hoped that he could work around the consequences of his conduct by having an anticipated suspension imposed during

the period of time that he expected he would be absent from work in any event. The conversation speaks volumes of his lack of remorse.

There is no real dispute that the Grievor's conduct occurred and merited discipline. As set out in *Wm. Scott 1 Can.L.R.B.R.1*, the next question to be addressed is whether the Company's decision to dismiss the Grievor was an excessive response in all of the circumstances of the case? Given the Grievor's previous record and his long standing service, the issue of whether his misconduct justified discharge is especially difficult. In that respect, a review of the criteria set out in *Wm. Scott* is warranted.

(i) How serious is the immediate offence of the employee which precipitated the discharge?...

The offence committed by the Grievor was, by any standard, serious. He refused the direct order of the RTC (an almost identical offence he committed just three months earlier) and caused the Employer to move the replacement crew to a location which he alone chose rather than that to comply with the request and grieve later.

(ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?

Subjective intentions may be gleaned from objective facts and conduct. Here the Grievor abruptly terminated the conversation with the Chief RTC; he chose to stop the train at Queens knowing that the change over point had already been arranged for Nappanee; thereafter, he refused to accept his conductor's request to follow the RTC's instructions. Finally, he had committed the identical offense a mere three months earlier.

In my view his conduct was unprovoked and – although emotional – it represented the antithesis of a momentary aberration. In the circumstances, I conclude that his conduct was both premeditated and repetitive.

(iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?

This is the most troubling aspect of this case. The Grievor has a very long service record with the Company. But is that enough on its own? It should be noted that the criterion of an employee's long service record, as quoted above, is to be read conjunctively with his proving to be an able worker who enjoys a "*relatively free disciplinary history*". In this case, while the Grievor has a long service record he clearly does not meet the other two, conjoined, considerations.

(iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?

A review of the record makes it clear that the Company used repeated forms of progressive discipline with the Grievor to no avail. His conduct in this matter - considering that by this point he had already been provided with two "*final opportunities*" to continue his employment by being assessed suspensions rather than further demerit disciplines - reflects the fact that the Grievor neither understood nor appreciated the accommodations that had been provided to him. In fact, in his previous disciplinary matter, which was for

the identical offense, he “promised” to learn from it and rectify his behaviour going forward.

(v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

There is no suggestion that the Grievor was singled out or that his treatment was arbitrary.

As the conversation in Company Tab 4 (Audio Tape #7) manifests, the Grievor was not remorseful. Nor - as reflected in his answers at the investigation where he attempts to colour his conduct as a safety issue to avoid his being distracted from his job (notwithstanding that he had over 300 trips on this line) - did he take responsibility. Rather, as his subsequent, inadvertent voice mail captured, he intended to play the system and have his discipline served while he was off work.

In the circumstances, is his termination unreasonable and excessive or is a substitute penalty warranted?

I am, understandably, given pause by the Grievor’s age and long service. However, those factors – in and of themselves – do not provide him immunity or impunity from discipline up to and including termination. Given his record, his conduct and the attitude he displayed in the circumstances of the last two disciplines, it would be

understandable for the Company to conclude that there was an insufficient level of trust in their relationship for the Grievor to remain in its employment.

While I genuinely regret the dismissal of an employee of the Grievor's age and service, the circumstances do not provide any compelling, mitigating considerations that suggest the discipline imposed by the Company is not fair and reasonable. In the result, I am regrettably left with no alternative but to sustain the discipline imposed.

The grievance is dismissed.

April 11, 2019



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