

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

CASE NO. 4674

Heard in Calgary, March 7, 2019

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 35 demerits and subsequent discharge of Conductor S. Nighttraveller for accumulation of demerits in excess of sixty (60) for violations of Canadian Railway Operating Rules, Time Tables and General Operating Instructions resulting in a derailment.

THE JOINT STATEMENT OF ISSUE:

On March 22, 2016, the Grievor worked as a Conductor on assignment L59641-22 in North Battleford, SK. During the tour of duty, the Grievor's movement derailed on the west end of track NB02. The Grievor was discharged for accumulation of demerits, however, following Step 3 of the grievance process, the Company notified the grievor that he would be reinstated effective November 16, 2016, and the 35 demerits would be replaced with a suspension without pay or benefits for all time out.

The Union's position is that the Grievor's limited involvement and responsibility for the derailment fell far short of justifying either discharge or a lengthy suspension. The Union requests that the discipline be significantly reduced and the grievor made whole.

The Company's position is that notwithstanding the grievor's allegation that his involvement in the derailment as the Conductor on the crew was limited in scope, the evidence proves otherwise and when coupled with his discipline history and the extent of damage/delay to operations, he was deserving of a serious form of discipline.

FOR THE UNION:

(SGD.) R. S. Donegan
General Chairperson

FOR THE COMPANY:

(SGD.) D. Houle (for) K. Madigan
Senior VP Human Resources

There appeared on behalf of the Company:

- D. Houle – Labour Relations Associate, Edmonton
- K. Morris – Senior Manager Labour Relations, Edmonton
- G. Guest – Superintendent Operations, Saskatoon
- J. El Shamey – Manager Labour Relations, Montreal
- M. Boyer – Senior Manager Labour Relations, Montreal

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- J. Thorbjornsen – Vice General Chairperson, Saskatoon
- S. Nighthtraveller – Grievor, Battleford

AWARD OF THE ARBITRATOR

On March 22, 2016, Steve Nighthtraveller (the Grievor) was working as a Conductor in North Battleford. He and his crew were on Road Switcher assignment building trains in the North Battleford yard. As part of their assignment, the crew was building Train 411 on Track NB02 in the North Battleford yard. The Grievor and the Assistant Conductor were instructing the Locomotive Engineer to move the rail cars back and forth by radio instructions. In keeping with the common practice, the crew was shoving cars into specific tracks, reversing the movement and performing the same manoeuvre until the cars were properly blocked.

In normal circumstances “kicking” to marshall cars into a track is an accepted manoeuvre. However, kicking of cars is prohibited on track NB02 because of the curvature of the track entering its west end. In fact, the time table instructions for the North Battleford yard expressly states (Company Tab 4) that the cars “*must be shoved to rest*”. Nevertheless, the crew kicked a set of five cars down the lead track into track 02. Because of the curvature the cars stalled on the curve. They then moved the locomotive

to the cars to shove them into track 02. After they did so they coupled the cars. Coupling on a curved track requires specific attention to ensure that the knuckles and draw bars are properly aligned. After the coupling, the joint must be stretched and tested to ensure that the coupling is properly made. There is no dispute that the coupling was not properly secured or tested pursuant to the rules. Consequently, the crew shoved the cars into track 02 and, as a result, two locomotives and a rail car derailed due to crossed draw bars. Approximately 300 feet of track was damaged.

Following an investigation, the Company determined that the crew was in violation of CROR 113; CROR 106; and GOI 8.12.10 (coupling). The Grievor, along with the student LA and the Assistant Conductor, were each assessed 35 demerit points for the rule violations. The Locomotive Engineer, whose discipline sat at 59 active demerits at the time, was six months away from retirement after thirty-five years of service. Given his tenure, the Company elected to issue a 6-month suspension in his case without pay or benefits. Upon completion of the same the Locomotive Engineer retired from the Company. At the time of the incident, the Grievor's discipline record stood at 40 demerits and therefore the assessment of 35 demerit points led to his discharge for accumulation of demerits in excess of 60 (Company Tab 6).

In November 2016, the Company elected to bring the Grievor back to work and the termination was replaced with a time served suspension (seven months) without pay or benefits. The Union grieved both the original demerits assessed and the subsequent suspension.

A review of the material satisfies me that the Grievor and his crew were in breach of the requirements of CROR 106; CROR 113 and GOI 8.12.10 and were all subject to appropriate discipline. While the Grievor accepted responsibility for the breach of CROR 106, he denied any responsibility for CROR 113 and GOI 8.12.10 on the basis that, at the time, he was not in control of the movement and was located away from the train where the crew tried to couple the five cars that had stalled. His failure to accept responsibility is curious because, firstly, it is undisputed that the Conductor is in charge of the total movement (including directing where each specific cut of cars are to be marshalled). In doing so, he takes responsibility for the entire crew to ensure safety and rule compliance during the switching procedures. Secondly, it appears that he was both in radio contact with his crew at the time the coupling took place and was within a distance which allowed him a view of the same. Accordingly, he must take responsibility, at some level, for all of the infractions.

The Union, alternatively, argues that the initial assessment of 35 demerits was excessive and outside of the established range of discipline for similar offences.

Each of the crew members received an assessment of 35 demerit points. The damage caused by the derailment was significant and each of the other parties took responsibility for the derailment. The Grievor, ultimately, accepted some form of responsibility during the investigation where he states: “.... *I should have spoken up*” and also showed remorse for the incident and his participation in the same.

Given that the other members of the crew received the same demerit discipline, I am satisfied that the Company's attempt to provide an equal disciplinary response was fair. Ordinarily, I would accept that the seven months suspension to the Grievor was fair and reasonable having regard to the observations of Arbitrator Moreau in **CROA 3654** where he states:

"In the end, it was the Grievor who had the overall charge of the crew. As such, the penalty for the infraction should reflect those position of authority. On that basis, I believe the penalty imposed on the Grievor of 25 demerits was not out of line given that the ultimate responsibility for the assignment fell on the shoulders of the Grievor."

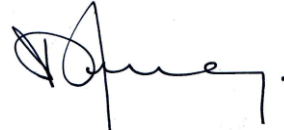
In the present case, the Grievor had a similar level of responsibility and the extra month of suspension might have addressed that. However, from a mitigating perspective, in addition to the fact that the LE was assessed a six month suspension, the Grievor showed genuine remorse and I was left with a particularly positive impression of him including the fact that he has not had any discipline assessed against him since he was reinstated in December 2016. Even having regard to his short service of 3½ years, and a previous significant disciplinary record, it is apparent that – this time – he has learned from this progressive discipline.

In the circumstances, I would reduce his discipline to a six months suspension without pay or benefits and direct that he be appropriately compensated for the time loss difference.

The grievance is allowed in part.

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

April 12, 2019

A handwritten signature in black ink, appearing to read "R. Hornung", positioned above a horizontal line.

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