

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4720

Heard in Montreal, January 14, 2020

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of the discharge of Locomotive Engineer A. Kamei of Winnipeg, Manitoba for violation of Canadian Rail Operating Rule 439.

THE JOINT STATEMENT OF ISSUE:

On January 3, 2019 the Grievor was operating train M31851-01 on the Rivers Subdivision when the train passed Signal 504S at Nattress, which was displaying a Stop indication, without authority in violation of CROR Rule 439 resulting in a side collision with train M31541-03. Following an investigation, the Company determined that the Grievor was in violation of CROR Rule 439.

The Union's position is that discharge is excessive under all of the circumstances, that the discipline is not progressive and that the Company has not taken into consideration the mitigating circumstances and requests that Mr. Kamei be reinstated without loss of seniority and that he be made whole for all lost wages and benefits.

The Company disagrees with the Union's position.

FOR THE UNION:

(SGD.) M. King

General Chairperson

FOR THE COMPANY:

(SGD.) L. Paulicelli (for) **D. Klein**

VP Human Resources

There appeared on behalf of the Company:

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|----------------|---|
| F. Daignault | – Manager, Labour Relations, Montreal |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| L. Paulicelli | – Human Resources, Business Partner, Winnipeg |
| S. P. Paquette | – Director, Dispute Resolution and Labour Standards, Montreal |
| B. Blass | – Senior Engine Service Officer, Toronto |

And on behalf of the Union:

- | | |
|-------------|---|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| K.C. James | – General Chairman, Edmonton |
| M. King | – Senior Vice General Chairperson, Edmonton |
| K. Ilchyna | – Local Representative, Winnipeg |

A. Kamei – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

THE BACKGROUND

1. On April 25, 2011, the Grievor was hired by the Company as a Conductor Trainee. On August 11, 2015, approximately four years later, he qualified as a Locomotive Engineer in Winnipeg, Manitoba.

2. On January 3, 2019, as the Grievor was on duty operating Key Train M31851-01, he failed to stop the locomotive 300 feet in advance of a stop signal resulting in a side collision with train M31541-03. On, January 9, 2019, he was discharged for violating the Canadian Railway Operating Rule 439 (Rule 439).

3. Rule 439 states:

Unless required to clear a switch, crossing, controlled location, or spotting passenger equipment on station platforms, a movement not authorized by Rule 564 must stop at least 300 feet in advance of the STOP signal.

THE FACTS

4. The day of the accident, the Grievor was operating the Key train M31851-01 (Train M318). Key Trains transport dangerous commodities and are defined as follows at paragraph 3.4 of the Key Train Rules:

a) that includes one or more loaded tank cars of dangerous goods that are included in Class 2.3, Toxic Gases and of dangerous goods that are toxic by inhalation subject to Special Provision 23 of the *Transportation of Dangerous Goods Regulations*; or

b) that includes 20 or more loaded tank cars or loaded intermodal portable tanks containing dangerous goods, as defined in the *Transportation of Dangerous Goods Act, 1992* or any combination there of that includes 20 or more loaded tank cars and loaded intermodal portable tanks.

5. The grievor was familiar with the territory as he has worked on the direction numerous times¹. The Train M318 was travelling in an eastward direction and had entered double track at Station Kearns at mile 55.7, approximately 5 miles from the Station Nattress, where the accident took place. At this time, Train M31541-03 (Train 315) was travelling in the opposite direction, proceeding on the north track and had just entered the north track at Station Nattress.

6. During this time, the Grievor was operating the train using the automated "Trip Optimizer"² system. The conductor and the Grievor were having a conversation. The conductor interrupted the conversation to announce the signal indication "Clear to Stop" on channel 1. A "Clear to Stop" indication signals to the crew that they must be prepared to stop prior to the location of the next signal. It was at this point that the Grievor lost situational awareness. As the train was passing the approach signal to Nattress, Signal 522S, at mile 52.2, the Grievor says that he «blanked out».

7. During the grievor's investigation, questions were asked concerning the circumstances of passing the signal "Clear to Stop":

¹ Records indicate he worked the Rivers Subdivision on 132 occasions.

² Trip Optimizer (TO) is an energy management system that minimizes fuel use and reduces train forces and improves safety and train handling. Based on the Company's submission "the Trip Optimizer is analogous to the cruise control in a car".

34Q. Mr. Kamei, do you recall what the approach signal to Nattress was?

A. I do not recall seeing it. I was completely blanked out.

35Q. Mr. Kamei, do you recall the Conductor on your Train calling in the cab a Clear to Stop signal at Nattress?

A. No. I was completely blanked out I can not recollect anything there. I do remember Shaun calling every fixed signal and detectors, as well as the miles ending in 5. I recall him calling all of those.

8. The grievor did not take action after passing the sign “clear to stop” at mile 52.2 where he ought to prepare the train to stop at the next signal. He did not slow the train in anticipation of having to stop it shortly. The steps that he failed to take upon the clear to stop signal included transitioning trip optimizer from auto-control to manual, and bringing the train to a stop. Instead, the train continued to accelerate while getting close to a stop signal.

9. This stop signal was in place to prevent a collision between the grievor’s train and train M315 which was arriving head-on from the opposite direction and in the process of entering the North track of the Rivers Subdivision, where the track goes from single to double track.

10. The conductor realized the situation and reminded the Grievor that the last signal indication had been a “Clear to Stop”. The Grievor who was still operating in Trip Optimizer, states that he immediately took a full-service brake. The Grievor made an emergency warning broadcast on Channel 1 and called the crew of train 315 imploring them to increase speed in order to avoid a potential sideswipe. He passed the signal at high speed « namely 27 MPH » exceeding maximum allowed speed.

11. During the investigation the Grievor states:

What I recollect is I was having conversation with Shaun, and 315 came and waved and right away Shaun told me we got a Clear to Stop that's when I realised immediately and took full application and I don't know what the sequence was but I throttled down and a few seconds later what I believed was an emergency brake application. I remember reaching out for the toggle cover and trying to flip up. And telling Shaun I had taken emergency and to broadcast that out quickly. I believe Shaun at that time was quite panicked. I quickly broadcasted out on Channel 1 Emergency at Nattress. At the same time I was telling train 315 to pull a bit faster so to avoid a sideswipe if possible. I Yelled at Shaun that we need to get out.

12. Realizing that a collision was imminent, the Grievor made the decision to abandon the locomotive cab and grabbed hold of the conductor and physically moved him to the door and out of the cab onto the rear platform where they braced for impact. The train collided at 23 mph with the side of the passing train. Following the impact, the locomotive stopped in the upright position. The crew jumped from the rear steps of the locomotive to the ground.

13. The Grievor's inaction resulted to a side collision that caused material damage estimated at 8.5 million dollars as well as a shut down of the mainline for over 24 hours disrupting traffic in Canada and four persons were at risk of serious injury or even death.

14. The Grievor tested non-positive after a post test for presence of drugs or alcohol.

Decision

15. The violation of Rule 439 by the Grievor and his role in the matter is not in dispute. The issue before the arbitrator is the severity of the penalty assessed.

16. To assess the appropriateness of the disciplinary measure imposed, each case must be judged for itself based on all the facts.

17. A Rule 439 offence is a cardinal rule violation and it has been treated very seriously in CROA jurisprudence.

18. The union alleges that the penalty is unwarranted and excessive and that it was not progressive. For the Union, the Company has not taken into consideration the mitigating circumstances.

19. In the present case, the Grievor's nearly nine years of service constitutes "significant service" in the railway industry (**CROA 4564**). Before the accident, the Grievor's record was free of any prior discipline at the exception of a written reprimand in 2007 for an attendance related issue.

20. The Grievor's forthrightness and honesty, in the immediate aftermath of the accident and during the course of his formal employee statement, brings further mitigating factor to consider.

21. Shortly after the collision, the Grievor wrote the following narrative:

“I remembered having Clear to limited at East Tower. We were in trip optimize operation. We were having conversation about Portage yard and other things. I ~~missed~~ couldn't recall seeing the signal to Nattress. I was totally blanked out what the signal was. My conductor called the Signal which I did not hear. He reminded me that we came up in clear to stop because I was not slowing down and at the time, I took air and put in emergency application.”

22. The January 3, 2019 accident is due of an inadvertent lapse of attention in the course of his job. The evidence reflects that the Grievor was not involved in any other non-railway activity at the time of the incident. The Grievor was engaged in his duties up until prior to the accident when he lost situational awareness.

23. The Union submits, that it is possible that the Grievor situational awareness deteriorated as a result of reliance on the Trip Optimizer. The Grievor has confirmed that he was operating in Trip Optimizer for the majority of the trip, including just prior to the event. This automated function was not disabled until the train was put into emergency just before the collision occurred.

24. The Company began integrating Trip Optimizer equipped locomotives into its fleet in 2010, prior to the hiring of the Grievor in 2011. The arbitrator is satisfied that the Grievor had received proper training related to the use of the Trip Optimizer. It is possible that the Grievor's reliance on the Trip Optimizer system had potentially detract him from his engagement and his situational awareness. However, this is no excuse to have lost situational awareness, nor a valid explanation. The accident can't be blame to the use of the trip Optimizer.

25. In his employee statement, the Grievor acknowledged that he would normally have taken off the Trip Optimizer:

37Q. Mr. Kamei, the download indicates that you went by mile 52.2 signal 522S displaying Clear to Stop at 42 MPH in Trip Optimiser and then you turned off the headlights at Mile 51.7 at 09:07:35. As per your statement were you blanked out at this time?

A. I was oblivious because any other time I would take off the Trip Optimiser at East Tower at any other times. But I do not understand why I had it in Trip Optimiser throughout. I was in conversation with Shaun going through Portage la Prairie and that could have distracted me.

(Emphasis added)

26. In his statement, the Grievor is candid and forthcoming about his lapse of attention. He expresses sincere remorse:

I feel extremely sorry and wish that it had not happened and that we don't have to be in this room talking about this. I understand the severity of the incident, the hazards placed upon my fellow colleagues involved in the accidents, the potential hazards to the community around, the loss of properties, and many more that I may not fully comprehend. I extremely feel sorry. I am very grateful that Shawn and I came out of it unharmed and so are the crew members (Rick Chudy and Anthony Hazzlehurst) on 315. I have played in my mind so many pictures of what could have happened and imagined the worst that could have happened. I do want to apologize to Shawn to have put through all of this and so is to Rick and Anthony and to CN caused due to my short lapse of attention at that moment. I don't have appropriate words to describe how sorry I am.

However regretful I am I cannot change what had happened but now going forward all I can do is to learn out of this, changed me for the better as a person and an employee if I get the opportunity in the future, and work intentionally in putting practices in my work that will help me in preventing incidents like this in the future.

That trip was the first time I had met Shawn and our first trip together. I have very high regards for him as a person and a railroader. He

displayed qualities of a good railroader and I wish that he wouldn't have to be in this position. In a way he had saved me and possibly had helped prevented accidents that could have been worst by carrying out his duty by telling me firmly that we had a clear to stop when he realized that I wasn't slowing down. I wish him well and that he may be given opportunity again to work and serve the railroad.

27. The Grievor transparently acknowledged his error, expressed sincere regret. He has been open and straightforward about his role and his remorse.

28. He has assured that he has learned from the accident. His record and his honesty during his statement reflects his rehabilitative potential, his ability to learn from this significant incident and shows that he is well aware that such an incident can never be repeated.

CASE-LAW

29. In **CROA 3744**, the grievor was reinstated to his former position without compensation or loss of seniority in circumstances of a Rule 439 violation caused by his failure to properly stop the train in advance of a stop signal, by 352 feet. This incident did not result in any serious accident. The locomotive engineer had admitted at his investigation that he had committed an error in judgement. In allowing the grievance, in part, the Arbitrator commented:

The grievor has an unenviable disciplinary record which includes prior CROR and GOI rules' violations. His record stood at 45 demerits at the time he was discharged for the current incident. There are, however, important mitigating factors which must be considered. The grievor has 19 years of service. He has fully and unequivocally accepted responsibility for this incident. In that regard, he acknowledged at his interview both the seriousness of the incident and the potential for harm and damage that could have resulted from

his negligence. That forthrightness must be viewed as a strong mitigating factor which suggests that the grievor recognizes his error and will pay greater attention to his duties and responsibilities in the future. This is a case where it would be appropriate to grant the grievor an opportunity to prove that he can be a reliable employee who will be vigilant in ensuring the safe operation of his assigned locomotive while on duty. The grievor shall be reinstated to his former position without compensation or loss of seniority.
(Emphasis added)

30. Even if this case differs from the present concerning the gravity of the consequences due to the violation of Rule 439, the Arbitrator's comments and considerations applies. The Grievor similarly demonstrated sincere forthrightness in his statement by unequivocally accepting responsibility for this accident. He has demonstrated remorse and learned from the event.

31. In the **CROA 2356**, the Grievor, who had seven years of service at the time of the incident, proceeded four car lengths past a signal with a stop indication in violation of CRO Rule 429 (now Rule 439). As others had realized the error simultaneously, the passenger train moving in the same direction, on what would have been a side-collision course, also came to a stop. The Grievor, realizing what he had done, then committed additional infractions, the most significant of which was instructing the locomotive engineer to pull back without any authorization from the rail traffic controller to do so. Arbitrator Picher substituted the penalty of discharge, and reinstated the Grievor without compensation and without loss of seniority, with a significant period of suspension.

32. After reviewing the prior CROA awards, Arbitrator Picher states in a oft-cited passage concerning Rule 439:

Outright discharge for a violation of Rule 292 [now Rule 439], generally coupled with other rules violations, is revealed in a relatively limited number of cases (see CROA 474, 681, 745, 1479, 1505, 1677 & 2124 [reduced to a suspension]). In each of the cases involving an imposition of outright discharge by the company there has been some aggravating factor. For example, in CROA 681 and 2124 the employee discharged for passing a stop signal had committed his second offence against the rule. In CROA 745 a locomotive engineer was dismissed where a violation of Rule 292 was found to also involve a violation of Rule G, resulting in a collision and two fatalities. Serious collisions were also involved in CROA 1479 and 1677, while in CROA 1504 the discharge of the locomotive engineer was motivated, in part, by his falsification of an employee statement intended to evade his responsibility. More recently, employers have again used the assessment of suspensions for violations of rule 292 of the UCOR and rule 429 of the CROR (See, e.g., CROA 2126, 2161, & 2267.)

33. This reasoning has been followed by other arbitrator in particular in the **CROA 4250, 4488, 4495 and 4583.**

34. In the last decision **CROA 4583**, Arbitrator Sims ordered the conductor be reinstated notwithstanding her role in an incident which was a very serious cardinal rule violation. The Arbitrator writes:

Having weighed all these factors I conclude the penalty of termination would only be justified in this case had the employer established its allegation that the grievor and Mr. Maggio had deliberately failed to report this incident in an effort at cover-up. The evidence convinces me that they did not. However, the incident was a very serious cardinal rule violation involving an incorrect assumption which Ms. Bujold failed to double check against the documentation as well as missing the red flag. Ms. Bujold's record over the prior year was poor. In these circumstances the termination is set aside and the grievor will be reinstated without compensation. She has been remorseful

and has accepted full responsibility which convinces me that this is a working relationship that can be successful in the future.

(Emphasis added)

35. In the present case, the Company, likely so, emphasizes the fact that a serious collision took place and caused considerable damages which is an aggravating factor, particularly given the history of serious crashes like for example the Lac Megantic disaster. The Company sustains that the Grievor's actions compromised his own safety, his crew safety and the Company's business interests and reputation.

36. The seriousness of the accident and the significant damage resulting from it are considered an aggravating factor. Notwithstanding, in other cases, dismissals following serious collisions with comparable mitigating circumstances as in the present case have weighed in favour of reduction of penalty.

37. In **CROA 4563** a grievor, who had nine years of service including four as a locomotive engineer, was operating a train when it collided with the trail end of a proceeding train in non-main track territory, causing a derailment and significant damage to equipment. The grievor had several prior disciplinary assessments on his record. In ordering the grievor reinstated, Arbitrator Sims writes:

I accept as a mitigating factor that Mr. Hansen cooperated fully during the investigation, and has been honest throughout. It is said that he is respected by his co-workers, managers and Union officers in Medicine Hat. I also accept that he has personally viewed this as a learning opportunity on the need for constant vigilance.

In my view this is a reconcilable working relationship and the grievor is capable of and willing to learn from this mistake. The question is

whether the magnitude of harm caused by this negligent lack of vigilance outweighs any consideration of mitigation. I find that it does not, and that his relatively clear proven record and his years of service justify a second chance. The grievor is to be reinstated but without compensation.

(Emphasis added)

38. In **CROA 4419**, the Grievor, a locomotive engineer of seven years services, was instructed to drive two locomotives behind another train in the yard. He entered a curve at 25 miles per hour, believing the other train was further down the track. A collision occurred and caused significant damage to five locomotive units (two millions dollars) and minor injuries sustained to both crews. As an additional aggravating factor, the grievor had been in violation of the rule prohibiting use of personal electronic devices in the course of his assignment. In ordering the grievor reinstated, Arbitrator Schmidt cited the following mitigating circumstances:

Notwithstanding the Company's legitimate concerns about the grievor's most serious error in failing to insist that Grewal go to the point lack of their movement, and his decidedly and exceptionally poor decision to use a gaming device during a tour of duty, I am not persuaded that the grievor's misconduct in this case warrants his termination in all of the circumstances. While it is true that the grievor is not a long service employee and his error was a critical one, it is not properly elevated to the degree of recklessness such that the employment relationship is beyond redemption.

Having regard to all of the forgoing I am of the view that the imposition of a serious sanction, short of termination, will have the desired rehabilitative impact on this grievor. I therefore direct the Company to reinstate him forthwith without loss of seniority but without compensation for any wages or benefits lost.

39. In the present case, as in **CROA 4419**, the arbitrator agrees that the error of the Grievor was a critical one.

40. However, the Grievor's action does not reflect any wilful misconduct or intentional derogation from adherence to Rule 439. He lost situational awareness. As soon as he realised the situation, when his conductor reminded him that they came up in clear to stop signal, the Grievor took action.

41. The Company asserts that the Grievor does not have valid reason for passing the signal and that it has no longer confidence in the Grievor's ability to safely perform his responsibilities and safeguarding the safety of his environment and continuous safe train operations.

42. In **CROA 3972**, a locomotive engineer had been discharged for a second violation of CRO Rule 439. The grievor stated that he had lost focus and became distracted as the result of a conversation that commenced between himself and the conductor regarding a slow zone which they were approaching. In his ruling Arbitrator Picher provided the following:

If it were necessary to choose as between the two versions of events offered by the parties, bearing in mind that the Company bears the burden of proof, I would be inclined to accept the uncontradicted evidence of the grievor that he lost concentration by reason of his conversation with his conductor.

The real issue in this grievance is the appropriate measure of discipline. In considering that question there are both aggravating and mitigating factors to take into account. The most aggravating factor is that this appears to have been the second violation of Rule 439 by the grievor. In October of 1993 he received thirty demerits for that infraction while operating on the Yale Subdivision. As counsel for the Union stresses, however, the grievor has not received demerits for

any operating rule violation for some seventeen years prior to the incident here under review. I am satisfied that the record, coupled with the grievor's thirty-five years of service to the Company does justify a substitution of penalty, albeit a severe one.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. The period between the grievor's discharge and reinstatement shall be recorded as a suspension

43. In this case, the arbitrator recognized that the conversation between the grievor and the conductor was a source of distraction and was a mitigating circumstance.

44. There's an analogy to be made with the present case when during the investigation the Grievor states: "I was in conversation with Shaun going through Portage la Prairie and that could have distracted me". This decision weigh in favor of reduction of penalty.

45. As for the decisions cited by the Company, the majority of the grievors were in violation of another or other rules in addition to Rule 439 or it wasn't their first offense or their record contended more serious disciplinary measures.

46. Some principles can be made out of these decisions. But none of the cases cited by the parties is exactly the same as in the present case.

47. As it is explicit from his statement, the Grievor remains remorseful for his role in the January 3, 2019 accident. He has accepted his role in the accident, and has offered

apologies to CN management and other employees for his involvement. The arbitrator believes that the Grievor has learned his lesson, that he will not make the same mistake again and that he should be given a second chance. I am satisfied that he is sincere and has recounted truthfully, without diminishing his implication, the events of the collision.

48. The present case does justify a substitution of penalty although a severe one. The period between the grievor's discharge and reinstatement shall be recorded as a suspension which is equivalent of a substantial one.

49. **NOW THEREFORE**, the CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION:

ALLOWS	the grievance in part;
CANCELS	the dismissal;
REINSTATES	the Grievor into his employment forthwith, without loss of seniority and without compensation for all wages and benefits lost.

March 3, 2020



**SOPHIE MIREAULT
ARBITRATOR**