

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

CASE NO. 5093

Heard in Montreal, October 10, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Conductor J. Sparrow of Saskatoon, SK who was discharged for “violation of CROR 439 resulting in the collision with S77181-04 at Wainwright West during your tour of duty on Z11531-06 on August 8, 2023.”

JOINT STATEMENT OF ISSUE:

On August 8, 2023, the Grievor’s train passed a stop signal and collided with another train, causing a derailment. Following an investigation, the Company assessed the Grievor a disciplinary discharge.

The Union’s position is that discharge was unwarranted, or in any case excessive in the circumstances. The discipline should be expunged, or in any case reduced, and the Grievor reinstated and made whole.

The Company disagrees with the Union’s position and maintains that the Grievor violated CROR 439 through a complete lack of situational awareness and attention. Discharge was warranted based on the egregious rule violation.

For the Union:
(SGD.) R. S. Donegan
General Chairperson

For the Company:
(SGD.) J. Girard
Senior VP Human Resources

There appeared on behalf of the Company:

L. Dodd	- Manager, Labour Relations, Winnipeg
J. F. Migneault	- Manager, Labour Relations, Montreal
A. Chouman	- Jr. Associate, Labour Relations, Montreal
T. Hein	- Transportation Manager, Saskatoon (via Zoom)
C. Baron	- Manager, Labour Relations, Edmonton (via Zoom)

And on behalf of the Union:

R. Church	- Counsel, Caley Wray, Toronto
R. Donegan	- General Chairperson, CTY-W, Saskatoon
J. Thorbjornsen	- Vice General Chairperson, CTY-W, Saskatoon

AWARD OF THE ARBITRATOR

Context

1. On August 8, 2023, the grievor was the Conductor on train Z11531-06, which consisted of 175 loaded rail cars more than two miles long, weighing more than 20 million lbs (10,104 tons). The train went through a Stop signal at 32.5 mph and collided with a passing train causing derailments of two locomotives and eight cars, but fortunately no serious injuries.

2. After an investigation, the grievor was terminated for his role in the incident.

Issues

- A. Were there grounds for discipline?
- B. Was discharge appropriate in the circumstances, or should some lesser discipline be imposed?

A. Were there grounds for discipline?

Position of Parties

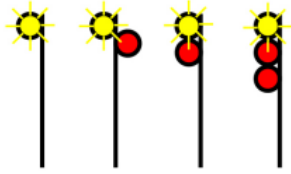
3. The facts concerning the actual movement of the train, arising from the Download Report, are not in dispute, and excerpted from the Company Brief:

At 10:20:26 am, at Mile 137, the crew were presented with an Advanced Clear to Stop. At this point, the Grievor's train was travelling at 32.59 MPH.

As information, an Advanced Clear to Stop signal indicates that the second signal the crew will encounter, following this current signal, will indicate Stop. Given a freight train needs sufficient time to stop, these signals provide warnings well in advance of a stop in order for the crew to prepare to stop the train at the upcoming location. This is governed by Canadian Railway Operating Rule (CROR) 415, written as follows:

415. ADVANCE CLEAR TO STOP

Advance Clear to Stop - Proceed, prepared to Stop at second signal.



As information, the Clear to Stop indicates that the next signal the train will encounter will be a Stop signal and the train will be required to come to a complete and controlled Stop at least 300 feet in advance of that signal.

Upon passing the Clear to Stop signal at Mile 139.4, at 10:24:24 am (four minutes from the time the crew had passed the Advanced Clear to Stop signal), the train was travelling at 42.9 MPH.

Furthermore, the train was also travelling in a downward grade, which should also logically prompt the crew to be extremely concerned and therefore take extra measures to control the speed of their train.

In fact, at Mile 140, less than a mile after passing the Advanced Clear to Stop signal, the Grievor's train increased speed up to 45.5 MPH.

Thereafter, the Grievor's crew took slow reductions in speed over the next 1.7 miles, however, the train did not slow enough in order for the crew to bring the train to a controlled stop at the next signal, the critical Stop signal, located at Mile 141.8.

Of great concern is the fact that, at Mile 141.7 at 10:27:37, literally at the Stop signal, the Grievor's train was still travelling at 35.19 MPH at which time the crew finally placed the train into emergency.

At the time of the collision, the Grievor's train was still travelling at 20 MPH, causing destruction and carnage as the two trains collided.

4. Many of the facts concerning the actions and conversations of the Engineer, Conductor and Conductor Locomotive Operator (“CLO”) are not in dispute either:

18.Q. Mr. Sparrow, company records indicate that your crew also consisted of Joe Bonten as your Locomotive Engineer and Brody McFadyen making a CLO trip is that information correct?

A. Yes

Note. The system is auto generating Brody McFayden as a Student Locomotive Engineer, this should read as CLO instead.

19.Q. Mr. Sparrow, were all 3 members of your located within the leading unit for the entirety of your tour of duty on Z11531-06?

A. Yes.

34.Q. Mr. Sparrow, do you remember the indication of Signal 1369N (Approach to Wainwright East)?

A. Yes, it was Advance clear to stop.

35.Q. Mr. Sparrow, CROR 415 states “Advance Clear to Stop” as “Proceed, prepared to Stop at second signal.” Is that correct?

A. Yes.

36.Q. Mr. Sparrow, was there communication within the cab of the locomotive in regard to Signal 1369N (Approach to Wainwright East) or its indication?

A. I know that we called it in the cab and I called it on the radio but I don’t remember if there was any discussion beyond that.

37.Q. Mr. Sparrow, do you remember the indication of Signal 1391N (Approach to Wainwright West)?

A. Yes it was clear to stop.

38.Q. Mr. Sparrow, what was the communication within the cab of the locomotive in regard to the CFZ?

A. we talked about the CFZ’s at some point but I don’t remember if that was in Saskatoon or later on.

39.Q. Mr. Sparrow, CROR 411 defines “Clear to Stop” as “Proceed, preparing to stop at next signal.” Is that correct?

A. Yes.

40.Q. Mr. Sparrow, was there communication within the cab of the locomotive in regard to Signal 1391 N (Approach to Wainwright West or its indication)?

A. I remember calling it in the cab and on the radio but I don’t remember if I called it as “to Wainwright West” or “at Wainwright East”.

49.Q. Mr. Sparrow, do you remember indication of Signal 1417N (Home Signal at Wainwright West)?

A. I know that it was a Stop Signal due to the Signal progression but I don’t actually remember the light itself.

50.Q. Mr. Sparrow, do you remember any communication within the cab of the locomotive in regard to Signal 1417N (Home Signal at Wainwright West or its indication?

A. I'm sorry but I don't. the last things I remember was the clear to stop then remember thinking about pulling the handle but Brody beat me to it, the next thing I remember is being stopped and being upside down.

5. The Company takes the position that the grievor was highly negligent in the performance of his duties as Conductor. It alleges that he failed to do proper planning, failed to properly communicate with respect to speed and braking in light of the signals given, failed to verbally intervene when the train was in the Critical Focus Zone ("CFZ") and failed to act by using the emergency brake. It submits that this negligence permitted an egregious Rule 439 breach with more than \$3 million of damage, and only good luck preventing fatalities.

6. The Union argues that the grievor did properly communicate both externally and internally when the signals were passed. It submits that the grievor appropriately exercised judgment to not distract the Engineer and CLO while the train was in the CFZ. It notes that the grievor fully intended to use the emergency brake, but the CLO used it first.

Analysis and Decision

7. Canadian Rail Operating Rule 439 requires trains to stop well in advance of a Stop signal:

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.

8. A failure to respect CROR Rule 439 is viewed as a cardinal rule violation, as it involves a critical safety action. Indeed, Arbitrator Schmidt in **CROA 4335** referred to such a violation as: "the most serious that an employee can commit on a railway".

9. There is no dispute that the train on which the grievor was the Conductor failed to stop prior to a STOP signal, and as such, the grievor has violated Rule 439. However, the grievor also committed multiple errors prior to the train failing to stop, which then led to the ultimate rule violation. I therefore find, for the reasons set out below, that the actions and inactions of the grievor are worthy of discipline.

10. The grievor did not respect the obligations set out in the CFZ. The CFZ requires the following:

CFZ to be applied in the following circumstances:

- The Critical Focus Zone (CFZ) is an environment you create in the cab of the controlling locomotive which allows the employee controlling the locomotive to focus on controlling the movement while approaching upcoming restrictions.
- The purpose of the CFZ is to reduce/eliminate distractions while approaching a potentially hazardous situation. Only communications which involve the immediate tasks/operations of the train's operation may be discussed when in a critical focus zone.
- When required to apply the Critical Focus Zone (CFZ) while moving, all other duties such as but not limited to the broadcast of restrictions at five mile intervals that will not interfere with safe operation of the movement, should be performed while in the CFZ. However, the priority is complying with the provisions of the CFZ and the upcoming restrictions.
- The following applies when approaching stop signals, end of operating limits or approaching restrictions where permission to enter has not yet been obtained:
 - Not less than one mile from the location, the Locomotive Engineer must advise the conductor of the stopping plan.
 - If the Locomotive Engineer does not advise the Conductor of the stopping plan, the Conductor must immediately ascertain what the stopping plan is.
- The stopping plan must include the following:
 - The way the train will be stopped e.g., airbrakes, dynamic brake etc.
 - The location where the train will stop e.g., 300' from the signal or clear of the crossing etc.
- CFZ is to be applied in the following circumstances:
 - Stop Signal – CFZ commences three miles from the stop signal or the moment the advanced signal is observed (if it

is within 3 miles) until movement has stopped for the stop signal or the next signal has been identified to be permissive.

11. The grievor clearly admits that he did not know what the plan was to stop the train, contrary to the CFZ requirements:

43.Q. Mr. Sparrow, what was the plan to bring the train to a stop?

A. I'm not sure.

12. The Union argues that the CFZ required the Engineer and CLO not to be distracted and that this explains the silence of the grievor. As the grievor stated:

44.Q. Mr. Sparrow, at what time did you realize that things were not going according to plan?

A. I'm not sure exactly where we were but it was probably closer to the dump crossing, its hard to say as I haven't drove and didn't want to distract the rest of my crew.

13. However, the CFZ requires that: "Only communications which involve the immediate tasks/operations of the train's operation may be discussed when in a critical focus zone". Given that the train increased its speed after passing the Advanced Clear to Stop and Clear to Stop signals, the immediate task/operation called out for communication on the part of the Conductor to ascertain the stopping plan of the Engineer and whether the train was in conformity with it. In my view, the passing of the signals and the speed of the train required the Conductor to forcefully intervene. Instead, he failed to speak up.

14. When all else fails, the Conductor has the right and obligation to activate the Emergency brakes. There is no doubt that such a decision is a difficult one, as it calls into question the actions/inactions of the Engineer. Here, the Emergency brakes were activated by the CLO some 400 feet before the Stop sign. The application of the Emergency brakes caused the train to slow from 32.5 mph to 20 mph at point of impact. It is obvious that applying the Emergency brakes at that time would result in an inevitable Rule 439 breach, as the train would fail to stop 300 feet from the Stop sign and would clearly go well beyond the Stop sign. This is in fact what happened.

15. It is deeply troubling that the Conductor did not engage the Emergency brakes far earlier, to permit stopping before the Stop sign and in conformity with Rule 439. Instead, the Conductor waited and only thought about acting when the CLO finally did act:

50.Q. Mr. Sparrow, do you remember any communication within the cab of the locomotive in regard to Signal 1417N (Home Signal at Wainwright West) or its indication?

A. I'm sorry but I don't. The last things I remember was the clear to stop then remember thinking about pulling the handle but Brody beat me to it, the next thing I remember is being stopped and being upside down.

16. Even the grievor admits that he breached Rule 439:

51.Q. Mr. Sparrow, were you compliant with CROR 439 at Wainwright West as the Conductor on Z11531-06?

A. Not at that time.

17. Accordingly, I find that the grievor was properly the subject of discipline.

B. Was discharge appropriate in the circumstances, or should some lesser discipline be imposed?

Position of the Parties

18. The Company takes the position that the actions of the grievor were so negligent that it can have no further confidence in him. Accordingly, discharge is the only penalty which is appropriate (see **CROA 3745, CROA 4582, CROA 4335**). In the alternative, it submits that if the grievor should be reinstated, it should be without compensation for the time period off work (see **CROA 3849, CROA 4285, CROA 4720**).

19. The Union takes the position that discharge is a penalty which is far too harsh in the circumstances. It notes that the grievor had no previous discipline at the time of the incident and had been a solid employee for six years.

20. It submits that Rule 439 offences are usually met with 30 to 45 demerits or suspensions of up to 90 days (see **CROA 4156, CROA 4105 CROA 4203, CROA 3718**).

The discharge of employees for a first offence is commonly only upheld where there are aggravating circumstances, which do not exist here (see **CROA 2356**).

21. The Union argues that reinstatement without compensation is not an appropriate remedy, as the delays in obtaining a decision are far greater than a reasonable suspension.

Analysis and Decision

22. The oft-cited William Scott decision enjoins arbitrators to consider both aggravating and mitigating factors in determining if discharge was appropriate in the circumstances.

23. Aggravating factors include the multiple opportunities which existed for the grievor to intervene, which could have avoided the Rule 439 breach and the collision which ensued.

24. Mitigating factors include the pristine discipline record of the grievor and his obvious remorse (see Q and A 54¹). The Union argues that the entire incident took place over a very short period of time, some 3 minutes. At most, this was a failure to act quickly enough.

25. The Company has relied on the cases cited below as examples of discharges for Rule 439 violations, even where the seniority of the employee was substantially greater than the present grievor.

26. Arbitrator Moreau upheld the termination of a 24-year Locomotive Engineer in **CROA 3745**. The Engineer stopped 60 feet past a Stop sign, and 360 feet past where he should have stopped and thereby breached Rule 439. Although there was no collision, there was potential for the Go train he was driving to have hit a Via train. After the incident, he failed to make an emergency broadcast as he was required to do under Rule 102.

¹ CN Investigation Statement August 11, 2023.

Arbitrator Moreau found that the Company was entitled to have lost confidence in the ability of the grievor to perform his duties safely:

The grievor's 24 years of service is a mitigating factor which weighs in favour of his reinstatement. His key position of responsibility for passenger safety as a GO train locomotive engineer is, however, of utmost concern. The grievor has, in my view, irreparably damaged the confidence that the Company places in his ability to perform his duties in a safe manner by his actions on November 29, 2008. After considering all the evidence, including his past disciplinary record, I must regrettably uphold the discharge and dismiss the grievance.

27. Arbitrator Sims upheld the discharge of a 20-year Locomotive Engineer in **CROA 4582**. The Engineer missed a Slow to Stop sign and was unable to stop at the next signal, causing a major collision. Aggravating factors included 50 demerits earned from safety violations and the very serious damage caused:

"The evidence discloses both Rule 411 and Rule 439 violations. It shows that the grievor failed to reduce speed in response to the situational issues that arose; the smoke obscuring where a signal would have been known to exist, and any feeling of distraction or overload due to the pedestrian warning. The very proximity of train 118-18, close to a crossover point, should also have induced caution.

A Rule 439 offence is a cardinal rule violation and has been treated very seriously in prior CROA decisions as cited by the Employer, for example CROA 4391 and 4112.

[...] In the Employer's submission, the grievor's record, albeit over twenty years of service is not sufficient to be a mitigating factor.

[...] The incident reveals a lack of attention by a railroader thoroughly familiar with the territory that caused very significant damage."

28. Arbitrator Schmidt upheld the discharge of a 9-year Locomotive Engineer in **CROA 4335**. She found that he had essentially ignored a "Normal to Stop" sign and was unable to stop prior to a Stop sign, despite the application of emergency braking. He stopped 50 feet past the Stop sign, although there was no collision. The Arbitrator found aggravating factors in recent serious breaches of operational rules resulting in serious discipline: "A worrying trend emerges regarding the complainant: fully aware of the operational rules, he shows a tendency not to pay attention to them". She also found an additional

aggravating factor, in that the grievor failed to make the necessary emergency call. The Arbitrator found that dismissal in the circumstances was appropriate:

“A Rule 439 violation is the most serious that an employee can commit on a railway.

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

[...] the Grievor has irredeemably damaged the Company's confidence in his ability to safely exercise his functions.

For these reasons, I believe the Company had good reasons to dismiss the Grievor. The grievance is therefore declined.”

29. The Union relies heavily on **CROA 2356** for the proposition that discharge is rarely warranted for a violation of Rule 439, in the absence of other rules violations or other aggravating factors. As Arbitrator Picher noted:

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 these 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.)

30. This reasoning has been followed in many other CROA cases (see, for example, **CROA 4250** and **CROA 4583**).

31. It is noteworthy that all three cases relied upon by the Company for an outright termination had other aggravating factors, as was noted by Arbitrator Picher. In **CROA**

3745, in addition to the Rule 439 infraction, there was a Rule 102 infraction for the failure to make an emergency broadcast. In **CROA 4582**, the grievor had very substantial demerits on his record for previous safety violations. In **CROA 4335**, there was both a failure to make an emergency broadcast and previous safety violations.

32. In my view, Arbitrator Picher's 1993 summary of the jurisprudence in **CROA 2356** continues to reflect the majority of the jurisprudence today. A 439 Rule violation remains a highly dangerous and very serious offense. It does not usually result in a termination, in the absence of aggravating factors, which are not found in the present matter. There was no other rule violation alleged and the grievor had no discipline on his record. As such, it is my view that termination was not warranted in the circumstances.

33. However, that is not to say that the actions and inactions of the grievor do not warrant very serious discipline, including a possible lengthy suspension without compensation.

34. The Company relies on the following cases as examples of decisions to reinstate a discharged grievor, but with a lengthy suspension and no compensation.

35. In **CROA 3849**, Arbitrator Picher reinstated a Conductor, who together with the Engineer, had violated Rule 439 after mistaking a signal:

While the grievor is a relatively junior employee, he had never previously received any discipline prior to the incident which is the subject of this grievance. In the Arbitrator's view it is less than clear that he could not be rehabilitated by an alternative, albeit serious, measure of discipline. In the result, I deem it appropriate to direct that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits, and without loss of seniority. The time between his termination and reinstatement shall be recorded as a suspension for his violation of CROR rule 439 on August 14, 2009.

36. This was in effect a 5-month suspension.

37. In **CROA 4285**, Arbitrator Picher reinstated a Conductor without compensation after a Rule 439 violation where there was confusion in the communication between the Engineer and Conductor, and where the Conductor had no sight line to the signal. This was in effect an 8-month suspension.

38. In **CROA 4720**, Arbitrator Mireault reinstated a 9-year Engineer after a Rule 439 violation and a collision causing \$8.5 million in damage and shutting down the mainline for 24 hours. The grievor explained that he had lost situational awareness. The Arbitrator cites a number of cases and notes: “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”. Here the grievor had no serious discipline, was forthright and honest during the investigation and had expressed sincere regret. The Arbitrator reinstated the grievor, in light of the serious infraction but with the mitigating factors mentioned, with an unpaid suspension of 14 months.

39. The Union relies on multiple cases in which discipline of 90 days has been imposed by CROA arbitrators for Rule 439 violations (see **CROA 4156**, **CROA 4105**, **CROA 4203**). In many of these cases, however, the extent of the Rule 439 violation was far less important than here, as set out below.

40. In **CROA 4156**, the train moved past the Stop signal by some 4-5 car lengths. The arbitrator found that there was a signal fault and overturned the suspension.

41. In **CROA 4105**, the train moved past the Stop signal by a single car length. The 90-day suspension was upheld in light of the grievor’s discipline history.

42. In **CROA 4203**, the facts are less clear, but it does appear that the train would have been preparing to stop shortly. Initially the Conductor had called a stop in 40 car lengths, and then realized that the stop was in 4 car lengths. The train would therefore have stopped between 4-40 car lengths, likely closer to the former than the latter, given the recognition of the crew that they had passed a stop signal. The 90 day suspension was upheld.

43. The Union also notes the caution set out by Arbitrator Picher that reinstatement without compensation has the effect of a lengthy suspension, and that this is only appropriate if the suspension itself would have been appropriate:

The Arbitrator is in agreement with the general proposition advanced by counsel for the Union with respect to the utilization of reinstatement without compensation. When an employee's error or misconduct is plainly not a dismissable offence, and should have been dealt with from the outset on the basis of a lesser measure of discipline, it is inappropriate for an arbitrator to "split the baby" by subsequently reinstating the employee without monetary compensation. To pursue such a course would plainly not make the employee whole, in the sense that he or she is not returned to the position the employee would have been in had the just cause provision of the Collective Agreement been correctly applied. By the same token, where an employee's error or misconduct is grievous, and on its face would arguably justify resort to discharge, and arbitrator may, nonetheless, having regard to mitigating circumstances, exercise his or her statutory discretion under the Canada Labour Code to substitute a lesser penalty, including reinstatement without compensation. That approach recognizes that the employee's conduct is so serious as to give the employer some basis to believe that discharge was justified. If, in the end, the reinstatement of the employee without compensation has the effect of imposing a lengthy suspension, it is implicit in the judgement of the board of arbitration that that penalty is justified.

44. However, even in many of the cases cited by the Union, lengthy suspensions without compensation have, in effect, been imposed by an order of reinstatement without compensation: (see **CROA 4583** 14 months without pay; **CROA 4250**, 13 months without pay; **CROA 4419**, approximately 10 months without pay; **CROA 3718**, 15 months without pay).

45. Here, the grievor was discharged on August 8, 2023. A reinstatement without compensation effective November 2024 would amount to a suspension without pay of 15 months.

46. In my view, a 15-month suspension, in the circumstances of this case, seems excessive. Such a suspension would be at the highest level of discipline previously recorded, short of outright termination. However, I do not find that the 90-day suspensions invoked by the Union to be appropriate either. The grievor clearly missed multiple opportunities to speak up concerning a braking plan, the excessive speed and the passing of signals. The grievor undoubtedly had a duty to speak up or ultimately to take action himself by using the Emergency brake well prior to the Stop signal. Had he done any of these things, the derailment and the risk created for the crews of both trains could have been avoided. He clearly failed in his duty as a Conductor. However, his discipline record was clean, and he was clearly remorseful.

47. In all the circumstances, I find that the grievor should be reinstated without loss of seniority but without compensation for twelve (12) months, and thereafter made whole, less mitigation.

48. To this extent, the grievance is allowed.

49. On a more general note, this matter has revealed that further training may be necessary, or possibly amendments to policies, to make clear that forceful questioning and then active intervention by Conductors and others, such as CLOs, is required if a train may be standing into danger. There appears, for example, to be some confusion as to what is required when the train is entering a CFZ. I note that in the airline industry there has been extensive additional training brought in to emphasize the duty of other crew members to speak up when the captain may be making a mistake. I invite the Parties to explore whether changes could be instituted to prevent similar accidents in the future.

50. I remain seized for any questions of interpretation or application of this Award.

November 25, 2024



**JAMES CAMERON
ARBITRATOR**