

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

**CASE NO. 5094**

Heard in Montreal, October 10, 2024

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal on behalf of Conductor Brody McFadyen 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 and the Grievor’s past record of safety infractions.

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

**For the Company:**  
**(SGD.) S. Fusco** (for) **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. S. Donegan	- General Chairperson, CTY-W, Saskatoon
J. Thorbjornsen	- Vice General Chairperson, CTY-W, Saskatoon
Mr. McFadyen	- Grievor, Saskatoon

## **AWARD OF THE ARBITRATOR**

### **Context**

1. This matter arises out of the same August 8, 2023 collision which was the factual context of **CROA 5094**. As many of the facts are identical, they will not be repeated here.

2. The grievor here was the Conductor Locomotive Operator (“CLO”). He was a trained Conductor but was not acting as such on this run. He had completed a five day classroom training session and was on his first ever run driving a two mile long, 20 million pound freight train. He did so under the guidance of the trained Locomotive Engineer, seated beside him.

### **3. Issues**

**A.** Was Discipline Appropriate?

**B.** Was Termination Appropriate and if not, what Discipline is Appropriate in the Circumstances?

### **A. Was Discipline Appropriate?**

### **Positions of Parties**

4. The Company takes the position that the grievor was negligent, in not speaking up earlier and more forcefully with the Locomotive Engineer next to him, in not applying the dynamic brakes earlier and at the highest setting and in not activating the Emergency brake sooner.

5. It submits that the grievor knew that the train was going too quickly, given the passing signals, and failed to act.

6. The Union does not appear to contest that some discipline is appropriate, but underlines that the role of the grievor was secondary to that of the Locomotive Engineer. It contests that the grievor did not act or speak up, noting the increasing braking applied

by the CLO, his multiple questions to the Engineer about applying automatic braking and ultimately, his application of the Emergency brakes.

### **Analysis and Decision**

7. There is no doubt that the grievor was in a training role on the day of the incident, operating under the guidance of the Locomotive Engineer Joe Bonten.

8. Addendum No 64 (see Tab 19 Union documents) clearly sets out roles and responsibilities of the CLO, even after he has finished necessary training:

In this respect, the Company indicated that it is necessary in an extended run environment to have two employees who can operate the locomotive. The intent of the course is to provide the conductor the ability to operate the locomotive under the guidance of a qualified locomotive engineer. This will not affect their present duties as the conductor is still in charge of the train and the locomotive engineer is still responsible for the operation of the locomotive.

The structure of the modified engine service training course is as follows:

Technical & Rules Training - Gimli Manitoba 14 Days

- Basic Air Brake training Program
- Motive Power
- Simulator Training - 10 structured hours

On Job Training

- Joint Selection Process On Job Trainer
- Training with credible On Job Trainer - 2 weeks
- Review of runs with local officer, trainee and OJT, using downloads and evaluation sheets.

Upon successful completion of this program conductors will receive an Operator's Permit which will allow them to operate the locomotive when accompanied by a qualified locomotive engineer. While attending the training program the conductor will not suffer any loss of wages. (underlining added)

9. Here the grievor was on his first run in the context of on the job training. He was not even a qualified CLO, let alone a qualified Locomotive Engineer. As the Addendum notes, the Locomotive Engineer remains in charge of the locomotive while the Conductor remains in charge of the train.

10. The grievor, as a trainee CLO, was aware of the meaning of the Advance Clear to Stop, Clear to Stop and Stop signals (see Q and As 9-11). He confirmed that the crew called out the first two signals (see Q and As 36-40).

11. The grievor confirmed that the plan was to slow the train using Dynamic Braking (“DB”) on the locomotive and then Automatic Braking (“air”) on the train (see Q and A 43). It was the Automatic Braking on the train which would actually bring the train to a stop.

12. The grievor was clearly aware of the speed of the train and the warning signals. The facts show that the grievor used DB, moving from DB 2 to DB 6(see Q and As 30, 45). The Locomotive Engineer was in charge of the Automatic Braking. As the grievor noted in his Statement after the accident:

“Knocked down Wainwright East signal at around 43 mph. I believe we were out of throttle and in Dynamic. Went deeper, took air, train didn’t stop in time, plugged it. Asked a couple times as we were coming up to Wainwright West if we need more air. And the response was no. At that time Joe was in control of the auto brake” (see Tab 3, Union documents).

13. The fact that the LE was in charge of the Automatic Braking and that the grievor asked him a couple of times about applying more air and was told no, is confirmed in the statement of the Conductor, Joe Sparrow: “I heard Brody ask if he should take air” (see Tab 3, Union documents). Even the LE’s statement confirms his involvement in the braking process: “Clear to stop at Wainwright East. In dynamic, took air, train didn’t reacted as I expected” (see Tab 3, Union documents).

14. The grievor was asked about the speed of the train, his requests for air and when Automatic Braking was applied in the geographic context of Wainwright Station (some 1.5 miles from the Stop sign) and an Overpass (west of the Station and approximately 1 mile to the Stop sign). It is important to note that at Wainwright Station, the LE was in charge of the only effective braking mechanism on this lengthy and heavy train:

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

A. Yeah, at some point past the station but before the overpass I started to ask if we should be taking air.

45.Q. Mr. McFadyen, data provided within the ESO download report shows that your Train was travelling at 43.7 mph (DB6, ER=90psi, BP = 89psi, EOT = 90 psi) at the Overpass which is located 5211 feet east of Signal 1417N Wainwright Sub is that correct?

A. I don't remember but the evidence shows that, yes.

46.Q. Mr. McFadyen, data provided within the ESO download report shows that your Train was travelling at 41.48 mph (DB6, ER = 75 psi, EOT = 86 psi) at the dump crossing which is located 1758 feet east of signal 1417N Wainwright Sub is that correct?

A. Yes.

47.Q. Mr. McFadyen, data provided within the ESO download report shows that your train travelling at 35.19 mph when it is placed into an Engineer Initiated Emergency 400ft away from Signal 1417N (Home Signal at Wainwright West) Wainwright Sub is that information correct?

A. Yes.

48.Q. Mr. McFadyen, data provided within the ESO download report shows that 46 seconds elapsed from the time that the first Automatic Brake Application is taken to the time that the train is placed into emergency, is that information correct?

A. I don't remember the exact time as I was focusing on the light coming up, the evidence does show that.

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

A. Yes, it was a Stop Signal

50.Q. Mr. McFadyen, 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. Not really, the last clear thing I remember is on putting the train into emergency and the next is asking if everyone else was ok after we came to a stop.

15. The Company has argued that the grievor bears responsibility for the collision, as he should have gotten the LE's attention, seated literally an arm's length away, or called his supervisor, or the RTC, or applied the Emergency brake earlier.

16. While the grievor was undoubtedly late in applying the Emergency braking mechanism only a short distance from the Stop sign, it is noteworthy that he, as a Trainee,

did so before either the Locomotive Engineer or the Conductor, both of whom had a greater responsibility to do so in the circumstances.

17. With respect to the argument that the grievor should have sought the LE's attention, the evidence shows that the grievor did raise the need for additional air a couple of times and the suggestion was refused by the qualified LE.

18. However, if the grievor had been more explicit with respect to his concerns about the current speed, the weight of the train and the rapidly approaching Stop sign, it is possible that the LE would have reacted and the collision avoided.

19. Even the grievor admits that he was not compliant with Rule 439:

51.Q. Mr. McFadyen, were you compliant with CROR 439 at Wainwright West as the CLO on Z11531-06?  
A. Not at that time.

20. As such, I must find that some discipline was appropriate.

**B. Was Termination Appropriate and if not, what Discipline is Appropriate in the Circumstances?**

21. In **CROA 5093**, the Parties have set out the arguments for and against termination in the context of a Rule 439 violation. The same arguments and jurisprudence are led here. In the previous decision, I concluded that termination was not appropriate for the Conductor:

“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.”

22. Here the grievor had a secondary or tertiary role in terms of stopping the train and avoiding the Rule 439 violation.

23. The grievor's discipline record stood at only 5 active demerits. While the Company has argued that there were two previous safety infractions, I note that neither were Rule 439 infractions and that the initial demerits were agreed by the Parties to be reduced. Globally, the 40 demerits against the grievor have been reduced through good conduct (see Tab 2, Union documents).

24. The Company has argued that one of the previous safety violations involved a failure to speak up as a Conductor when the LE was speeding. The grievor was apologetic and stated that he would not hesitate to speak up in the future (see Tab 12, Company documents):

32.Q. Do you have anything further to add to this employee statement?

A. Honestly I am embarrassed that this even happened. I understand what we did could have caused something worse to happen. Leaving Dugault with 4 cars, Merv said it was no big deal. I realized that he was serious and I was hesitant to say something sooner which I now regret. As much as I can I will tell other Conductors that they should not hesitate and take action immediately when in this situation. I am truly embarrassed and I apologize for my lack of actions on that day.

25. The Union argued that this transcript did not form part of the investigation and should not therefore be introduced into evidence now under the CROA Rules.

26. However, I note that the company's grievance response speaks to "past safety infractions" and the JSI speaks directly to previous incidents: "Discharge was warranted based on the egregious rule violation and the Grievor's past record of safety infractions". The grievor's disciplinary record and past safety infractions were referenced by the Company, and I do not believe the Union or the grievor is prejudiced or surprised by a quotation from a previous mitigating statement made by the grievor. As such, the objection is dismissed.

27. While this evidence has been accepted, I do not agree with the Company argument that the grievor failed to learn from the previous experience and failed to act or to speak up. I find, to the contrary, that the grievor did both, questioning the LE about the need for air and triggering the Emergency brake.

28. The Parties did not provide evidence of any other rule violations or aggravating circumstances of the grievor, as pointed out by Arbitrator Picher in **CROA 2356**. I therefore find that termination was not appropriate in the circumstances.

29. As set out in the frequently quoted **William Scott** matter, I must now consider aggravating and mitigating factors when considering an appropriate penalty.

30. The Parties disagree whether I should look at the consequences of the Rule 439 violation or not. The Company argues that I am entitled (see paras 82-89, Company Brief), while the Union argues that I should not (see paras 10-11 Union Reply Brief). I am not sure that whether I look at the results of the violation or not changes the outcome. Rule 439 is in place to avoid collisions, damage and potential fatalities. All Rule 439 violations are highly serious, whether the risk of collision actually occurs or not.

31. The grievor is a relatively short service employee at 5.5 years. He has had previous safety infractions, albeit not involving Rule 439. He did not speak up as forcefully as he should have, which might have caused the LE or the Conductor to act earlier. He admits a Rule 439 violation. Mitigating factors include the fact that he was a first run trainee and was not the primary person responsible for the proper braking of the train. His active disciplinary record was only at 5 demerit points.

32. He clearly is remorseful:

54.Q. Do you have anything further to add to this employee statement?

A. I would like to take this opportunity to apologize for what happened, this was absolutely not how I envisioned my first time behind the throttle going. I tried my best to do what I could, going forward I will absolutely do everything in my power to avoid ever being in a situation like this again. I am so thankful that everyone



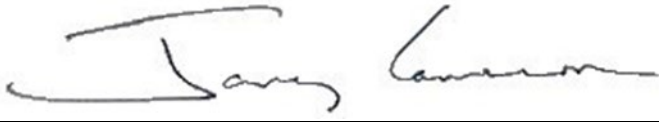
was okay and I look forward to learning from this experience and in future training is no way a representation of how I want to run.

33. When I consider all of the aggravating and mitigating factors, I find the Company alternative proposal that the grievor be reinstated without compensation after 15 months to be too severe in the circumstances. I find that a three-month suspension without compensation to be sufficient, as was found in **CROA 4105**, **CROA 4203** and **CROA 3718**. This penalty, together with the reality of the collision, will be amply sufficient to ensure that the grievor is quick and forceful in raising any future safety concerns.

34. Accordingly, a three-month suspension without compensation is substituted for the previous discharge. The grievor is to be reinstated without loss of seniority and made whole, less mitigation, after this period.

35. I remain seized with respect to any questions concerning the interpretation or application of this Award.

**November 25, 2024**



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**JAMES CAMERON**  
**ARBITRATOR**