

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3936**

Heard in Montreal, Wednesday, 15 September 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Locomotive Engineer Mr. Scott Montani for accumulation of discipline in amount of 70 demerit points: assessment of 30 demerits and 40 demerits.

JOINT STATEMENT OF ISSUE:

On May 8th, 2009 Mr. Montani was required to attend a formal investigation in connection with the circumstances surrounding derailment at BIT Yard May 6, 2009 while working as the Conductor on train Q1113-07. Following the investigation the Company issued a discipline form 780 dated May 28, 2009 assessing Mr. Montani 30 demerit points.

The Union considers the discipline assessed Mr. Montani as too severe and requests the removal of such.

The Company disagrees.

On January 26, 2010 Mr. Montani was required to attend a formal investigation in connection with the circumstances surrounding operation of distributed power train Q101-31-16 Toronto to Capreol, including delay at BIT, while employed as the locomotive engineer on this train January 16, 2010. Following the investigation the Company issued a discipline form 780 dated February 19, 2010 assessed Mr. Montani 40 demerit points which, when combined with his active discipline, led to his discharge from Company service.

The Union requests that the discipline assessed Mr. Montani be reduced to a level that would preclude his dismissal.

The Company, given the severity of the violation, disagrees.

FOR THE UNION:
(SGD.) P. VICKERS
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) R. A. BOWDEN
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

F. O'Neill	- Manager, Labour Relations, Toronto
D. Gagné	- Sr. Manager, Labour Relations, Montreal
Wm. Glass	- District Engine Service Officer
R. Widemann	- Engine Service Officer
A. Daigle	- Manager, Labour Relations, Montreal

And on behalf of the Union:

R. A. Beatty	- Transition Director, Sault Ste Marie
P. Vickers	- General Chairman, Sarnia
J. M. Robbins	- General Chairman, Sarnia
B. R. Boechler	- General Chairman, Edmonton
A.M. Montani	- Witness
S. Montani	- Grievor

AWARD OF THE ARBITRATOR

This grievance concerns two heads of discipline registered against the grievor. The first is the assessment of thirty demerits for a derailment at the BIT Yard on May 6, 2009 while the second involves the assessment of forty demerits for the faulty operation of a distributed power train operating Toronto to Capreol on January 16, 2010.

With respect to the first incident, the Arbitrator is satisfied that the grievor was deserving of discipline. The record discloses that on May 6, 2009, in preparation for the operation of a train from Toronto to Capreol, Mr. Montani was required to perform certain switching moves at the BIT Yard prior to departure. While he was in the process of shoving cars into track no. 210, proceeding over a number of cross-over switches, the leading car of his movement passed over a derail, causing the derailment of that car. It appears that in fact the switches were not properly lined for the grievor's movement to enter track no. 210, but rather the cars under his control proceeded onto

another track which contained the derail. It is also common ground that the grievor was not riding the point of his movement at the time.

In the Arbitrator's view it is of little consequence whether in fact the grievor can be said to have violated CROR 115, which involves riding the point of his movement, or CROR 104, for his failure to properly line switches. In either event, the Arbitrator is satisfied that the grievor's assumptions and negligence did result in the derailment which occurred.

The Union raises the preliminary objection that the grievor did not receive the proper notice in relation to the disciplinary investigation which was held. It is common ground that Mr. Montani declined to have Union representation and that on May 7, 2009 he was given written notice to attend an investigation in relation to the derailment at BIT Yard the following day, May 8, 2009. The twenty-four hours' notice provided to him is clearly inferior to the forty-eight hours' notice stipulated in article 82.1 of the collective agreement in relation to disciplinary investigations. Can that grievor's attendance at an investigation with twenty-four hours' notice be put forward by the Union as a basis for vitiating the entire discipline against him? I think not.

What appears from the record is that the grievor raised no objection to the Company when he was given notice to attend within a twenty-four hour period. The Company effectively relied on the grievor's compliance with the notice, and was clearly given no opportunity to correct the notice if the grievor or his bargaining agent should

later claim that it was insufficient. On what basis can the grievor or his Union raise no objection to the procedure at the time, yet plead the inadequacy of notice some months later at the stage of arbitration to effectively nullify the discipline in its entirety? I can see no fair basis for such an objection by the Union. While it may be that technically an employee cannot waive the application of the provisions of the collective agreement, where, as in the instant case, Mr. Montani declined Union representation and attended the investigation without objection, it would in my view be inequitable to strike down the investigation and the related discipline by reason of an after-the-fact objection. The preliminary objection is therefore declined.

The real issue is the appropriate measure of discipline in the circumstances. At the time of the incident the grievor's disciplinary record stood at twenty demerits. Over some twenty-two years of service with the Company he had previously been assessed discipline for a rules violation, in 1988 when he received ten demerits for a UCOR 104 violation. In the Arbitrator's view the assessment of thirty demerits after close to twenty years of discipline free service in relation to rules violations is excessive. I am satisfied that the assessment of fifteen demerits would have been appropriate in the circumstances. The Arbitrator therefore directs that the penalty registered against the grievor be amended to reflect fifteen demerits for the derailment in the BIT Yard on May 6, 2009.

The second head of discipline concerns a more serious incident. The grievor was required to operate a distributed power train, Q101-31-16 on January 16 from Toronto

to Capreol. In accordance with distributed power procedures, the train had locomotives at either end of the consist, presumably to be controlled by the head end locomotive. However, in the preparation of his train the grievor negligently left an angle cock closed on the first car of the train. In the result, unbeknownst to the grievor, the braking system of his train was controlled only by the trailing locomotive. While that locomotive was obviously under the control of the head end, that control was by means of radio transmission. In the result, should the train find itself in a location where radio transmission might be interrupted, it would effectively become a train without air brakes, with the only brakes available to the grievor being the braking system of the head end locomotive.

As can be seen from the foregoing, an extremely perilous situation was allowed to develop by reason of the grievor's oversight in the preparation of his train. Fortunately no untoward incident occurred, although the chance of a major disaster was not insignificant. It appears that the fault was discovered by the relieving crew at Capreol and, following a delay, it was corrected and the train proceeded in proper condition.

The Union questions whether the grievor's unfamiliarity with the setting up and operation of the distributed power train was known to the Company, and in particular to Supervisor Bob Widemann who monitored his work on the day in question. The Union also questions whether there was any meaningful delay caused by the grievor's actions.

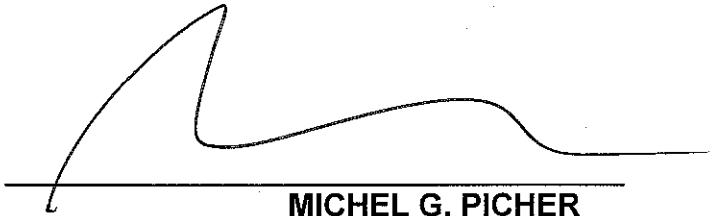
In the Arbitrator's view it is irrefutable that delay occurred at Capreol by reason of the error of Mr. Montani. Nor can I find that there was knowledge on the part of Mr. Widemann sufficient to know of the specific error committed by Mr. Montani or otherwise to correct or prevent what he had done. The simple fact is that, unbeknownst to anyone, he made a critical error in setting up his train and operated in a manner which could have left him without any airbrakes on the consist should a failure of radio communication with the tail end locomotive ever occur. Fortunately that appears not to have happened. The grievor was clearly liable to a serious measure of discipline.

What is the appropriate measure of discipline? Should the grievor's twenty-two years of employment be terminated by reason of this incident? After careful reflection, I am satisfied that discharge is not appropriate, and that a substitution of penalty should be made. As noted in the prior portion of this award concerning a switching error committed by Mr. Montani, prior to the two incidents which are the subject of this award the grievor had committed no rules infractions since 1988, with only one such infraction on his entire working record. He is, to all appearances, an employee who has operated safely and efficiently for many years. In the circumstances I am satisfied that a substantial suspension would be sufficient to communicate to Mr. Montani the importance of operating safely, and of seeking the necessary instruction or assistance when he is uncertain about any equipment or procedure.

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 wages and benefits lost. The time between the grievor's termination and reinstatement shall be recorded as a suspension for the events of January 16, 2010, with his discipline record to stand at thirty-five demerits.

September 20, 2010

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a series of connected loops and a horizontal line extending to the right.

**MICHEL G. PICHER
ARBITRATOR**