AH664

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY (CN)

And

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM COUNCIL NO. 11 (IBEW)

ASSESSMENT OF TWENTY (20) DEMERITS TO DARRYL REID AND DISCHARGE FOR ACCUMULATION

Arbitrator: Graham J. Clarke

Appearing for IBEW:

R. Church: Counsel
S. Martin: Sr. General Chairman, IBEW
P. Mueller: Reg. Representative, Great Lakes Division
D. Reid: Grievor

Appearing for CN:

S. Smith: Manager, Labour Relations
F. Daignault: Manager, Labour Relations
S. Lauzon: Sr. Manager S&C
L. Clark: Track Supervisor

Heard in Montreal on May 30, 2018.

AWARD

Nature of the Case

1. CN issued 20 demerit points to S&C Maintainer Darryl Reid, an employee with over 10 years service, for allegedly failing to resolve a Track Occupancy Permit (TOP) with a conflicting foreman. Those 20 points, in addition to Mr. Reid's existing 59 demerit points, took him over the 60-point threshold for termination under the Brown System.

2. The IBEW contested the 20 demerit points and resulting termination on the basis that CN failed to demonstrate that Mr. Reid had violated the various Canadian Rail Operating Rules (CROR) rules and General Engineering Instructions (GEI) on which it had relied in support of the discipline.

3. The arbitrator has concluded that CN failed to meet its burden of proof that it had cause to impose 20 demerit points. As a result, Mr. Reid will be reinstated in his employment.

Facts

4. On July 13, 2017, CN provided Mr. Reid with a Form 780 (U-2; IBEW Brief; Tab 7) assessing 20 demerit points for the following reasons:

> Please be advised that you have been assessed twenty (20) demerits for your failure to resolve a TOP conflict as evidenced by your failure to review, recognize, note and act upon conflict in TOP 5828 protection limits, a violation of CROR 854, 856, 857, General Rule A, GEI 10.8, 10.10, resulting in loss of protection between you and conflicting foreman at London Junction on June 26.

5. CN concurrently issued a second Form 780 discharging Mr. Reid for an accumulation of demerit points over 60.

6. On July 7, 2017, CN had obtained a brief 2-page Statement (U-2; IBEW Brief; Tab 4) from Mr. Reid about the events of June 26, 2017. At QA 9, Mr. Reid provided his view on what had occurred:

> I was intending on going out and doing track inspections on foot. So I filled out my lone worker form and I brought up ETOP to get an idea of what trains were in the area. I observed that there were no trains in the area. So I decided I would get 2 TOP's to have full protection on both tracks. I then reviewed my TOP's and I proceeded to walk off track from the east signal of London Jct and proceeded eastward on the north track. When I was at Egerton Street I checked the joints and hand throw switches and walked across both tracks and then was heading back to north to continue eastward and Lawrence Clark called me and told me I had a confliction with a supervisor. I assumed he was talking about himself in the 3rd person and I said I didn't have a confliction with him. He said that I did have a confliction and to meet me at my truck.

7. At QA15, CN asked Mr. Reid why he did not resolve a "confliction" with a different foreman:

> 15 Q: Why did you not resolve your confliction with Foreman Stafford prior to commencing work?
> A: Due to the fact that I wasn't performing work or putting on track as per the rules in place I wasn't required to.

8. CN also asked Mr. Reid about certain specific CROR rules and the GEI. Mr. Reid gave his view on the applicability of those rules to his circumstances (U-2; IBEW Brief; Tab 4 QA16-18).

9. CN also provided Mr. Reid with a copy of Supervisor Lawrence Clark's Narrative from the day in question which read:

> Today Jamie Stafford and I were patrolling the Strathroy and Dundas sub. Jamie was taking our E Tops, we were running on permit # 5816. 04s @ Ridout to 756s at Highbury with no conflict ions. As we came up to London Jct we seen a employee in the middle of the south track between London Jct and Highbury when we looked at the ETOP we noticed that Reid had a permit in our limits. I called Reid and asked if he had a top he said yes on both tracks I then asked if he had a conflict in and he said NO. I told him to walk back to his truck and look at his top as he open it he then noticed he had a conflict in with Jamie. I spoke

to Jim Ross and Darrel is currently waiting at London Transportation building. (sic).

10. The investigator did not interview Supervisor Clark or Foreman Stafford during Mr. Reid's investigation.

11. The parties confirmed during the hearing that Mr. Reid completed his Lone Worker form in accordance with Lone Worker Protection GEI 4.0. The Form 780 had not referred to this Lone Worker process, though CN's Brief did refer to it on several occasions.

12. The parties also agreed that Mr. Reid had obtained two TOPs: i) for work between signal 766s at London Junction and signal 756S at Highbury and ii) for work between 766N London Junction to 740N at Frauts.

13. CN alleged that Mr. Reid's TOPs conflicted with those of Foreman William Stafford and that Mr. Reid ought to have resolved this conflict prior to working. Mr. Reid set out his understanding regarding any need to resolve this conflict at QA15, *supra*.

14. At the hearing, neither Mr. Reid nor Mr. Clark testified although both were present. Mr. Mueller, the IBEW's Regional Representative for the Great Lakes Division, testified that a CN supervisor had advised employees that the obligation to resolve a conflict with a foreman only existed in situations where it impacted the movement.

Analysis and Decision

15. CN bears the burden of proof in this discipline case. There is only one civil standard for the burden of proof which is on a balance of probabilities: CROA&DR 4500.

16. The IBEW alleged that CN failed to conduct a fair and impartial investigation and asked the arbitrator to declare the discipline null and void. On the merits, the IBEW put forward alternative positions, the main one of which argued that the facts provided no justification for any imposition of discipline.

17. The arbitrator dismisses the IBEW's argument that CN failed to conduct a fair and impartial investigation. CN provided Mr. Reid with the information on which it intended to rely, including the statement from Mr. Clark. CN asked Mr. Reid for his views on some of the rules and policies it believed were relevant.

18. CN's investigation was relatively summary, as evidenced by the 2-page statement (excluding the signature page). This does not make it unfair or partial. However, a summary investigation can make it tougher for an employer to meet its burden of proving just cause, especially if it disputes the employee's explanation for his actions.

19. On the merits, the IBEW noted that Mr. Reid had been forthright throughout his Statement when describing his obligations on June 26, 2017. As Mr. Reid noted in QA15, he believed he was not "performing work" which would render the track impassable or "putting on track" such as by using a HiRail.

20. In the IBEW's view, based on the rules and on existing practices as described by Mr. Mueller, Mr. Reid was on foot conducting visual inspections and was not working on the track.

21. While an arbitrator can take judicial notice of notorious facts, such as surfaces being slippery when wet, CN needed to prove why Mr. Reid's explanations ought not be accepted. A simple reference to various rules, without more, does not meet this burden.

22. CN had the burden of demonstrating on a balance of probabilities why Mr. Reid had an obligation to resolve a TOP conflict on June 26, 2017. Supervisor Clark may have believed this, but the only evidence before the arbitrator came from his brief written statement. That statement does not explain why Mr. Reid was wrong when he said he was not in conflict.

23. There is no dispute about the importance of safety rules and the need for employees to comply with them: SHP598.

24. But several allegations remained in dispute, as noted during Mr. Mueller's testimony, regarding whether Mr. Reid was crouching or doing more than visual inspections.

25. Mr. Mueller also disagreed that Mr. Reid's work as described "fouled the track". The arbitrator notes CN did not raise GEI 1.5 in Mr. Reid's Form 780, though it did refer to the concept in its December 13, 2017 grievance letter and to the specific rule in its Brief (E-1; CN Brief; Paragraph 20). CN also referred to GEI 9.3 for the first time in its Brief.

26. As the arbitrator mentioned in passing during the hearing about various recent cases, it is challenging when new facts first come to light at an expedited arbitration. Article 13.19 of the parties' collective agreement seems to assume that the parties have fully discussed all relevant facts, especially if a Joint Conference (Article 13.8) has been held.

27. Article 13.21 regarding the parties' right to present evidence seems to assume that any oral evidence will focus mainly on key contradictions. Otherwise, if the evidence presented raises new facts, then the parties might as well hold a traditional multi-day arbitration. Similarly, raising potentially new grounds for discipline can be problematic in any expedited arbitration process: CROA&DR 4628.

28. CN suggested there was a possible contradiction between Mr. Reid saying there was no conflict yet also taking the steps necessary to obtain TOPs. Mr. Mueller commented that the TOPs dealt with Mr. Reid driving his vehicle to other locations.

29. Ultimately, based on the record, the arbitrator can only discern an implicit disagreement on CN's part regarding Mr. Reid's explanation of his actions on June 26, 2017. In the face of these differing views, CN needed to demonstrate to the arbitrator why its position ought to be preferred.

30. As noted in CROA&DR 4603, it is not enough for an employer to reject an employee's explanation without presenting evidence or argument to support its position:

> 13. CP has the burden of proof for disciplinary matters. This involves demonstrating, on a balance of probabilities, that its evidence is to be preferred. There are two areas where CP did not meet this burden.
>
> 14. CP did not demonstrate on a balance of probabilities that Mr. Shewchuk failed to have a 3-point stance. CP said he did not; Mr. Shewchuk said he did.

> This contradiction in the evidence required something further from CP, whether via supplementary investigation or evidence at the hearing, to meet its evidentiary burden.
>
> 15. CP also did not demonstrate that employees protecting the point had to be located at the very front of the locomotive. The arbitrator could speculate that protecting the point requires a person to be able to see not only what is out front of the locomotive, but also what is directly down on the tracks, especially if travelling across a pedestrian crossing. Indeed, Mr. Shewchuk himself went to the nose on one of the four occasions.
>
> 16. But an arbitrator cannot speculate; a decision must be based on the evidence presented. CP did not subsequently rely on the rules to which Mr. Hill referred during his testimony during the investigation. The bulletin to which CP referred (Bulletin MBNO-098-15) does not expressly say that protecting the point in a yard requires an employee to be at the front of the nose:
>
> "For train crews working or operating in yards or industry tracks, all employees other than the Locomotive Engineer must be positioned outside of the cab of the Locomotive when the Locomotive is leading in the direction of travel".
>
> 17. While CP might consider the employee's positioning to be obvious, the TCRC contested that position. This required further evidence to convince the arbitrator of the requirement to be on the front of the nose.

31. Similarly, in this case, CN evidently did not agree with Mr. Reid's explanation since it later terminated his employment. But, other than referring to various rules in its Form 780 and in its Brief, CN did not demonstrate why Mr. Reid's position must be rejected, and the discipline upheld.

32. For example, in his statement, Mr. Reid explained why he felt certain rules to which CN referred did not apply to his situation. The IBEW during the grievance process and at the hearing argued that Mr. Reid was not operating a "track unit" or working as part of a gang for the purposes of certain rules.

33. To illustrate the point, CROR 854 and 856 read:

> 854. One Track Unit - Foreman Requirements
> Before acting under the authority of a TOP, a foreman in charge of a single track unit must;
> (a) read the TOP aloud to the employees accompanying the track unit; and

> (b) require those employees who hold a valid certificate of rules qualification to read and initial the TOP.
>
> …
>
> 856. Communication between Employees and Foremen
>
> An employee who has been made aware of the contents of the TOP must remind the foreman of the contents in sufficient time to ensure compliance.

34. Mr. Reid was not asked about rules 854 and 856 during his statement, though CN had alluded to them as part of the "evidence" (U-2; IBEW Exhibits; Tab 4 QA6). It is unclear on examining the text of these rules how they applied to Mr. Reid's specific situation.

35. CN did ask Mr. Reid about Rule 857 (E-1; CN Brief; Paragraph 26). He stated this rule (along with GEI 10.10) applied "to protect track units or on track work" (U-2; IBEW Exhibits; Tab 4 QA17).

36. The IBEW argued that Mr. Reid was not operating a track unit, such as a HiRail, on the day in question. It further suggested that the wording of the rules to which CN referred contemplated a foreman working with employees, as opposed to Mr. Reid's situation of working alone.

37. There may be competing interpretations of these rules and how they applied to Mr. Reid, but none were put before the arbitrator. The arbitrator has no evidentiary basis on which to dismiss Mr. Reid's position out of hand. Even if there were other interpretations, there is a difference between an employee's innocent error and a flaunting of safety rules.

38. The parties did not dispute that Mr. Reid followed the process under the Lone Worker Policy. He obtained two TOPs. When confronted, Mr. Reid told Mr. Clark he was not in conflict. Mr. Clark's statement does not explain why he thought Mr. Reid was in conflict. As mentioned above, Mr. Clark did not testify at the hearing.

39. During Mr. Reid's later investigation statement, he also indicated that some of the rules raised such as GEI 10.10, and for which he was later disciplined, applied to workers using track units like a HiRail. During his work, he did not use a HiRail.

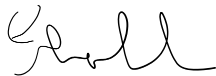
40. The record demonstrates that Mr. Reid took steps to comply with important safety rules. Maybe he was wrong in some way, but the evidence presented was insufficient to demonstrate this.

41. CN did not persuade the arbitrator to discount Mr. Reid's explanations. The rules on which CN relied included multiple references to "track units", and suggested employees were working as part of a gang. The arbitrator would need to know how these terms should be interpreted if Mr. Reid's comments were to be discounted.

42. The arbitrator orders CN to reinstate Mr. Reid in his employment without loss of seniority, remove the 20 demerits points and resulting dismissal from his record and compensate him for his losses.

43. The arbitrator remains seized to resolve any questions arising from this award.

Signed at Ottawa this 6th day of June 2018.



Graham J. Clarke