

**IN THE MATTER OF AN ARBITRATION UNDER THE *CANADA LABOUR CODE,*  
*RSC 1985, C L-2.***

**BETWEEN:**

**TEAMSTERS CANADA RAIL CONFERENCE (TCRC)**

**-and-**

**CANADIAN NATIONAL RAILWAY COMPANY (CN)**

**Discharge Grievance of Locomotive Engineer David Bashford**

**Arbitrator:** Graham J. Clarke

**Date:** February 4, 2022

**Appearances:**

**TCRC:**

D. Ellickson: Legal Counsel  
P. Boucher: General Chairman  
C. Wright: Senior Vice-General Chairman  
M. Kernaghan: Vice-General Chairman  
D. Bashford: Grievor

**CN:**

A. Borges: Manager, Labour Relations  
F. Daignault: Senior Manager, Labour Relations Montreal  
V. Paquet: Manager, Labour Relations Toronto  
S. Roch: Manager, Labour Relations  
V. Carreiro: Labour Relations, Montreal  
J. Sokolan: Engine Service Officer

Arbitration held via videoconference on January 26, 2022.

# Award

## INTRODUCTION

1. On January 26, 2022, the parties pleaded two unrelated termination grievances in a matter of a few hours. For both cases, they successfully drafted a Joint Statement of Issue (JSI) summarizing their detailed positions. They also exchanged their Briefs in advance of the hearing. This Award deals with the second of those cases involving the termination of Mr. Bashford<sup>1</sup>.

2. CN hired Mr. Bashford in November 1989; he qualified as a locomotive engineer (LE) in 2006. He had 31 years service and 55 demerit points at the time of the May 29, 2021 incident which led to his termination. On June 25, 2021, CN imposed 30 demerit points for a speeding violation on a Key Train. On July 5, 2021, CN discharged Mr. Bashford for “Accumulation of active demerits exceeding 60 (85 total active)”<sup>2</sup>.

3. The TCRC did not dispute the Key Train speeding violation but argued that Mr. Bashford’s dismissal was excessive and discriminatory. There were mitigating factors arising from the incident. In addition, the TCRC alleged that CN had discriminated against Mr. Bashford since it had demoted other employees to conductor roles in similar situations.

4. For the reasons which follow, the arbitrator has decided not to intervene to reduce the penalty. Mr. Bashford was already on the threshold of dismissal given his 55 demerits when the incident occurred. Just three months previously, CN had suspended him for speeding. Even if the arbitrator reduced the demerits for the serious Key Train speeding incident, Mr. Bashford still significantly exceeded the 60-point termination threshold in the Brown System.

## FACTS

5. On May 29, 2021, Mr. Bashford operated Key Train M31441-26 from Capreol to Toronto. The Key Train had 40 cars containing hazardous materials including copper, nickel, sulfuric acid and arsenic. Key Trains can travel at 50 mph but have a 35-mph

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<sup>1</sup> The first Award can be found here: [Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 5833](#)

<sup>2</sup> CN Exhibits, page 39/129

speed restriction in specified zones to protect the public from derailments and dangerous goods.

6. At 02:58, LE Bashford's train passed mile 57.36 of the Bala Subdivision at 42.8 mph. It should have been going no more than 35 mph in this special zone. The RTC (railway traffic control) Chief contacted LE Bashford<sup>3</sup>:

32 Q Mr. Bashford who and at what point were you and the Conductor Made aware you were operating over the 35 MPH Speed restriction though the key Zone as stated above?

A. I am not completely sure, as I believe as we were starting in the siding at Pefferlaw and were contacted by the RTC Chief. (sic).

7. Mr. Bashford did not deny speeding, which he acknowledged was an error and offered this explanation in this Statement<sup>4</sup>:

27.Q. Mr. Bashford, please explain in your own words why train M31441 26 exceeded the Key Train zone speed restriction of 35mph?

A. At that point in our trip we had approximately 20 minutes left to get in gear at pefferlaw, cut the crossing and tie the train down. I was fully aware of the Key Train zone as demonstrated between mile 276-245 Bala sub. While approaching M58 zone I was focusing on the hot Box and the time we had left to clear the main. I was further South than I thought I was and as a result put a brake light on and did not get down to 35 MPH speed restriction.

28. Q. Mr. Bashford in question 27 you stated you had "20 minutes left to get in clear at Pefferlaw and cut crossing". Does this give you the authority to speed?

A. My answer was not to use the time we had left to speed, it was to set the stage to show all the different things that were occurring at that time. There is nothing that I would use to justify speeding. It was an error.

...

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

A. In my 31 years I have never been disciplined in Special Dangerous or Key train zones. In fact I train ESE's to come in at lower speed which allows room in case speed increases. I am ashamed that I missed where it started, and in future will do all I can to fully comply with these speeds. (sic)

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<sup>3</sup> Employee Statement, TCRC Brief, Tab 4

<sup>4</sup> Ibid.

8. CN imposed 30 demerit points for the May 29, 2021 incident which brought Mr. Bashford's total active demerits to 85. This resulted in Mr. Bashford's dismissal under the parties' demerit system<sup>5</sup>.

## ANALYSIS AND DECISION

9. The arbitrator must examine two issues:

1. Did the May 29, 2021 Key Train incident warrant discipline? and
2. Should the arbitrator substitute another penalty for the dismissal and reinstate Mr. Bashford?

### Did the May 29, 2021 Key Train incident warrant discipline?

10. The parties do not dispute that Mr. Bashford operated his Key Train in excess of the permissible speed. The train operated at 42 mph despite being restricted to 35 mph. The Chief RTC advised Mr. Bashford "that he was in excess of the 35 mph Key Train Speed Restriction"<sup>6</sup>.

11. In [CROA 4485](#), Arbitrator Sims described the concept of a "Key Train":

Both Mr. Bartley and Mr. Spain knew the concepts and rules governing key cars and "special dangerous zones". However, it is useful to recap them briefly. **The key train concept was introduced following the Lac-Megantic tragedy in 2013. Trains are designated as Key Trains when they involve tank cars loaded with poisonous or toxic hazards or ammonia, spent nuclear fuel or high level radio active waste or twenty or more loaded tank cars containing crude oil which include one of the older style cars.** Before the key train policies came into force, trains carrying dangerous commodities were only limited to 35 MPH when there was a high density population along the right of way. Otherwise, they were able to travel at regular track speeds. **Now, there is a universal 50 MPH limit for key trains, reduced to 35 MPH in these "special dangerous zones".**

(Emphasis added)

12. The TCRC highlighted that Mr. Bashford exceeded the speed limit for only 1 mile during a period of 1 minute and 30 seconds. However, given the fact that the RTC Chief had advised Mr. Bashford of the speeding, the length of time it took to slow the train down

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<sup>5</sup> Form 780, CN Exhibits, page 39/129

<sup>6</sup> JSI, TCRC Brief, Tab 1

does not lessen the seriousness of the situation. The TCRC's Brief suggested that Mr. Bashford was already reducing the speed when the RTC contacted him<sup>7</sup>.

13. Given the importance of safety, CN satisfied the arbitrator that it had grounds to discipline Mr. Bashford for speeding when operating a Key Train. The main issue in this case is what consequences does that conduct attract given the Brown System the parties follow and Mr. Bashford's unenviable discipline record.

### **Should the arbitrator substitute another penalty for the dismissal and reinstate Mr. Bashford?**

14. The parties use the "Brown System", which has a 60-demerit point threshold for termination, to add further precision to the concept of progressive discipline. The arbitrator commented on that system in [CROA 4600](#):

14. The parties follow the Brown System, which seeks to add additional clarity to the progressive discipline process. In CROA&DR 3592, Arbitrator Picher described the Brown System:

As stressed by the Company's representative, the case at hand truly tests the meaning of progressive discipline and the application of the Brown System. **That system is intended to give the employee, without the imposition of suspensions, a basis to understand the severity of any infractions which he or she may commit and the clear understanding of the vulnerability of his or her employment as the demerits on the employee's record accumulate towards the fatal total of sixty.**

15. The Brown System's use of demerit points provides progressive discipline guidance to employees, their trade unions, employers, as well as to CROA arbitrators. The latter group, of course, as in any progressive discipline system, retains the discretion to substitute a different penalty.  
(Emphasis added)

15. In some situations, the facts may persuade an arbitrator to substitute a suspension for the demerits which took an employee over the 60-point threshold<sup>8</sup>:

11. The arbitrator concludes that CN had grounds to discipline Mr. Norman for missing two calls without proper reason. However, the TCRC persuaded the arbitrator to intervene and substitute a suspension for the dismissal. There are several reasons for this.

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<sup>7</sup> TCRC Brief, paragraph 14

<sup>8</sup> [CROA 4627](#). See also [CROA 4498](#).

16. Given those circumstances, the arbitrator will remove the 20-demerit points CN imposed for the missed calls and substitute a 30-day suspension. CN can schedule the dates for this suspension based on current operational needs.

16. However, an employee's lengthy disciplinary record may lead to the opposite conclusion<sup>9</sup>. In [CROA 4600](#), the arbitrator commented:

30. Given Mr. Kettela's 49 demerit points and his previous suspensions, CN persuaded the arbitrator that the Brown System should apply as intended in this case. The Rule 42 violation, which was a serious offence, albeit unintentional, placed Mr. Kettela significantly beyond the 60 demerit points which the parties have agreed constitutes the threshold for termination.

17. For multiple reasons, CN urged the arbitrator not to intervene. Speeding always merits discipline but speeding with a Key Train constitutes an aggravating factor. Mr. Bashford's active discipline history already had 55 demerits when the May 29, 2021 Key Train speeding incident occurred<sup>10</sup>. He had already been suspended in February 2021 for a different speeding incident while still sitting at 55 demerits.

18. CN noted Mr. Bashford's cumulative discipline history had 344 demerit points, 3 suspensions and 2 written reprimands, a record far worse than any other long service employee in the TCRC's bargaining unit<sup>11</sup>.

19. The TCRC highlighted not only Mr. Bashford's 31 years of service, but also the fact that he did not attempt to deny his responsibility. He admitted his error in judgment since he thought he was further north and still had time to comply with the speed limits<sup>12</sup>. Mr. Bashford also admitted he was "ashamed" that he missed the Key Train zone<sup>13</sup>. In addition, the TCRC noted that 220 demerits of the 344 occurred over 10 years before the current incident.

20. The TCRC suggested that CN discriminated against Mr. Bashford since in other situations it had demoted LEs to conductor positions for a period rather than terminate them<sup>14</sup>. The documentation provided only included other employees' discipline records. For one of them (Alvi) the arbitrator notes that an agreement between the parties led to

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<sup>9</sup> See, for example, [CROA 4492](#).

<sup>10</sup> TCRC Brief, Tab 3

<sup>11</sup> CN Brief, paragraphs 84-85.

<sup>12</sup> TCRC Brief, Tab 4 (Employee Statement), QA 38

<sup>13</sup> Ibid. QA 41

<sup>14</sup> TCRC Brief, Tabs 9-11.

that result. While the parties may negotiate such arrangements, the TCRC did not persuade the arbitrator that CN had waived its right to apply the Brown System.

21. As mentioned, this case is not so much about the speeding Key Train incident. The TCRC might have persuaded the arbitrator to lower the 30 demerit points. But, given the gravity of the incident, Mr. Bashford would still have far exceeded the 60-demerit threshold.

22. Should the arbitrator apply the Brown System the parties use or intervene as occurred in [CROA 4627](#)?

23. In [CROA 3314](#), Arbitrator Picher noted:

If employees are to have the advantage of a system of progressive discipline, so must employers.

24. In [CROA 4485](#), *supra*, a case involving the same run, a speeding Key Train, and a grievor with 31 years of service and 49 demerit points, Arbitrator Sims concluded<sup>15</sup>:

I have weighed the fact that there was no injury or accident here, that is Mr. Spain's first speeding infraction, and that he has in the past had extended periods without discipline. However, against this must be weighed the grievor's very poor record and particularly the "second chances" he had already been afforded. **It is true that the aim of the Brown system is primarily corrective. However, there comes a point where the repeated reduction in penalties to avoid the system's ultimate sanction only serves to undermine the system's preventative aspects. This is not a situation where there are sufficient mitigating factors to, yet again, relieve Mr. Spain of the consequences of his failure to take heed of prior warnings about the tenuous nature of his employment. This is not a technical violation. Significant speeding, in a special dangerous zone, when operating a key train, is a serious matter. Considering all these factors the grievance must regretfully be dismissed.**

25. In Mr. Bashford's situation, his 55 demerit points, as well as his far higher than average disciplinary record, militate against the arbitrator intervening. Since 2015, Mr. Bashford had his demerits reduced twice due to "twelve consecutive months of active

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<sup>15</sup> The arbitrator also considered [CROA 3744](#) put forward by the TCRC, but that three paragraph award did not provide the same detailed context one finds in CROA 4485 and did not involve a Key Train.

service free from discipline”: 2015/11/29 (-10 demerit points) and 2019/08/12 (-20 demerit points)<sup>16</sup>.

26. However, since 2017, his disciplinary record included 7 new events (not including the May 29, 2021 Key Train speeding incident):

Date	Discipline	Reason
2021/02/19	Suspension (3 days)	Exceeding speed limit on a speed restricted car
2020/07/13	20 Demerits	Failure to comply with GOI section 5.2 B(v) and 5.3 A
2018/08/17	20 Demerits	Running through the Halton/Green Switch
2017/12/08	Suspension (2 days)	Non-compliant with a Hot Box safety engagement test
2017/07/07	25 demerits	Non-compliance to a Hotbox Malfunction Safety Engagement test
2017/05/18	10 Demerits	Non-compliance to a hotbox efficiency test
2017/04/21	Written reprimand	run through switch

27. As noted above, CN had already spared Mr. Bashford the consequences of the Brown System just three months previously when it suspended him for speeding. Neither was the “culminating incident” minor but instead involved a Key Train speeding in a special dangerous zone.

28. The arbitrator has concluded that these circumstances do not warrant intervention.

## **DISPOSITION**

29. Mr. Bashford had 55 demerit points when the Key Train speeding incident occurred. Just a few months prior, he had received a suspension for a speeding incident rather than the demerit points which would have put him over the 60-demerit limit. While the TCRC’s submission might have persuaded the arbitrator to reduce the number of demerits he received, Mr. Bashford’s total would still have far exceeded the 60-point threshold.

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<sup>16</sup> TCRC Exhibits, Tab 3.



30. Mr. Bashford's service of 31 years and candour after the incident were insufficient, given all the circumstances, to avoid the application of the Brown System the parties use.

31. The arbitrator dismisses the grievance.

SIGNED at Ottawa this 4<sup>th</sup> day of February 2022.

A handwritten signature in black ink, appearing to read 'G. Clarke', written in a cursive style.

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Graham J. Clarke  
Arbitrator