

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)

Grievance contesting 25 demerit points – Conductor M. Vigario

Arbitrator: Graham J. Clarke

Date: October 18, 2022

Appearances:

TCRC (CTY):

K. Stuebing: Legal Counsel

J. Lennie: General Chairperson, Killaloe

G. Gower: Vice General Chairperson – Ottawa

E. Page: Vice General Chairperson - Burlington

R. Donegan: General Chairperson, Saskatoon

CN:

A. Borges: Manager Labour Relations - Toronto

M. Boyer: Senior Manager, Labour Relations - Montreal

L. Green: Assistant Superintendent Transportation – Southern Ontario Zone

V. Carreiro: Junior Associate, Labour Relations - Montreal

R. Singh: Manager Labour Relations – Surrey, BC

Arbitration held via videoconference on October 13, 2022.

Award

Background

1. In their November 26, 2019, Memorandum of Settlement, the parties established a “Supplemental Arbitration Process” (SAP). The SAP required the parties to follow the rules and procedures of the Canadian Railway Office of Arbitration & Dispute Resolution¹ (CROA). The arbitrator agreed to provide 4 hearing dates in 2022 on the condition that the parties would plead no more than 2 cases per day².
2. On November 9, 2021, an improperly lined switch led to a derailment. CN assessed the conductor, Mr. Vigario, 25 demerit points for his role in the incident.
3. The TCRC argued that CN failed to conduct a fair and impartial investigation. On the merits, the TCRC argued that 25 demerit points was excessive for a first incident and noted that Mr. Vigario had only recently qualified as a conductor.
4. For the reasons which follow, and given the arbitral jurisprudence, the arbitrator has decided to reduce the demerit points from 25 to 15.

Facts

5. The Record the parties placed before the arbitrator includes their written Briefs and Exhibits. Given those extensive materials, the arbitrator will only briefly summarize the facts and issues.
6. CN hired Mr. Vigario on January 18, 2021. He qualified as a conductor on September 29, 2021 and at all material times held the status of a probationary employee³.
7. On November 9, 2021, Mr. Vigario, as well as the locomotive engineer and the brakeman, received a safety briefing which included being advised that an earlier crew had run through the east cross over switch at Clarkson Yard. Mr. Vigario and his two colleagues crossed that switch successfully on two occasions. But when they crossed it a third time, the train derailed. Mr. Vigario admitted⁴ that he had failed to use “point and

¹ Croa.com

² Hearing Notice dated May 7, 2021.

³ Collective agreement, article 58.1.

⁴ Investigation, QA 24; Ex-4; TCRC Exhibits; Page 52 of 205.

call”, despite being required to do so by Canadian Rail Operating Rules (CROR) Rule 104⁵.

8. On November 24, 2021, CN assessed Mr. Vigario 25 demerits for:

[F]ailure to comply with CROR 104, specifically lining your movement for the incorrect route, resulting damage to the east end crossover switch at Clarkson yard which lead to the derailment of CN4138 while on assignment L55432-09, on November 9th, 2021⁶.

Analysis

9. The arbitrator must consider whether CN conducted a fair investigation and whether to reduce the 25-demerit penalty.

Did CN conduct a fair and impartial investigation?

10. The arbitrator summarily dismisses the TCRC’s objections.

11. The TCRC argued that CN’s Notice to Appear was too vague because it “failed to identify a single CROR Rule, GOI provision or special instruction”⁷. Mr. Vigario’s November 11, 2021 Notice to Appear⁸ stated in part:

You are required to attend an investigation in order to provide a Formal Employee Statement in connection with Your alleged involvement in the derailment of CN 4138 will working on L55432 09 at Clarkson Yard, Oakville Sub.

12. This Notice clearly identified for Mr. Vigario the derailment about which CN would be carrying out an investigation. He also received further information at the beginning of the investigation along with proper time to review it⁹. This is not a case of Mr. Vigario remaining in the dark about why CN wanted to interview him.

⁵ [Rule 104](#)

⁶ Form 780, CN Ex-2, Page 48 of 141.

⁷ Ex-3, TCRC Brief; Paragraphs 54-56.

⁸ Ex-2; CN Exhibits; Page 87 of 141.

⁹ QA 9-10; Ex-4; TCRC Exhibits; Page 50 of 205.

13. The TCRC further suggested that the Investigating Officer (IO) offered evidence to supplement the record¹⁰. However, in QA18 when the IO asked, “Please describe in your own words, the circumstances leading up to the derailment of locomotive CN 4138 on November 09, 2021”, the answer was “Refer to the employee statements”. The arbitrator sees nothing wrong, if employees decide not to take advantage of the opportunity to put their full position on the Record, for an IO to read in parts of their statements.

14. Moreover, the TCRC did not object at the time and never suggested that the IO had incorporated incorrect information into the Record.

15. CN conducted a fair and impartial investigation.

Should the arbitrator intervene and modify the penalty of 25 demerit points?

16. CN clearly demonstrated that it had grounds to impose discipline.

17. During its argument, the TCRC amended its Brief¹¹ to clarify that it was no longer contesting that CN had cause to impose some discipline. However, it argued that 25 demerits for a first offence went far beyond the appropriate penalty for running through a switch.

18. The arbitrator agrees with the TCRC. The imposition of 25 demerits for a recently qualified conductor’s first offence appears excessive.

19. It is not enough to rely on previous cases which may have awarded a penalty of 25 demerits for running a switch. The parties must consider the context of each case they put forward since the underlying facts remain crucial to any analysis.

20. CN relied on [CROA 3654](#) to justify the imposition of 25 demerits for a conductor on a train which derailed. However, Arbitrator Moreau emphasized that the conductor in that case was “acting as yard foreman”:

The employees working this assignment included the grievor, who was acting as yard foreman, the yard helper and the locomotive engineer.

¹⁰ See, for example, QA 18, 29 and 30; Ex-4; TCRC Exhibits; Pages 51-52 of 205.

¹¹ Ex-3 TCRC Brief; Paragraphs 12 & 21.

...

In the end, it was the grievor who had the overall charge of the crew. As such, the penalty for the infraction should reflect his position of authority.

On that basis, I believe the penalty imposed on the grievor of twenty-five demerits was not out of line given that the ultimate responsibility for the assignment fell on the shoulders of the grievor.

(Emphasis added)

21. At the material times, Mr. Vigario remained a probationary employee. He did not have any authority akin to that of a “yard foreman”.

22. CN further relied on [CROA 3027](#), a two-paragraph award which supported the imposition of 20 demerit points for a CROR 104 violation which resulted in \$140,000 of damage.

23. No one now disputes that Mr. Vigario deserved some discipline. But the cases CN put forward to support the discipline it assessed do not satisfy the arbitrator of the reasonableness of assessing 25 demerits for a first offence.

24. Instead, for the following reasons, the arbitrator has decided to reduce the penalty to 15 demerit points.

25. First, the arbitrator in [CROA 4549](#) concluded that a conductor deserved 15 demerit points for running through a switch and causing two cars to derail. The grievor’s candour was one of the elements the arbitrator considered in reducing the penalty to 15 demerit points. Mr. Vigario, who accepted that he was in charge of the movement, did not attempt to deny his errors which led to the derailment¹².

26. Second, the TCRC’s cases support a lower penalty than the 25 demerits CN assessed to Mr. Vigario. While there is no standard number, different awards have imposed demerits in the 10-20 range and are always based on the specific facts of the case.

¹² QA 24 & 35; Ex-2 TCRC Exhibits; Pages 51-52 of 205.

27. For example, Arbitrator Albertyn in [CROA 4411B](#) upheld CN's assessment of 15 demerit points for a train engineer who had run through a switch and damaged it:

9. Given that there is no other reasonable explanation for how the switch was damaged, like the Company, I conclude, on a balance of the probabilities, that the Grievor's train run-through of the switch is likely what caused it to be damaged and that the Grievor is responsible for that damage. I see no reason to interfere with the Company's assessment of discipline of fifteen demerits, which is within the range of reasonable responses (see CROA&DR 2775).

28. Arbitrator Albertyn referred to [CROA 2775](#) in support of his award. In CROA 2775, Arbitrator Picher refused to intervene in the assessment of 20 demerits for a run through switch for a short-term employee who had "amassed a remarkably negative disciplinary record within his relatively short period of employment of less than one year":

To put it simply, Mr. Williams amassed a remarkably negative disciplinary record within his relatively short period of employment of less than one year. While the Council seeks his reinstatement on compassionate grounds, there are no compelling mitigating factors advanced which would support such an approach. Neither long service nor good prior performance can be advanced in support of Mr. Williams' grievance. While it may be that he was no longer a probationary employee at the time of his discharge, a board of arbitration must nevertheless respect the concerns of an employer which is faced with so negative a record of both job performance and attendance at work in the very first months of an employee's service. **Regrettably, I must conclude that this is not a case for the substitution of penalty, largely by reason of the grievor's limited service. Mr. Williams has demonstrated that he is not capable of honouring the most fundamental obligation of his employment contract, which is to be at work when scheduled. He was also deserving of discipline for his carelessness in allowing, for a second time, the run-through of a switch, when his prior disciplinary record was already in a highly precarious state. For all of these reasons the grievance is dismissed.**

(Emphasis added)

29. Mr. Vigario's situation clearly differs from that of the employee in CROA 2775 given that the events of November 9, 2021 led to his first disciplinary offence.

30. In short, Mr. Vigario's conduct, while deserving of discipline, does not support the awarding of 25 demerits for a first offence. CN did not satisfy the arbitrator that the arbitral jurisprudence in the railway industry supports a penalty of that magnitude when considering the facts of this case.

Disposition

31. The arbitrator orders CN to reduce the demerit points for the November 9, 2021 incident from 25 to 15 and remains seized for any issues arising out of this award.

SIGNED at Ottawa this 18th day of October 2022.

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

Graham J. Clarke
Arbitrator