

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*  
*1985, c L-2.*

**BETWEEN:**

**Teamsters Canada Rail Conference (CTY-West)**

**(TCRC)**

**-and-**

**Canadian National Railway Company**

**(CN)**

**Conductor Christopher Ferguson – Discharge (Rule 42 violation)**

**Arbitrator:** Graham J. Clarke  
**Date:** December 6, 2022

**Appearances:**

**TCRC:**

K. Stuebing: Legal Counsel  
R. Donegan: General Chairperson TCRC-CTY West, Saskatoon  
J. Thorbjornsen: Vice General Chairperson TCRC-CTY West, Saskatoon  
C. Ferguson: Grievor, Grand Cache, AB

**CN:**

R. Singh: Manager, Labour Relations, BC  
V. Paquet: Senior Manager, Labour Relations  
K. Mclaughlin: Superintendent, BC North  
A. Bacchus: Manager, Labour Relations, Yellowhead  
K. Macdonell: Senior Manager, Labour Relations

Arbitration held via videoconference on November 22, 2022.

# Award

## BACKGROUND

1. The parties included a Letter of Understanding in their November 26, 2019, Memorandum of Settlement which established a “Supplemental Arbitration Process” (SAP). The SAP obliged the parties to follow the rules and procedures of the Canadian Railway Office of Arbitration & Dispute Resolution<sup>1</sup> (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 day<sup>2</sup>.

2. CN hired Mr. Ferguson on March 26, 2018. On December 21, 2020, CN terminated Mr. Ferguson’s, and a locomotive engineer’s, employment for violating CROR<sup>3</sup> 42 (Rule 42), a rule which requires a foreman’s permission before a train may pass through “planned protection”<sup>4</sup>.

3. For ease of reference, [CROR 42](#) reads:

42. Planned Protection

(a) Rule 42 signals must not be in place more than 30 minutes prior to or after the times stated in the GBO<sup>5</sup> unless provided for in the GBO.

**(b) A movement in possession of the Form Y must not proceed beyond the red signal located at the identifiable location stated in the GBO, enter the track limits stated in the GBO, or make a reverse movement within such track limits until instructions have been received from the foreman named in the GBO.**

When a specific track is to be used, instructions from the foreman must specify the track upon which the instructions apply.

(c) The instructions must be repeated to, and acknowledged by, the foreman named in the GBO before being acted upon.

(d) When a signalled turnout is within two miles of Rule 42 protection which does not apply on all tracks, every movement must approach such location

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<sup>1</sup> [Memorandum of Agreement Establishing the CROA&DR](#)

<sup>2</sup> May 7, 2021 Hearing Notice.

<sup>3</sup> [Canadian Rail Operating Rules](#) from Transport Canada

<sup>4</sup> Also described as the “foreman’s limits” and “track limits” in the parties’ Record.

<sup>5</sup> GBO: General Bulletin Orders that train crews receive.

prepared to comply with the requirements of Rule 42 until it is known which route is to be used.

(Emphasis added)

4. The parties' Joint Statement of Issue<sup>6</sup> (JSI) described the Rule 42 incident:

On December 7, 2020, the Grievor worked as Conductor on train U76051-06 from Smithers to Endako. During the tour of duty, the Grievor's train entered a foreman's limits without proper authority. The Grievor subsequently obtained authorisation from the foreman, but did not stop the movement, notify the RTC, or transmit an emergency broadcast. The Company conducted a formal investigation and assessed a disciplinary discharge.

5. CN justified Mr. Ferguson's termination because he violated, *inter alia*, Rule 42, one of the cardinal rules in the railway industry. Following the violation, a failure to stop and advise the Rail Traffic Controller (RTC) of the incident aggravated the matter. Further, Mr. Ferguson was a short service employee and had had, just three months before, a CROR 115 violation involving a derailment.

6. The TCRC, while not contesting the seriousness of the Rule 42 violation, noted that the foreman had not placed flags at the appropriate location, something which would have provided an additional warning to Mr. Ferguson about the planned protection. Similarly, the TCRC alleged that CN should have followed progressive discipline, especially given Mr. Ferguson's expression of remorse.

7. For the reasons which follow, the arbitrator has decided not to intervene in CN's decision regarding the proper penalty. The parties' jurisprudence is consistent that a Rule 42 violation does not automatically lead to termination. However, Mr. Ferguson's failure to stop and to advise the RTC significantly aggravated the seriousness of the matter.

## CHRONOLOGY OF FACTS

8. **March 26, 2018:** CN hired Mr. Ferguson.

9. **September 29, 2020:** CN imposed 15 demerit points on Mr. Ferguson for non-compliance with CROR 115 which resulted in a derailment. This was the only "active

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<sup>6</sup> Ex-1; Tab 1

discipline” on his disciplinary record<sup>7</sup>. Mr. Ferguson’s “discipline history” contained a total of 30 demerit points, but 15 earlier points had been removed on August 15, 2020 due to twelve consecutive months of active service free from discipline.

10. **December 7, 2020** at 08:34 am approx: Mr. Ferguson’s train, train 760 CN 8102, passed through Foreman Torres’ planned protection for miles 87 to 85 at 40 mph. Mr. Ferguson contacted Foreman Torres for permission only after passing through his limits. The RTC later contacted Mr. Ferguson’s train when it had reached mile 55.5 and instructed the crew to secure the train and wait for a taxi to bring them back to Smithers<sup>8</sup>.

11. **December 7, 2020** at 10:12 am: Foreman Torres by email described the Rule 42 incident<sup>9</sup>:

Train 760 CN 8102 east did not call me until he was already passed mile 85 and was through my limits. I was waiting at crossing mile 85.2 for the 198 and 760 to go by so I could get a follow up TOP to put up my flags. 198 Cn 8834 called me before 8 and I cleared 198 through my limits at 0747. After that I called RTC for a follow up on the 198 then she advised me to wait for 760. I was waiting at the same 85.2 crossing when I heard the bell of the crossing start to go and see the CN 8102 go passed me, then I hear them call out mile 85 no restrictions. Immediately after the one train crew calls this I think they realized they were in my limits and then they called me for instructions through my limits while the train is going by me and is currently already in my limits at 08:34. At this point I gave them instructions through my limits despite them already being in my limits and then I proceeded to call my superiors to find out what my next steps should be<sup>10</sup>.

12. **December 10, 2020**: CN conducted Mr. Ferguson’s investigation<sup>11</sup>. The issue of missing flags arose:

25.Q. Mr. Ferguson, did you see flags at either locations stated in the 2 previous questions?

A. No I did not.

26.Q. Mr. Ferguson, are you familiar with Rule 44 a.? “Which reads “in the absence of any of the signals prescribed by Rule 42, between the times stated in a Form Y, a movement must be governed as though the signals are properly

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<sup>7</sup> Ex-2; Tab 2

<sup>8</sup> Ex-3; TCRC Brief; paragraphs 24-26.

<sup>9</sup> Ex-2; Tab 9

<sup>10</sup> In this award, the arbitrator will cite extracts verbatim and will not edit typos.

<sup>11</sup> Ex-2; Tab 12; Page 137/192.

placed. Such condition must be communicated to the RTC as quickly as possible.”

A. Yes I am.

27.Q. Mr. Ferguson, did you or Mr. Maurer make any attempt prior to contacting to Foreman Torres, call the RTC about the missing flags.

A. No.

28.Q. Mr. Ferguson, Why?

A. We were on the radio with the RTC at the same time as we went by the flag locations. We did not realize the flags were missing or we would have stopped or contacted the Foreman or told the RTC they were not up.

13. Mr. Ferguson did not dispute entering Foreman Torres’ “planned protection” at 40 MPH:

29.Q. Mr. Ferguson, in your statement you stated you did not realize until MP 85 that you had entered Foremen Torres 42 limits MP 87 to MP 85? Is this correct?

A.: That’s correct.

30.Q: Mr. Ferguson, according to the DL from the CN 8102 your train traveled through Foreman Torres limits at 40 MPH and the first attempt to slow your train was at 84.12 at 0833:04 where the LE throttle off and went into DB. Do agree with this information

A. Yes

14. Mr. Ferguson then explained why he did not stop his train or contact the RTC and later expressed remorse<sup>12</sup>:

33.Q. Mr. Ferguson, explain why you did not stop your train or tell your engineer to stop once you realized you were in Torres Limits?

A. I was in shock and disbelief, the train kept on rolling and I was going over what had just happened in my mind. Mentally knowing I had got clearance and knowing that was not enough. The gravity of the situation that just occurred hit me like a ton of bricks.

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<sup>12</sup> See QA37, Ex-2; Tab 2; page 140/192.

35. Q.: Mr. Ferguson, explain why you or Mr. Maurer, did not do an emergency call to the RTC and explain you entered and proceeded through Foreman Torres' limits without authority?

A. Foreman Torres cleared us through his limits, the headend of the train was east of Mile 85 and as said in question 33, I was in disbelief that this just happened.

15. **December 21, 2020:** CN's Form 780 discharged Mr. Ferguson for the following reasons<sup>13</sup>:

Violations of CROR Rule 42 and failing to report, 44a, CROR General Notice, General Rule A, CROR 34, CROR 125 while working U76051-06 on December 7th, 2020. All time out of service a suspension without pay or benefits.

## **PARTIES' POSITIONS**

### **CN**

16. CN argued that Mr. Ferguson had violated Rule 42, an acknowledged cardinal rule, by proceeding through the planned protection at 40 MPH. The planned protection covered the track between miles 87 and 85. Mr. Ferguson's GBO had identified the location of the planned protection. Rule 42 required that Mr. Ferguson obtain explicit permission from the foreman before entering the planned protection.

17. The absence of flags was immaterial since the crew, who knew where any flags should be, still had to comply with their Rule 42 obligations: CROR 44(a)<sup>14</sup>.

18. CN highlighted in its Brief that, despite violating Rule 42, Mr. Ferguson also failed to stop and advise the RTC as required under CROR 34 and 125:

49. To be clear, had he complied with his obligations, he would have had to bring his train to a stop and initiate an emergency broadcast, as per CROR 125, over the air waves and to the RTC, which would have brought the violation to light.

...

52. What the investigation discloses is that the Grievor fully understood his obligations under the rules, including what to do both when the flags were not in place and when he operated into the Foreman's limits without authority. His

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<sup>13</sup> Ex-4; TCRC Exhibits; Tab 7

<sup>14</sup> Ex-2; Tab 12; QA26

claim that he was ultimately given permission from the Foreman is not mitigation, as his actions clearly demonstrate the motivation was to avoid reporting it.

19. Given those circumstances, Mr. Ferguson's short service and discipline record, CN argued that the facts did not justify the arbitrator intervening to modify the penalty it imposed.

## **TCRC**

20. The TCRC did not minimize the seriousness of the incident<sup>15</sup>. However, given the lack of damage, it argued that the penalty of outright termination, even for a cardinal rule violation, was excessive. Certain mitigating factors existed, including the fact that Mr. Ferguson had been distracted by an RTC call and the warning flags had been missing as well.

21. The TCRC noted that while Rule 42 violations are very serious, they do not justify automatic termination unless aggravating factors exist. The TCRC noted that the arbitrator in [CROA 4600](#) had reduced a 40-demerit penalty to 30 demerits for a Rule 42 violation.

22. The TCRC highlighted that a 30-demerit point penalty would have brought Mr. Ferguson to a total of 45, still appreciably below the 60-point threshold required for termination.

23. The TCRC urged the arbitrator to apply CROA case law and not the unilaterally created and applied "Life Critical Rules" which CN had recently introduced. The TCRC further highlighted Mr. Ferguson's candour in accepting responsibility for the incident.

## **ANALYSIS AND DECISION**

24. Railway jurisprudence has identified certain cardinal rules. They involve safety and their violation could lead to termination regardless of an employee's demerit point level. Rule 42 exists to protect CN employees and contractors working on the tracks. Trains must not travel through the planned protection without first obtaining the foreman's permission.

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<sup>15</sup> Ex-3; TCRC Brief; paragraph 48

25. For the following reasons, CN has persuaded the arbitrator not to intervene and substitute a different penalty.

26. First, the arbitrator agrees with the TCRC that, absent aggravating circumstances<sup>16</sup>, significant demerits and/or a suspension generally constitutes the appropriate penalty for a Rule 42 violation: [CROA 4600](#). But as that award illustrates, it is the specific facts in each case which determine the result.

27. In CROA 4600, the employee violated Rule 42, but immediately stopped and contacted the conductor and the RTC. However, since the employee already had 49 demerit points, and several suspensions, a demerit point reduction from 40 to 30 would still leave him well over the 60-point threshold under the Brown system. The arbitrator further declined to substitute a suspension given that the employer had already imposed multiple suspensions rather than demerit points. Those measures had already avoided an earlier termination due to demerit points.

28. Second, Mr. Ferguson had under three years service. Arbitrators have lessened discipline in multiple cases involving Rule 42 violations for employees with lengthy service. For example, in [CROA 2377](#), arbitrator Picher took this factor into consideration for a case where a crew with significant seniority violated Rule 42 by going 3.5 miles into the working limits:

The material before the Arbitrator establishes, beyond controversy, that Locomotive Engineers Vickery and Grieve were responsible for a serious rules infraction, in their failure to observe CROR 309(b), by penetrating some three and one-half miles into the working limits of Work Extra TU 50471 on September 1, 1992.

In the Arbitrator's view, the only issue of substance is the appropriateness of the penalty. **On a review of the facts, and of sanctions imposed in similar circumstances, I am satisfied that the assessment of thirty demerits, coupled with the suspension already assessed, is a more appropriate measure of discipline in the circumstances. In coming to that conclusion the Arbitrator gives considerable weight to the length and quality of the prior service of both grievors.** The Arbitrator therefore directs that the grievors' records be amended to reflect the assessment of thirty demerits, with the time out of service from September 1 to September 15, 1992 to count as a suspension on their records.

(Emphasis added)

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<sup>16</sup> [CROA 2356](#)



29. However, the opposite result may occur for cases involving short service employees, as Arbitrator Picher noted in [CROA 2021](#):

For all of the foregoing reasons the Arbitrator can find no responsible basis on which to allow either of the grievances. Both grievors are relatively junior employees whose deliberate acts of negligence and recklessness gravely imperilled their own lives, the lives of their fellow crew members, the crew of the oncoming movement as well as the equipment of the Company and the freight of its customers. Their service and records are not comparable to those of the long service engineman who was reinstated on compassionate grounds, and I can see no justification for a reduction of the penalty of discharge in the circumstances.

30. CROA 2021 did not involve Rule 42, but it did involve a rule Arbitrator Picher described as “among the most serious of rules infractions” (UCOR Rule 292 at the time).

31. Third, while an arbitrator can consider distractions, as Arbitrator Picher did in [CROA 2588](#), the RTC call to which Mr. Ferguson referred appeared to end at least a mile before Foreman Torres’ planned protection<sup>17</sup>. In other words, the two events did not occur simultaneously. Moreover, an RTC call appears far more routine during the operation of a train than the third-party distractions which persuaded Arbitrator Picher to modify the penalty in CROA 2588:

**In the case at hand, however, there are certain mitigating factors to be considered.** As noted above, the territory in question requires the undivided attention of the crew because of its complexity. **On the day in question Locomotive Engineer Munro and Conductor A.L. Sproule were accompanied in the cab by Manager of Train and Engine Service M.R. Oakley.** It is common ground that Mr. Oakley was new to the territory as a supervisor, and was arguably unfit for duty, having worked with little or no rest for some thirty hours. Mr. Oakley’s presence in the cab caused the brakeperson, whose task is normally to ride in the cab and call restriction and clearance reminders, to be moved to a position in the third locomotive unit. **Unfortunately, during the course of the trip Mr. Oakley engaged in unnecessary conversation with the crew members, questioning them about the efficiency of their switching moves and operations en route. While there is some controversy about this aspect of the evidence, the Arbitrator is satisfied that a degree of argument ensued between Mr. Oakley and Conductor Sproule, causing some distraction to the crew.**

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<sup>17</sup> Ex-3; TCRC Brief; paragraph 19.

**As the above passages reflect, to the satisfaction of the Arbitrator, it would appear that there was simply too much going on in the cab of the lead locomotive at the time of the unfortunate rule infraction which transpired. While that does not excuse the responsibility of the locomotive engineer, or indeed of the conductor, it is a factor which can legitimately be taken into account when regard is had to the appropriate penalty.** The material before the Arbitrator discloses that the supervisor in question was also disciplined, and suffered a demotion and permanent loss of income as a result of his involvement in the rules violation. On the whole, however, the Arbitrator is not persuaded that the responsibility of Mr. Munro should be placed on the same level as in other cases where similar mitigating factors may not have been present (e.g., CROA 2377). It is also worthy of note that Mr. Munro is a good employee of twenty-four years' service without any prior cardinal rules infractions.

32. Fourth, the arbitrator accepts CN's position that aggravating factors exist in this case. Despite knowing of the Rule 42 violation, Mr. Ferguson did not stop his train and make an emergency broadcast. CN highlighted that his actions after the rule violation demonstrate a lack of candour. Mr. Ferguson did not stop his train until the RTC contacted him and directed him to do so. This occurred around mile 55 which the arbitrator understands to be some 30 miles past the location of Foreman Torres' planned protection.

33. In other words, unlike in most of the awards the parties submitted, Mr. Ferguson did not stop his train after violating Rule 42. He further did not communicate with the RTC, a required step which occurs in most of the cases the parties put before the arbitrator. Instead, Mr. Ferguson continued on his tour as if he had obtained a proper authorization from Foreman Torres. The logical inference from these actions is that if Foreman Torres had not advised his supervisor of what had happened, then CN might never have learned of this serious rule violation.

34. The only cases put forward for a situation somewhat similar were Arbitrator Sims' decisions in [CROA 4583](#) and [CROA 4584](#). In those cases, the evidence persuaded Arbitrator Sims that the employees' assumptions that the RTC was already aware of the events, while erroneous, nonetheless satisfied him that no cover up had occurred (CROA 4583):

**Weighing the sequence of events and the various explanations, while the crew clearly failed in their broadcast and reporting responsibilities, I am not persuaded that this was in any attempt to cover up what had happened. The assumption that Mr. Brennan and the RTC knew what happened was not unreasonable.** New instructions were received right away and clearance given to proceed. Also, the assumption was correct as they were

met by managers for testing and briefing at the location to which they were directed.

...

Having weighed all these factors I conclude the penalty of termination would only be justified in this case had the employer established its allegation that the grievor and Mr. Maggio had deliberately failed to report this incident in an effort at cover-up. The evidence convinces me that they did not. However, the incident was a very serious cardinal rule violation involving an incorrect assumption which Ms. Bujold failed to double check against the documentation as well as missing the red flag. Ms. Bujold's record over the prior year was poor. In these circumstances the termination is set aside and the grievor will be reinstated without compensation. She has been remorseful and has accepted full responsibility which convinces me that this is a working relationship that can be successful in the future.

35. The facts are different in the instant case. Other than saying he was "shocked", Mr. Ferguson had no explanation why he failed to stop the train or call the RTC. The arbitrator found CN's argument persuasive that a reasonable inference from such conduct is that the crew hoped to avoid any responsibility. They had obtained permission from Foreman Torres, but only after already violating Rule 42, and then continued for 30 miles.

36. The arbitrator has the same reaction that Arbitrator Moreau did in [CROA 3745](#) regarding the suggestion that shock explained the subsequent conduct after a rule violation (failure to stop). In Arbitrator Moreau's case, which involved an employee with 24 year's service, a 4.5-minute delay in reporting an incident persuaded him not to intervene and modify the penalty imposed:

Added to this concern is the whole matter of the four and half-minutes when the grievor did nothing to initiate emergency contact. Rather than come clean immediately about what had just occurred with the RTC, the grievor elected to wait an inexcusable amount of time before reporting the incident and then offered the rather lame excuse that he was in shock. The grievor's 24 years of service is a mitigating factor which weighs in favour of his reinstatement. His key position of responsibility for passenger safety as a GO train locomotive engineer is, however, of utmost concern. The grievor has, in my view, irreparably damaged the confidence that the Company places in his ability to perform his duties in a safe manner by his actions on November 29, 2008. After considering all the evidence, including his past disciplinary record, I must regrettably uphold the discharge and dismiss the grievance.

37. While CROA 3745 dealt with a commuter train, the instant situation is no less serious. Rule 42 and other rules exist to protect individuals working on track. Such work occurs continuously in the railway industry. CN has many employees involved in maintenance of way or signals who constantly work on the tracks. Contractors also perform these vital services, as may have been the case with Foreman Torres and his crew.

38. In this case, Mr. Ferguson's failure to stop and call the RTC aggravated an already serious situation in which he violated Rule 42 after running through Foreman Torres' planned protection at 40 MHP. That incident, and the aggravating factors of failing to stop or report what had happened, irreparably damaged the confidence that CN must have in its conductors.

## **DISPOSITION**

39. The arbitrator might well have provided Mr. Ferguson with another chance, despite the gravity of the Rule 42 violation if the train had stopped and the matter reported immediately. This would have allowed CN to investigate a serious safety violation which fortuitously did not result in injury or death.

40. But those are not the facts in this case.

41. Mr. Ferguson left the scene, and his train only stopped some 30 miles later down the track after the RTC contacted him and directed him to do so.

42. In these circumstances, CN has persuaded the arbitrator not to intervene in the discipline it assessed for the incident.

43. The grievance is dismissed.

SIGNED at Ottawa this 6<sup>th</sup> day of December 2022.



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Graham J. Clarke  
Arbitrator