

**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)

Dana Baker: Grievance contesting 20 demerit points and resulting discharge

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

Appearances:

TCRC:

K. Stuebing: Legal Counsel
J. Lennie: General Chairperson TCRC-CTY Central
G. Gower: Vice General Chairperson
E. Page: Vice General Chairperson
R. Donegan: General Chairperson TCRC-CTY West, Saskatoon

CN:

S. Roch: Labour Relations Manager
M. Boyer: Sr Manager Labour Relations
A. Borges: Labour Relations Manager
S. Johnson: Assistant Superintendent Atlantic region

Arbitration held via videoconference on November 23, 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 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 March 23, 2022, CN assessed Mr. Baker 20 demerit points³ for:

Not reporting damage to customer track FM07 Goodfellows Inc on February 18 while on assignment L53711-18.

3. Those demerits brought Mr. Baker’s total to 65 and resulted in his dismissal.

4. CN argued that on February 18, 2022, Mr. Baker failed to report damage to a stopblock and track when his train backed up to a coupling to pull a car at Goodfellow, one of its customers. CN only learned of this damage on February 22, 2022 when Goodfellow reported it. In CN’s view, the circumstances merited 20 demerits which led to Mr. Baker’s termination under the parties’ Brown System due to an accumulation of demerits⁴.

5. The TCRC did not pursue certain procedural arguments it had raised in the Joint Statement of Issue⁵ (JSI) but instead focused its arguments on the merits. The TCRC contested the evidence on which CN based its decision to issue 20 demerits. The TCRC requested the arbitrator to remove all 20 points or, in the alternative, to substitute an appropriate penalty under the Brown System.

¹ [Memorandum of Agreement Establishing the CROA&DR](#)

² May 7, 2021 Hearing Notice.

³ Ex-2; Tab 1; Form 780

⁴ See Collective Agreement 4.16 Addendum 124.

⁵ Ex-2; Tab 2

6. For the reasons which follow, the arbitrator has decided to reduce the number of demerits from 20 to 10 for the November 18, 2022 incident. Mr. Baker ought to have reported the incident immediately to allow CN to determine the extent of damage. However, the evidence remained contradictory about Mr. Baker's responsibility for the damage Goodfellow alleged CN had caused.

CHRONOLOGY OF FACTS

7. **January 2017:** CN hired Conductor Baker who, at the time of his termination, had completed 5 years of service.

8. **February 2022:** At the material times for this arbitration, Mr. Baker's pre-incident disciplinary record⁶ contained 45 demerit points and 4 suspensions. On October 22, 2020, Mr. Baker had had 20 demerits removed from his file for "twelve consecutive months of active service free from discipline".

9. **February 18, 2022:** Date of the Goodfellow incident. Mr. Baker did not report anything to CN.

10. **February 22, 2022:** Goodfellow contacted CN and blamed it for damage to its tracks/stopblock. It provided photos and a \$7640.00 estimate of damage⁷:

Hi,

We noticed some damages to our tracks/stopblock this morning.

The train ran into it while picking up the empty boxcar on Friday.

11. **February 25, 2022:** CN via internal email asked that the matter be investigated. The email⁸, which was titled "Goodfellow Inc Moncton (FM07) – Rail damaged during service of Friday February 18th 2022 (possibly)", read:

Good afternoon Jamie,

Allegedly, CN damaged the customer's track and stopblock during the service on Friday February 18th, 2022.

⁶ Ex-2; Tab 6

⁷ Ex-2; Tab 8; Page 27/88

⁸ Ex-2; Tab 8; Page 24/88

Our customer would like very much for this situation to be accessed by someone at CN and for his track to be repaired before his next scheduled shunt on Wednesday March 2nd, 2022.

In the attachments, you will find pictures of the damages along with a quotation from the cost of repairs (in case the repairs need to be done by the customer).

Please advise what's in the plans for this customer,

Thank you,

12. **March 13, 2022:** CN conducted Mr. Baker's formal statement⁹. The document is 3 pages long and contains 24 questions. Mr. Baker provided his evidence about the February 18, 2022 events¹⁰:

14.Q. Mr. Baker during the investigation with Mr. Doiron¹¹ he was advised that based on evidence provided customer Goodfellow claims while during CN a shunting process on February 18 a CN crew hit and damaged a stop block and track at FM-07. When asked if he recalled an incident that occurred to validate the customers claim Mr. Doiron stated yes. What do you recall in relation to his response?

A. Upon coupling at coupling speed, the car in question slid back due to slack action. Once the movement stopped, I proceed to inform my engineer we may have slid into the bumper. At that point, my concern was to ensure the car was still on the rail after the visual inspection I confirmed everything was ok. I then advised the engineer to give the coupling a stretch. At that point, I then inspected to ensure everything else was ok and there was nothing abnormal to report. We then put the air to the car removed the handbrake and as we were blocking the crossing I advised the engineer to pull ahead to clear the switch and crossing.

15.Q. Mr. Baker, you stated that there was nothing abnormal to report, but do you recall any visual damage to the track, bumper or car in question?

A. Yes

16.Q. Mr. Baker can you elaborate

A. Once we cleared the switch at FM-07, I noticed the trainline hose and operating lever had some damage.

17.Q. Mr. Baker since you stated you did a visual inspection prior to coupling to the car at FM-07 was this damage on the car prior to coupling to it?

⁹ Ex-2; Tab 10; Page 35/88.

¹⁰ The arbitrator cites the text in the Record and will not edit/correct typos.

¹¹ The locomotive engineer on Mr. Baker's train.

A. Not that I recall.

18.Q. Mr. Baker, did you report the alleged incident to any supervisor?

A. Upon discussion with my engineer in the cab, the operating level and trainline hose were discussed but because we didn't feel that, there was not any noticeable damage to the bumper and track we did not notify a supervisor.

19.Q. Mr. Baker, are you familiar with GOI section 4.1 reporting requirements?

A. Yes

20.Q. Mr. Baker, do you understand the importance of reporting incidents/accidents in real time so proper measures can be taken to protect facilities, people and equipment?

A. Yes, the week prior to incident in question I had damaged a customer gate, which upon discovery reported right away to supervisor before continuing our work.

13. **March 23, 2022:** CN assessed Mr. Baker 20 demerit points which resulted in his dismissal due to an accumulation of 65 demerit points.

ANALYSIS AND DECISION

14. CN has satisfied the arbitrator that Mr. Baker failed to report the February 18 incident. However, since the evidence about damage remained contradictory, and CN did not appear to follow up with Goodfellow, the arbitrator cannot conclude what damage, if any, Mr. Baker might have caused.

The Duty to Report

15. The parties do not dispute the importance of reporting accidents, as required by GOI Section 4.1¹².

16. CN has satisfied the arbitrator that Mr. Baker had a duty to report the February 18, 2022 incident even if the locomotive engineer and he felt the damage they observed was minor. This reporting requirement, which Mr. Baker already knew about from having reported a different matter the week before (QA20), allows CN to conduct a proper investigation. In [CROA 4522](#), the arbitrator emphasized the importance of reporting:

11. The arbitrator does not dispute CP's legitimate interest in having its employees report accidents promptly. Prompt reporting allows CP to ensure the

¹² Ex-2; Tab 5.

welfare not only of the employee who suffered the accident, but also to take steps to prevent other employees from being injured.

17. An employee's subjective analysis of the damage does not determine whether to report a matter or not¹³:

48. Fifth, GreenFirst satisfied the arbitrator that Mr. Blackburn's situation was more serious than the one examined in Touchette. In Touchette, GreenFirst acknowledged that the damage was not major and did not constitute a safety risk. In Mr. Blackburn's situation, no one disputed the significant damage though the parties had differing opinions about the extent to which it created a safety hazard.

49. Mr. Blackburn should have remained on the scene, secured the area and immediately alerted someone. Instead, he left the scene with his Liebherr. While Mr. Tremblay did not testify, it appears he innocently started to close the open garage door as one might tend to do when finding a large industrial garage door open in Cochrane in January.

50. Fortunately, Mr. Tremblay stopped closing the garage door as soon as he noticed the parts on the floor. It will never be known whether Mr. Tremblay's innocent action aggravated the original damage or not. The whole point of ceasing all activity and securing the scene is to preserve the evidence. One can only speculate what might have happened had a different employee attempted to close the door and not stopped it. The evidence disclosed that some of the wheels from the heavy industrial garage door were no longer in the track but lay on the garage floor.

18. Mr. Baker's failure to report the incident merited some discipline.

Who caused what damage?

19. The TCRC raised several valid concerns about the evidence of damage. The only evidence from Goodfellow appears to be in its February 22 2-sentence email, which included some pictures¹⁴.

20. The first sentence of the email reads "We noticed some damages to our tracks/stopblock this morning". But the Record contains no evidence of CN following up to identify the damage to the tracks and stopblock.

¹³ [United Steel Workers, Local 1-2010 \(USW\) v Greenfirst Forest Products Inc., 2021 CanLII 125068](#)

¹⁴ Ex-2; Tab 8; Pages 28-30/88.

21. The stopblock, for example, does not appear new. Were scratches the issue? Don't know. It is also not clear in what way the tracks were damaged. CN may have had some questions itself after considering the email/pictures hence its use of the words "alleged" and "possibly" in its email thread.

22. In the second sentence, Goodfellow said "The train ran into it while picking up the empty boxcar on Friday". But the Record contains no interviews or other investigation which might have provided particulars about who saw the accident and what specifically they observed. If someone had seen the train run into the stopblock at the time, then why did no one contact CN until 4 days later? This probably did not happen since the first sentence indicates they discovered damage "this morning".

23. What the Record shows is that Mr. Baker's evidence and the two-sentence summary Goodfellow provided appear contradictory. In the arbitrator's view, CN, to meet its burden of proof, needed to follow up with the customer, get the full details and then put those particulars to Mr. Baker. That might have allowed it to suggest that Mr. Baker had caused more damage than what he had admitted. But there is no evidence in the Record on which to draw this conclusion.

24. In [CROA 4647](#), the arbitrator noted the evidentiary challenges which may arise from third-party complaints:

11. A third-party complaint brings additional evidentiary complexity but can still be heard under this Office's expedited arbitration system: CROA&DR 4587.

12. In this case, while CP interviewed the employees involved, no follow-up occurred with Mr. Singh. Mr. Singh's only evidence came from his original email complaint. This raises the issue of how the arbitrator should resolve conflicts in the evidence and related credibility issues.

25. An employer will have challenges with its burden of proof if it accepts a written complaint as the truth of its contents when the employee has a different version of events:

14. There is no dispute that CP, like all employers, has significant responsibilities in the areas of discrimination and harassment. In this case, however, the arbitrator must consider that while some of the evidence was investigated; other evidence was not.

...

18. The evidence does not permit the arbitrator to conclude that Mr. Lewis did utter the terrible things to which Mr. Singh made mention in his email. This is

not a finding on Mr. Singh's recollection. Rather, it reflects the fact that an allegation differs from an investigation's evidence. CP did not follow up with Mr. Singh during the investigation. The arbitrator must accordingly decide this case based on the record.

26. CN did not meet its burden regarding the damage. Does the situation appear suspicious? Perhaps. But a suspicion is not a fact in a legal hearing. The Record does not allow the arbitrator to conclude that Mr. Baker caused more damage than that to which he has admitted. The arbitrator must accordingly intervene and modify the discipline imposed.

DISPOSITION

27. CN has satisfied the arbitrator that Mr. Baker merited some discipline. However, while Mr. Baker failed in his duty to report the February 18, 2022 incident, the Record does not demonstrate what track/stopblock damage, if any, was caused on that specific date. The facts remain contradictory.

28. The arbitrator has decided to reduce the demerits issued from 20 to 10 and to reinstate Mr. Baker in his employment, without compensation but without loss of seniority. As a short service employee, Mr. Baker has an unviable disciplinary record given the 45 demerits and 4 suspensions it contained at the time of the February 18, 2022 incident.

29. He should view this remedy as providing him with a last chance to demonstrate his value as an employee and to start reducing the 55 demerits on his file through discipline free employment.

30. The arbitrator remains seized for any issues arising out of this award.

SIGNED at Ottawa this 6th day of December 2022.



Graham J. Clarke
Arbitrator