

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 5037

Heard in Montreal, May 14, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

On November 21, 2023, Conductor Martin was operating train X37631 20 which was involved in a collision with an EXO train at mile 135.8 on the CN St. Laurent Sub.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

It is the Union's position that the Company is in violation of Articles 82, 85, 85.5 and Addendums 123 and 124 of the 4.16 Collective Agreement when they assessed an outright discharge to Conductor Martin.

The Union contends that the discipline assessed was arbitrary, discriminatory, unjustified, and excessive discipline when he was assessed an outright discharge.

The Union further contends that the Company failed to recognise any mitigating factors that were present and highlight in the Conductor Martin's investigation.

The Union submits that the Company had already made up their minds at the time of the incident of what the Grievor's fate would be as they immediately rendered the decision to assess an outright discharge to Conductor Martin.

The union seeks an order instructing the Company to reinstate Conductor Martin without loss of seniority, wages and benefits including any pension entitlement.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 21, 2023, Conductor Martin was operating train X37631 20 which was involved in a collision with an EXO passenger train at mile 135.8 on the CN St. Laurent Sub.

The RTC instructed the crew to follow the EXO 1212 upon departure of RDP North. During this time the crew should have been going at restricted speed (15 mph) instead the crew travelled up to 40 mph.

Subsequent to the investigation the grievor was deemed culpable for the collision between X37631 20 and EXO 1212 and was discharged.

COMPANY'S POSITION:

The Grievor underwent a fair and impartial formal investigation during which all evidence was presented. It was determined that the Grievor violated CROR rules 436, 401.1 failure to proceed at restricted speed, resulting in a collision with a commuter train carrying passengers.

During the investigation, the Grievor acknowledged these violations and admitted to exceeding speed limits by up to 25 MPH above the speed limit before colliding with the commuter train. Considering the Grievor's gross negligence the Company did not require an extended period to determine the appropriate disciplinary measures for this egregious and indefensible violation, which posed a significant risk to passenger safety and caused a poor reputation to the Company's public image and eroded community trust in rail safety.

FOR THE UNION:**(SGD.) J. Lennie**

General Chairperson, CTY-C

FOR THE COMPANY:**(SGD.) A. Borges**

Manager, Labour Relations

There appeared on behalf of the Company:

- | | |
|----------------|---|
| A. Borges | – Manager, Labour Relations, Toronto |
| J.F. Migneault | – Manager, Labour Relations, Montreal |
| V. Carreiro | – Associate HR Compliance, Montreal |
| S. Ng | – Intern, Labour Relations, Montreal |
| C. Wolak | – General Manager, Champlain Division, Montreal |
| F. Bergeron | – Assistant Superintendent, Montreal |

And on behalf of the Union:

- | | |
|---------------|---|
| R. Whillans | – Counsel, Caley Wray, Toronto |
| J. Lennie | – General Chairperson, CTY-C, Hamilton |
| G. Gower | – Vice General Chairperson, CTY-C, Brockville |
| E. Page | – Vice General Chairperson, Hamilton |
| R. S. Donegan | – General Chairperson, CTY-W, Saskatoon |
| M. Kernaghan | – General Chairperson, LE-C, Trenton |
| C. Wright | – Senior Vice General Chair, LE-C, Trenton |
| R. Martin | – Grievor, Montreal |

AWARD OF THE ARBITRATOR

Context

1. This matter concerns the dismissal of a nine year Conductor, who was involved in a collision with a Montreal commuter train. At the time of his dismissal, he had no active discipline on his record.

2. Issues

A. Preliminary objections

B. Was the dismissal imposed reasonable in the circumstances, and if not, what penalty should be imposed?

Preliminary objections

Position of the Parties

3. The Union argues that the Company is advancing both new allegations and new evidence in its Briefs, contrary to the CROA Rules. It submits that the allegations need to be raised in the Notice to Appear and the evidence to be produced at the investigation stage.

4. It submits that a failure to respect these Rules should result in either the discipline being declared void ab initio, or the evidence presented to be given no weight (see **CROA 4558**).

5. The Union submits that the Notice to Appear did not comply with article 82.1, as it referenced Rule 436 “and other rules that may be applicable”. The Notice did not cite Rule 401.1, which is cited in the dismissal letter.

6. The Union relies on **CROA 2073, 3975, 4509, and 4663**, as well as **AH 521** for the proposition that the grievor is entitled to know the charges against him and that a failure to ensure this is not just a technical error, but one going to the integrity of the process.

7. The Union notes that there are new allegations about a Code of Conduct violation as well as about harm to reputation, neither of which were advanced in the Notice or during the investigation.

8. The Company argues that the grievor was perfectly aware that the Company needed to investigate the facts leading up to the collision of the grievor’s train with a passenger train stopped ahead of it.

9. It argues that the Notice to Appear was not like the one in **AH 521**, which was completely devoid of particularity. It was much like the notice found to be acceptable in

AH 794. There was no objection taken by the Union at the investigation that the grievor was caught by surprise or in any way prejudiced by the content of the Notice to Appear.

Analysis and decision

10. The Union is correct when it asserts that a grievor is entitled to know the charges against him. As Arbitrator Picher noted in **AH 521**:

“Notice is one of the most essential rights and protections available to an employee facing disciplinary charges. It is, needless to say, important for an employee to know in advance the precise conduct or events which will be the subject of the investigation that may result in his or her discipline”.

11. In that matter, Arbitrator Picher found that a Notice containing only the allegation: “failing to meet your obligations as an employee on the following dates...” was wholly inadequate to provide the proper notice.

12. It is clear that these matters are not just technical issues, but rather go to the integrity of the process. Failure to provide proper notice can result in the charges being dismissed ab initio (see **CROA 4663** and **CROA 4509**).

13. The Notice to Appear reads as follows:

You are required to attend an investigation in order to provide a Formal Employee Statement to explain the circumstances surrounding your involvement in the collision between CN3100 and EXO1212 and your alleged violations of R436 and other rules that may be applicable in the incident, while you were working on X37631 on November 21st, 2023.

14. The Notice to Appear was specific in its referral to Rule 436 but made only a general reference to “any other rules which may be applicable”. However, he was provided with both Rule 401.1 and the definition of slow speed and the requirement to stop within half the distance of any visible obstruction prior to the investigation. He was also provided with the downloads from the engine and the analysis showing speed and had the necessary time to review this evidence.

15. I find that the situation is akin to that examined by Arbitrator Clarke in **AH 794**. There, Arbitrator Clarke found that the Notice to Appear was sufficient to provide proper notice to the grievor:

“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 it. This is not a case of Mr. Vigario remaining in the dark about why CN wanted to interview him”.

16. The grievor clearly knew that the Company needed to learn all relevant facts concerning the collision of his train with a passenger train, causing both injuries and damage.

17. It is noteworthy that there was no objection by the Union at the time, nor any evidence that the grievor was taken by surprise by any of the questions asked by the Investigating Officer.

18. In my view, the Company is entitled to question the grievor about signage requiring slower speeds and the requirement to stop within half the distance of any obstruction on the track.

19. However, the matter is different with respect to certain new allegations and new evidence. The Notice to Appear, the Investigation itself and the Dismissal letter all fail to make any reference to the allegations concerning the Code of Conduct or harm caused to the reputation of the Company. While the Company does raise these issues in its grievance responses, these issues are not addressed in the Dismissal letter. As they were not relied on by the Company for its decision to terminate the employment of the grievor, they cannot be relevant to the present decision. The pictures and social media found at Tabs 10 and 11 of the Company documents must have been available to the Company at the time of the investigation, or for a supplementary investigation. As they were not provided to the grievor at the time, they cannot now be used. In contrast, the photo of the EXO train was provided to the grievor for his investigation and may be used (see Ex 8 at Tab 6, Company documents).

A. Was the dismissal imposed reasonable in the circumstances, and if not, what penalty should be imposed?

Position of the Parties

Company

20. The Company submits that as the Conductor, the grievor was responsible for ensuring that the train was protected according to the Rules. He controlled an emergency brake to stop the train, if the Engineer did not do so.

21. The RTC told the crew they would be following passenger train EXO 1212. They were moving largely in a restricted block, where speeds could not exceed 15 mph. Roughly seven seconds into the block, they exceeded the slow speed indicated, and did so by as much as 25 mph.

22. Rule 401.1 is explicit that the speed indicated governs for that entire block; you cannot accelerate in the first block on the belief that the second block will have a higher speed. Instead, the crew accelerated in their restricted block, mistakenly believing that the next block was clear. They collided with the stopped passenger train at over 30mph.

23. The Union argues that visibility was reduced because of a curve and due to the dimming of headlights. This should have led to the train further reducing speed.

24. The Company submits that if the grievor had followed the speed restrictions indicated, the collision could have been avoided.

25. The grievor admits to the violations which amount to gross negligence on his part.

26. The Company cites a number of cases where Rule 401.1 and Rule 436 violations resulted in discharge.

27. In **CROA 4592** Arbitrator Hornung upheld the discharge of the grievor who had misaligned a switch, causing a head on collision. The discharge was upheld despite a sincere apology and seven years of seniority.

28. In **CROA 3966** Arbitrator Picher upheld the termination of a LE Trainee, who had entered non-main track territory which required reduced speed. Despite being cautioned to stop behind another train and not knowing his precise location, he failed to slow his train. The thirteen years of seniority were considered but did not constitute a sufficient mitigating circumstance to overcome the actions of the grievor.

29. In **CROA 2791** Arbitrator Picher upheld the termination of a LE who was involved with a head on collision. It was noted that he had exceeded speed limits on a relatively consistent basis throughout the trip, and had not established a medical condition to explain his behaviour. The Arbitrator held:

“The error committed by Locomotive Engineer Taverna was extremely grave, and could have had fatal consequences. In the circumstances, neither the length of his service or his prior disciplinary record would appear compelling, from the standpoint of mitigation. In the result, I am satisfied that the discharge of the grievor was for just cause, and that this is not an appropriate case for substitution of penalty.”

30. In **CROA 3584** Arbitrator Picher upheld the termination of a welder, who lit his own truck on fire. Despite the grievor’s eight years of seniority with no discipline, Arbitrator Picher found his judgment to be so wanting as to fundamentally undermine the bond of trust between the parties.

Union

31. The Union notes that the grievor has 9 years of service, with no active demerits at the time of the incident, and only 80 demerits in total. The grievor had multiple periods where his record was entirely discipline free. It notes that there was a single CROR incident in the past, which did not relate to Rules 436 or 401.1.

32. The Union submits that the grievor was candid and direct during the investigation and accepts responsibility.

33. The Union notes that the grievor was not on a Key Train at the time of the incident. It notes that the engineer dimmed the train lights as it passed another EXO train, which reduced visibility, as did the fact that EXO 1212 was not using marker lights.

34. The Union argues that, while the crew knew they were following a train, both crew members saw a clear signal ahead of them, which they thought was for their train. Unfortunately, the signal was for the passenger train, which was still in the controlled block. The grievor did a proper emergency broadcast after the collision, helped with passengers and was tested negative for drugs and alcohol. Fortunately, there were no serious injuries on the passenger train.

35. The Union argues that the incident was not the product of willful or intentional conduct; there is no evidence of willful derogation from safety critical duties, and the grievor did not act recklessly or turn a blind eye to requirements of CROR.

36. The primary thrust of the Union arguments is that the sanction of dismissal is far too severe in the circumstances and not in keeping with the arbitral jurisprudence in similar cases. It asserts that in most instances, first offences against Cardinal rules do not result in termination in the absence of aggravating factors. This is the case for speeding infractions, even those involving collisions.

37. In **CROA 193**, Arbitrator Weatherill awarded 10 demerits to a Conductor who violated a Restricted Speed rule and whose train was involved in a collision.

38. In **CROA 59**, Arbitrator Hanrahan awarded a 90 day suspension, where the crew knew a train could be around a bend ahead of them. Their train was over speed at the time of the collision.

39. In **CROA 1981**, Arbitrator Picher upheld a penalty of 35 demerits to the Yard Foreman, slightly less than the 40 demerits assessed to the engineer. This case is important as the collision was the second one in less than one year for the grievor.

40. In **CROA 3882**, Arbitrator Picher found the Engineer primarily responsible for the collision, and reinstated the grievor, the Conductor, without compensation.

41. In **CROA 4697**, Arbitrator Hornung, in nearly identical circumstances to the current matter, imposed a 93 day suspension on the Conductor Locomotive Operator. At the time of the incident, he had been speeding, doing 35 in 15 mph zone, despite knowing that there was a train in front of him.

42. In **CROA 2356** Arbitrator Picher reviewed the CROA jurisprudence with respect to discipline for passing stop signals:

Outright discharge for a violation of Rule 292, generally coupled with other rules violations, is revealed in a relatively limited number of cases (see CROA **474, 681, 745, 1479, 1505, 1677 & 2124** [reduced to a suspension]). In each of the cases involving an imposition of outright discharge by the company there has been some aggravating factor. For example, in **CROA 681** and **2124** the employee discharged for passing a stop signal had committed his second offence against the rule. In **CROA 745** a locomotive engineer was dismissed where a violation of Rule 292 was found to also involve a violation of Rule G, resulting in a collision and two fatalities. Serious collisions were also involved in **CROA 1479** and **1677**, while in **CROA 1504** the discharge of the locomotive engineer was motivated, in part, by his falsification of an employee statement intended to evade his responsibility. More recently, employers have again used the assessment of suspensions for violations of rule 292 of the UCOR and rule 429 of the CROR (See, e.g., **CROA 2126, 2161, & 2267.**)

43. In **CROA 4250**, Arbitrator Schmidt found an Engineer responsible for a Rule 42 violation, but reinstated the grievor without compensation, which had the effect of a 1 year suspension.

44. In **CROA 4583**, Arbitrator Sims reinstated a Conductor who had committed a serious Rule 42 violation without compensation. He noted that she was remorseful and accepted full responsibility:

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.

45. In **CROA 4495**, Arbitrator Clarke noted the following concerning appropriate discipline:

"In reviewing the past CROA&DR decision the parties submitted, CROA&DR 2356, by analogy, is the most helpful. That case demonstrated how discipline may vary depending on whether a repeated offence is in issue, if significant damage occurs, or if employees try to avoid responsibility for their actions" (underlining added).

46. In that matter, the arbitrator reinstated the grievor without compensation, for a speeding violation where the speed was 25 mph over the posted speed.

47. In **CROA 4488**, Arbitrator Sims reinstated an Engineer with a second CROR 439 violation:

This is a situation where the grievor's long service, combined with his apparent remorse, his personal difficulties at the time combined with the steps taken to overcome these difficulties justify giving the grievor one last chance to show his reliability. He has a significant prior incident on his record and the Employer is right to treat this as a second offence situation. However, his rule compliance record and the fact he had no active demerits at the time of his dismissal still offer hope for his future. The grievor will be reinstated to his former position without compensation or loss of seniority.

48. The Union accepts that significant damage can be an aggravating factor, but reinstatement without compensation can be awarded even in these circumstances (see **CROA 4563** and **CROA 4419**).

Analysis and decision

49. The grievor was fired on November 27, 2023 for the following reasons:

“Pour la violation de la règle REFC 436 et 401.1 résultant en une collision avec le train passager EXO 1212 causant des blessures alors que vous étiez affecté à l’assignation X37621-20 le 21 novembre 2023.” (See Tab 7, Company documents)

50. Rule 401.1 reads as follows :

General Description and Location of Fixed Signals
401.Location

Wherever practicable, fixed signals other than switches will be located above, or to the right of, the track they govern. Where circumstances require that signals be otherwise placed, such conditions will be indicated by GBO or special instructions.

Exception: A block or interlocking signal that is required to be placed to the left of the track it governs need not be indicated by GBO or special instructions, provided that such location does not place the signal to the right of another signalled track.

51. Rule 436 states :

436. RESTRICTING

Restricting-Proceed at RESTRICTED speed

RESTRICTED SPEED

A speed that will permit stopping within one-half the range of vision of equipment, also prepared to stop short of a switch not properly lined and in no case exceeding SLOW speed. When moving at RESTRICTED speed, be on the lookout for broken rails. When a broken rail is detected, the movement must be stopped immediately and must not resume until permission is received from the RTC or signalman.

SLOW SPEED

A speed not exceeding 15 miles per hour.

52. The Parties agree that the grievor violated both these Rules prior to the collision. They disagree whether the grievor should be terminated for the violations.

53. The explanations given by the Union for the collision, whether it is dimming of the headlights, a curve in the track, or a possible failure of the passenger train to display appropriate lights, do not overcome the fundamental failure of the crew to obey the speed restrictions to keep their speed at 15 mph or less while in their restricted block and to be prepared to stop within half the distance of any obstruction. The mistake in believing that a clear signal was for them, rather than the stopped passenger train ahead of them, merely underlines the importance of following the speed restrictions. Had they done so, it is entirely possible that a collision could have been avoided, despite all the other issues raised.

54. There is no doubt that the train was operating far above the speed restrictions given, and for a considerable length of time. It is incomprehensible that the Engineer would have done so, despite knowing that they were following a passenger train, on a dark November night, when visibility was necessarily limited.

55. The Company is correct that the grievor, as a Rules trained Conductor, bore a joint responsibility to ensure that the train obeyed the Rules. The grievor has no explanation for why he failed to intervene:

20.Q. M. Martin est ce que connaitre la définition du Vitesse de Marche a Vue?

R. Oui

21.Q. M. Martin la définition du Marche a vue parle de ne jamais dépasser la Petite vitesse, est-ce exact?

R. Oui

22.Q. M. Martin ce quoi la limite de Petit vitesse?

R. 15 mi/h

23.Q. M. Martin est ce que la Vitesse de Marche a vue était respecter?

R. Non

24.Q. M. Martin selon l'analyse de download votre vitesse à augmenter juste que 40mi/h est-ce exact?

R. Oui

25.Q. M. Martin aviez vous remarqué que la vitesse augmenter dans la locomotive?

R. Oui

26.Q. M. Martin quand la vitesse à augmenter a 40mi/h est ce que vous étiez toujours dans la zone de marche a vue selon votre dernier signal?

R. Oui

27.Q. M. Martin aviez-vous pris action ou parler avec votre mécanicien de locomotive quand la vitesse à dépasser cela du March a vue?

R. Non

28.Q. M. Martin est ce que vous connaisser la règles 401.1 du REFC?

R. oui

29.Q. M. Martin est ce que vous étiez au courant selon la règle 401.1 du REFC votre signaux Marche a vue est just qu'au prochain signaux?

R. Oui

30.Q. M. Martin est ce que la régler 401.1 du REFC était respecter?

R. Non

31.Q. M. Martin, est ce que vous puisse m'expliquer pourquoi vous aviez pas réagis de parler avec votre mécanicien de locomotive ou ne pas avait votre mouvement on urgence vous-même?

R. Non je ne suis pas capable de l'expliquer.

32.Q. M. Martin quand vous avez appelé le signal Clear aviez pas remarquer que votre vitesse commencer à augmenter?

R. Oui

33.Q. M. Martin est ce que vous étiez au courant que le signal de Clear était pour la vitesse permis dans le prochain block et non pour le block que vous étiez entrain d'occuper?

R. Oui

34.Q. M. Martin selon la définition de March a vue est ce que on a respecté d'être capable d'arrêter la moitié de distance de visibilité d'un matériel roulant?

R. Non

56. Yet Arbitrator Weatherill in **CROA 690** has noted that the primary responsibility for governing the operation of the train lies with the Locomotive Engineer. It is very difficult for the Conductor to intervene, with the sole tool at his disposal, the Emergency Brake:

It takes no benefit of hindsight to recognize that the situation had become serious. Head-End Trainman Tirrell, in particular, should have been considering an emergency application at least by that point. It is understandable, of course, that he would hesitate to take the matter out of the hands of the engineman in that way, but he did know the

nature of his own responsibility, and he was certainly aware that in cases of doubt (and there was then real doubt!) the safe course was to be taken.

It is also understandable that the members of a train crew might defer, to some extent, to the particular skills of the Engineman in matters of engine operation. Further it must be borne in mind that the events in question occurred rather suddenly; there was not much time for reflection before it was too late (underlining added).

57. This may explain the fact that the cases cited by the Company which resulted in a dismissal, all deal with actions for which the grievor bore primary responsibility (see **CROA 4592, CROA 3966, CROA 2791, CROA 3584**).

58. Indeed, as Arbitrator Picher noted in **CROA 2356**, dismissals are commonly upheld only in cases where there are aggravating circumstances.

59. Here there was extensive damage and several injuries, which clearly constitutes an aggravating factor. The fact that the speeding occurred over a lengthy period, knowing that they were following a passenger train, is also an aggravating factor.

60. Against these factors is the grievor's disciplinary record, which had no active demerits, and no penalties in relation to speeding. In addition to this mitigating factor, is the obvious remorse exhibited by the grievor in his testimony. The grievor was clear that he would act differently in the future and make use of his emergency brake if necessary.

61. The cases cited by the Union demonstrate that arbitrators have imposed reinstatement without compensation, even in matters where the grievor had previously infringed the same Rule, which is not the case here (see **CROA 1981, CROA 4488**).

62. These cases further illustrate that grievors are frequently reinstated without compensation despite serious infractions of the Rules (see **CROA 4697, CROA 4250, CROA 4583 and CROA 4495**), even in matters where significant damage has been caused (see **CROA 4419 and CROA 4563**).

63. In light of all the circumstances, I find that the relationship between the grievor and the Company, while very significantly strained, has not been irretrievably broken. The grievor should be given the opportunity to prove that he has learned from his very serious mistakes. He should be aware that he now has a poor discipline record, and further issues could well result in dismissal.

64. He should also be well aware that the situation, as bad as it was, could have been so much worse, as was the case in Hinton where twenty-three people were killed (see **CROA 1677**). I would encourage the grievor to read this case.

65. Accordingly, the grievor is reinstated without loss of seniority, but without compensation. The time since the dismissal should be recorded as a suspension.

66. I remain seized with respect to all matters of interpretation or application of this Award.

A handwritten signature in black ink, appearing to read "James Cameron", written over a horizontal line.

June 18, 2024

JAMES CAMERON

ARBITRATOR