

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("the Company" / "the Employer")

- AND -

**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-TCA)**

LOCAL 100

("the Union")

CONCERNING THE INDIVIDUAL GRIEVANCE of CAR MECHANIC BURCHELL
HUMPHREY

("the Grievor")

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Drew Ratajewski, Regional Vice-President, Local 100

Bruce Snow, Local 100 President

Robert Davis, Local 100, Lodge 110, Local Chairperson

Burchell Humphrey, Grievor

For the Company:

Ron Campbell, Manager Labour Relations Winnipeg

Lou Bartolo, Superintendent Mechanica, MacMillan Yard Toronto

Hearing held in TORONTO on December 14, 2011.

Award issued on January 26, 2012.

AWARD

Issue

1. This is a termination grievance. The Grievor is a 22-year employee who was terminated because his last discipline put him above the 60 demerit points that result in an employee's termination. He was given 30 demerits for an incident on July 14, 2011, resulting in a total of 70 accumulated demerits.

2. The Union challenges the fairness of the Grievor's termination. It does so on the basis that the safety practice the Grievor breached was not clear and the penalty issued to him was disproportionately severe.

3. The Grievor worked at the MacMillan Yard in Toronto.

Parties' Joint Statement of Fact and Issue

4. The cause of the Grievor's 30 demerits discipline is explained in the parties' Joint Statement of Fact and Issue:

Dispute

Thirty (30) demerits assessed Mr. Humphrey for failing to attain protection to cross over West 9 and crossing by stepping on the operating levers and over the coupler in violation of CN Safety Rule 4.6.2. and subsequent dismissal for accumulation of demerits in excess of 60.

Joint Statement Of Issue

On July 18, 2011, a statement was taken from Mr. Humphrey pursuant to Rule 27.1 of the collective agreement concerning the circumstances surrounding his alleged failure to attain protection to cross over West 9 and crossing by stepping on the operating levers and over the coupler. Following the investigation the Company assessed Mr. Humphrey with 30 demerits and dismissed him for accumulation of demerits in excess of 60.

Mr. Ratajewski Regional Vice-President of the Union appealed the Company's decision by letter dated August 28, 2011. In his appeal, Mr. Ratajewski claimed the following:

That the discipline assessed was excessive.

The Union requested the following by way of remedy:

That Mr. Humphrey be reinstated immediately and made monetarily whole for all lost wages and benefits incurred from the time of dismissal until such time as he is reinstated.

The Company denies the Union's contentions and claim.

Safety rule

5. The Union accepts that the Grievor's action was a violation of safety rules that put him in danger, particularly Safety Rule 4.6.2, which reads:

Crossing over, under or between rolling stock is prohibited except as required in the performance of duty and only when the proper protection is provided. When required to do so, use only the stirrup, side ladder, end ladder, handholds and crossover platform where provided. NEVER STEP ON THE COUPLER HEAD, DAFT GEAR, OR BETWEEN THE COUPLER HORN AND THE STRIKER CASTING.

Facts

6. On July 14, 2011, the Grievor was working the afternoon shift with Mr. Mark Lancia. Mr. Lancia is also a Car Mechanic. He completed his apprenticeship on March 31, 2011, four months prior to the incident. The Grievor and Mr. Lancia were assigned to work the head end of Train 397.

7. At approximately 22:45, Terminal Trainmaster Steven Dale observed the Grievor and Mr. Lancia crossing over Track W009 to get to W008, on which they were required to work. Mr. Dale provided the following statement:

At approx. 22:45 July 14, 2011 two Carmen were observed crossing over w009 to get to w008. W009 was unprotected and had 26 auto carriers in it. The Two carmen were observed driving up beside the cut in w009. (approx. half way.) The carman got out their trucks and walked between the two auto carriers. Before crossing over the track the two men turned and looked up at the dual tower and then proceeded to cross over the multi levels. The Carmen crossed over the tracks by stepping on the operating lever and then on to the draw bars of the cars.

8. The Grievor and Mr. Lancia confirmed there was no movement on track W9 prior to crossing it. They checked at both ends of the track to ensure there was no movement. They drove from the south end of the yard towards the north. They determined there was no power on the south end of W009. From where they crossed over the track they could verify there was no power on the north end either. They therefore took some precautions before crossing the track. They dispute looking back at the dual tower. They crossed over the coupling between two auto carriers. Auto carriers do not have hand holds and crossover platforms for safe crossing. The Grievor and Mr. Lancia dispute crossing on the operating lever. They say they crossed by stepping on the drawbars, over the coupling, without stepping onto the operating lever. This put them at risk, but no-one else.

9. I find that the Grievor and Mr. Lancia acted with less than the level of concern for their personal safety expected of them by the Employer and the Union. I find they unnecessarily put themselves in danger by not following the safe procedures required of them.

10. The practice at the MacMillan yard for safely crossing a line to work on a railcar on another line has not been entirely clear, despite the clear safety rule set out above. After the Grievor's termination, the Union raised the matter in the

local joint health and safety committee. As a result, a clear procedure has now been put into place by management, although the Union reserves its rights on it.

11. The informal procedure that applied at the time the Grievor breached the safety rule was the following: to cross a track, the employees had either to blue flag and lock down the line or to contact their supervisor and obtain verbal approval to cross the line without blue flagging it and locking it down. The supervisor would contact the tower and get confirmation that there was no movement on the track. The employees could then pass over, under or between rolling stock.

12. The informal procedure was not widely known or consistently applied. The written rule prevented crossing over a track by climbing on the coupler between railcars, unless there was a platform, with steps and handles to do so. The informal rule was that, with confirmation from the supervisor, the employees could crawl under the coupler without locking out the track.

13. So the Grievor's and Mr. Lancia's breach of the safety rule was their climbing over the coupler, when there was no safety steps, handles and platform, and their failure to obtain prior confirmation from their supervisor.

14. As a result of the discussions with the Union on the health and safety committee, management has determined that the alternative procedure previously applied (contacting the supervisor) – which does not appear in the collective agreement (only the blue flag procedure appears there) – is not safe.

15. The procedure now recommended by management (since the health and safety meeting discussions) is the following: if the rolling stock's (the cars') crossover platforms have steps and handles, then the employees intending to cross the track can get the yard master's permission by contacting their supervisor. The supervisor calls the tower and gets verbal confirmation of no movement on the track. The employees can then climb up the steps using the handles, onto the crossover platform, and down the steps on the other side. But, if there is no proper crossover platforms with steps, as for example on the auto carriers, then the employees must lock down and blue flag the line. So, under the new procedure, for crossing the auto carriers, which do not have steps, handles and crossover platforms, as the Grievor and Mr. Lancia did on July 14, 2011, they would have had only two safe options: they would have had to blue-flag the line and lock it out, or they would have had to cross at the end of the line, a safe distance from the rolling stock (though, at the huge MacMillan Yard, that would often involve a

very long walk around).

16. Mr. Lancia was given a written reprimand for the same offence for which the Grievor was terminated.

17. The Grievor had significant prior discipline, as follows:

<u>Date</u>	<u>Discipline assessed</u>	<u>Reason</u>
2010/10/23	30 day suspension	For your blue flag violation, specifically your failure to properly line and lock switch at the north end of track R-008 at the Toronto Mac Yard on October 23, 2010
2010/07/22	30 Demerit Points	Failure to apply blue flag protection before commencing a No. 1 air brake test on track E009 on Thursday July 22, 2010
2010/06/30	10 Demerit Points	Failure to be available to take assignment, direction and respond to Mechanical Supervisor's radio communications between 05:45 to 5:55 on May 25, 2010
2009/06/10	10 Demerit Points	Failure to recognize a defective load on CN 618169, during out bound roll-by inspection of Q 14931-11 on May 11, 2009.
2002/125/03	20 Demerit Points	Mr. Humphrey was in charge and driving vehicle # CNO 77878 when this vehicle skidded across the Dual Hump road crossing and came to rest on the tracks, fouling groups 2, 3 and 4. This vehicle incident caused an emergency stoppage of the humping process on

		November 17, 2002 at 1720 hours. Mr. Humphrey is in violation of CN General Safety Rule 4.1.3 and failing to comply to this rule by not adjusting his working procedures to compensate the changing weather conditions.
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18. When confronted with his wrongdoing, the Grievor readily admitted what he had done and acknowledged his misconduct.

Submissions and decision

19. The Union argues, relying on *SHP 276*, that the discrepancy in the discipline between that of Mr. Lancia and that of the Grievor is disproportionate. The Union refers to other instances in 2006 when employees were, like Mr. Lancia, issued written warnings for failing to cross safely between railcars. The Union says that the Grievor was punished disproportionately.

20. I don't agree. Their circumstances were very different. For Mr. Lancia it was a first safety infraction. For the Grievor, it was his third serious safety infraction in a relatively short period (the prior two being in July and October 2010). He had been given 30 demerit points for the first, and a 30-day suspension

for the second to impress on him the importance of his complying with the Company's safety rules. He appears not to have taken the warnings seriously enough. More severe discipline for him, over Mr. Lancia, was warranted.

21. It appears that the Grievor's misconduct, under the former procedure, was that he failed to obtain authorization from his supervisor before climbing over the coupler between the railcars. He should have done so. He acknowledges and understands he should have done so. He also had relatively recent safety warnings, and discipline for not following safety rules. Despite a reasonably good work record prior to 2009, since then the Grievor appears to have slacked in his adherence to safety rules.

22. Some factors assist the Grievor. Firstly, he is a very long serving employee with 22 years service. Secondly, he promptly admitted his wrongdoing and expressed remorse. Thirdly, the Grievor and Mr. Lancia took some steps to establish there was no movement on the line before crossing. They took some precautions, although, as has been seen, these did not meet the Employer's reasonable safety standards. Fourthly, there was, at least arguably, some question as to what the correct procedure was for crossing the line between the railcars, and as to the extent to which the rule had been made clear to the staff.

23. On these factors I find that the Grievor should be given a further chance to show that he can and must comply with CN's safety rules. This point needs to be driven home to him, though : he must comply with the safety rules. If he does not, he will likely lose his job on the next occasion.

24. The Grievor must understand, as the Employer argues, that MacMillan Yard is a large and active area, a multi-track complex in which train and engine movements occur at any time on any track in the Yard, without warning. Working in this environment, employees must maintain an unwavering focus on safety and on safe work practices because the consequences of failing to do so can be catastrophic.

25. Furthermore, the Grievor should understand that the rule for crossing a line through rolling stock is now clear, as described above. He must comply strictly with that rule.

26. In the circumstances, the discipline of 30 demerits will be removed from the Grievor's record. He will be reinstated in employment, without loss of seniority, effective the start of February 2012. The period between his termination

and February 2012 will be treated as an unpaid disciplinary suspension.

27. The grievance is therefore upheld.

28. I remain seized of the implementation of this award.

DATED at TORONTO on January 26, 2012.

A handwritten signature in blue ink, appearing to read "C. Albertyn", is written over a light blue circular stamp.

Christopher J. Albertyn

Arbitrator