

## ARBITRATION

BETWEEN:

**CANADIAN NATIONAL RAILWAY COMPANY**  
(the “Company”)

- and -

**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION  
AND GENERAL WORKERS UNION OF CANADA  
(CAW/TCA CANADA), LOCAL 100**  
(the “Union”)

With respect to a Union grievance dated 6 May 2004 about discipline imposed on Car Mechanics K. **Moon** and K. **Fadi** for TOP violation on 23 March 2004.

## AWARD

### ARBITRATOR

D. P. Jones, Q.C. . . . . . Sole Arbitrator

### REPRESENTATIVES OF THE UNION

Brian McDonagh . . . . .	CAW National Representative
John Burns . . . . .	Vice-President, Local 100
Burt Wilson . . . . .	President, CAW Lodge 448
Kris Moon . . . . .	Grievor
Den Fadi . . . . .	Grievor

### REPRESENTATIVES OF THE COMPANY

Patricia Payne . . . . .	Manager, Labour Relations, Edmonton
Rob Reny . . . . .	Senior Manager, Human Resources
Jeff Whelan . . . . .	Manager, Operating Practices
Dave Marchand . . . . .	Manager, Rail Traffic Control
Ken Langstaff . . . . .	Assistant Superintendent, Mechanical
Ben Tessier . . . . .	Manager, CN Police (observer)

**HEARD** at Edmonton, Alberta on 3 March 2005.

**AWARD ISSUED** at Edmonton, Alberta on 31 March 2005.

## **I. JOINT STATEMENT OF ISSUE**

The Grievors, Car Mechanics K. Moon and K. Fadi, were issued 40 and 29 demerits respectively and a restriction from performing secondary assignments and qualifying in Canadian Rail Operating Rules for a period of at least 12 months, subject to review after 12 months, in connection with Track Occupancy Permit (TOP) violation between Park Gate and Devona, Alberta involving the Road Repair Truck on March 23, 2004.

The parties have submitted the following joint statement of the issue:

### **Joint Statement of Issue**

On March 23, 2004, Car Mechanics K. Moon and K. Fadi were issued a TOP for use of Main and North tracks between Signal Number 1993D at Swan Landing and Signal Number 2146 at Devona. When contacted by the Railway Traffic Controller (RTC), the grievors were advised that they were occupying the South track between Park Gate and Devona without proper TOP authority.

Mr. Fadi and Mr. Moon attended separate formal employee investigations on March 25, 2004, with separate supplemental investigations on April 1 and 2 respectively. Following completion of the investigations, the grievors' responsibility was determined and they were each assessed discipline as described above.

The Union contends that:

- The discipline assessed Car Mechanics Moon and Fadi is unwarranted and excessive.
- CN Rail is in violation of Attachment "C" of the 2004 Memorandum of Settlement reached between the parties.
- The Company is in violation of its own policies and procedures and the Canadian Railway Operating Rules.
- The restriction placed on the two employees is permanent in nature and severely affects the employees' opportunity for earnings.

- The Union contends that the Company has issued double discipline for the same alleged infraction.

The Company disagrees and has declined the Union's grievance.

## II. SUMMARY OF THE RELEVANT FACTS

Mr. Moon and Mr. Fadi are Car Mechanics, and hold secondary assignments performing freight car repairs on line with the Road Repair Truck. On 23 March 2004, they were assigned to repair a defective car that had been set out in the backtrack at Devona, Alberta. Not being familiar with the public road access into Devona, they decided to hi-rail into the site from Swan Landing.

Going westwards, the track is single track from signal 1994 at Swan Landing to signal 2059 at Park Gate, double track from signal 2059 at Park Gate to signal 2165 at Devona, then single track again from signal 2146.

At that time, Engineering Foreman Newton was in possession of a TOP for the *south* track from Devona to Park Gate and from signal 2060S at Park Gate to signal 1994 at Swan Landing, and another TOP into the siding at Swan Landing in order to clear his equipment into the yard at Swan Landing.

Car Mechanic Kris Moon received TOP authority from Signal 1993D at Swan Landing to signal 2146 at Devona via the main and *north* tracks, with a TOP conflict with Foreman Newton which required Car Mechanic Moon to obtain Foreman Newton's verbal permission to enter into his TOP limits. Foreman Newton granted this verbal permission once he had cleared the yard at Swan Landing. Accordingly, Moon and Fadi proceeded westward from Swan Landing.

When Moon and Fadi reached the switch at Park Gate, it was aligned for the south track. Although they had no operating authority to be on the south track, they nevertheless proceeded along it towards Devona. The Railway Traffic Controller noted that the switch at Park Gate was not lined for the north track and contacted Moon to inquire whether they needed the switch lined. Moon advised the RTC that they were past that switch location. When RTC asked which track they were on, Moon replied that they were on the south one. RTC immediately advised Moon that they had no authority to be on the south track, and to stop everything until they received further instructions. Shortly afterwards, RTC issued another TOP to Moon for the south track between Park Gate and Devona. Moon and Fadi continued on, repaired the freight car, and then advised RTC that they were done and heading back east on the south track. RTC told them to go back west to the crossing at Devona and wait for Trainmaster Dave James who had been dispatched to meet them. James obtained their hard copies of the TOPs, and accompanied them and the Road Repair Truck to Jasper where Moon and Fadi were removed from service due to their rule violation pending formal investigation on 25 March 2004.

During the investigation, Moon maintained that the south track was the main line, and that he therefore was in compliance with the TOP. Nevertheless, Moon admitted that he had “made a mistake”, and Fadi said that “many rules have been made clear that were not clear prior to the incident”. Moon obtained approximately 5 TOPs a month; while Fadi had never personally obtained a TOP, he acknowledged that he as a member of the crew also had responsibilities to know the terms of the TOP and see that it was complied with. As a result of its concerns about both Moon and Fadi’s understanding of the TOP system, and in light of prior incidents involving them and TOPs, the Company imposed 40 demerits on Moon and 29 on Fadi (the maximum number the latter could receive without resulting in automatic

termination),<sup>1</sup> plus restricted both of them from performing secondary assignments and qualifying in the Canadian Rail Operating Rules for a period of at least 12 months, to be reviewed after 12 months. Although both grievors maintain their primary assignments, the effect of not being able to perform secondary assignments has adversely affected them financially because they cannot perform overtime.

The Union filed this grievance on 6 May 2004.

Subsequently, in September 2004, both Moon and Fadi successfully passed the examinations in the Canadian Rail Operating Rules (CROR) after a paid three-day rules class, although the Company has maintained the restrictions until its review at the end of the 12-month period. The Company has indicated that it would be willing to mentor Moon and Fadi in the CROR and to allow them to rewrite the examination at the end of the 12-month period in order to ensure their current knowledge in the CROR, which would allow them to perform their secondary assignments again.

Moon has worked for the Company for approximately 27 years; Fadi for approximately 24 years.

### **III. SUBMISSIONS FOR THE COMPANY**

The Company submits that the Grievors' presence on the south track was a breach of the TOP which had been issued to Moon and which Fadi had an obligation to see was complied

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1. Under the Company's disciplinary system, an employee will be terminated if the employee has 60 active demerit points. For every clear year of service, 20 demerit points are removed from the employee's record. At the time of this incident, Fadi had 30 demerit points.

with. This error was dangerous, potentially causing loss of life and limb and damage to property. Safety is not negotiable.

With respect to Moon's insistence that he was within the TOP because the south track is the main track, Ms. Payne pointed out that the Canadian Rail Operating Rules require double track to be clearly marked as "north" and "south" (or "east" and "west" as the case may be), so there was no room for any confusion that the south track was the "main line".

Given that both Grievors had been involved in other relatively recent incidents involving infractions of the TOP, Ms. Payne submitted that there was ample justification to remove them from any assignment involving TOPs, requiring them to requalify, and to wait a substantial period of time before being able to resume operating on the line in order to get their attention to the importance of following the rules accurately, completely, and every time.

Ms. Payne referred to previous arbitration decisions upholding this range of demerit points for TOP violations:

- *Canadian Pacific Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); T. McMahon and A.G. Beyer Grievance*, CROA 2855, Arbitrator M. Picher, 30 May 1997, where 40 demerits were assessed to two employees for the serious infraction of proceeding into a TOP limit without permission.
- *Canadian Pacific Railway and Brotherhood of Maintenance of Way Employees; McCarthy Grievance*, CROA 3255, Arbitrator M. Picher, 31 May 2002, where 45 demerits and a two-month suspension were imposed when an employee drove his

hi-rail vehicle directly into the path of a train, which he had cleared through his territory, which was a second cardinal rules infraction.

- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (Brotherhood of Locomotive Engineers); R. Sampson Grievance*, CROA 3251, Arbitrator M. Picher, 14 May 1999, which notes that discipline for cardinal rules infractions has generally ranged from 30 demerits up to dismissal.

With respect to the Union's objection that the 12-month restriction from secondary duties was a double discipline for the same offence, Ms. Payne submitted that it was rather a compound discipline necessary to address the Rule violation and the significant safety issue. The demerit assessment was the normal disciplinary action for the TOP violation, and the requirement for them to re-obtain their Operating Rules certification was safety driven. She referred to:

- *Ontario Northland Railway and Ontario Northland Employees Independent Union; J. Rosseter Grievance*, AH 495, Arbitrator M. Picher, 30 June 2000.
- *Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); Verdi Grievance*, CROA 3105, Arbitrator M. Picher, 14 April 2000, upholding the appropriateness of a mixed penalty of 50 demerits and 15 days' suspension.

Ms. Payne submitted that the discipline imposed was appropriate in light of the previous disciplinary records of the Grievors—in a four-month period, Moon had twice been found on the wrong track and had violated Operating Authorities; and Fadi had violated the Operating Rules three times in less than a three-year period. The Company had shown appropriate compassion to Car Mechanic Fadi by only assessing 29 demerits for the incident,

which allowed him to continue his employment when his services would otherwise have been terminated for accumulating more than 60 demerits. Any monetary loss to the Grievors had been limited to potential overtime they might have been entitled to if they had been permitted to perform their secondary assignment on the Road Repair Truck; they remained eligible for overtime on their regular assignments.

Accordingly, the Company submitted that the grievances should be dismissed.

#### **IV. SUBMISSIONS FOR THE UNION**

Mr. McDonagh submitted that both Grievors believed that they had authority to be on the tracks in question. The authority was for the main and north tracks. Moon told the investigators that he thought that the south track was the main track, and that he expected the switch at Park Gate to be aligned to that track. Similarly, Fadi told the investigators that he believed they had authority to be on the south track because it was the main track (as well as authority to be on the north track which he said was a branch off the main track); the authority extended beyond the double track to switches on the single track on either side; and he assumed that the RTC had aligned the switch at Park Gate for them.

The Union submitted that the discipline was extremely excessive for what appears to be nothing more than a misinterpretation of the TOP issued by the RTC, and far outweighs the educational value that progressive discipline is meant to instill. Even in cases where an employee clearly violated a TOP by being on the wrong track, previous arbitrators have assessed around 20 demerits:

- *Canadian Pacific Railway and Canadian Council of Operating Unions (United Transportation Union); George Grievance, CROA 3224, 16 November 2001, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); Brandon Grievance, CROA 3237, 16 January 2002, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); Ewald Grievance, CROA 3005, 17 November 1998, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (Brotherhood of Locomotive Engineers); Flack Grievance, CROA 3233, 19 December 2001, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (Brotherhood of Locomotive Engineers); Edwards Grievance, CROA 3252, 21 May 2002, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); Pastl Grievance, CROA 3028, 18 January 1999, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (Brotherhood of Locomotive Engineers); Sampson Grievance, CROA 3051, 14 May 1999, M. Picher.*

- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (Brotherhood of Locomotive Engineers); Sampson Grievance, CROA 3231, 19 December 2001, M. Picher.*
- *Canadian National Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); King Grievance, CROA 3270, 14 June 2002, M. Picher.*

In addition, Mr. McDonagh submitted that the one year restriction from performing secondary assignments (subject to review thereafter) effectively constitutes an open-ended demotion. A demotion is not normally used in disciplinary situations, and an open-ended or permanent demotion is usually inappropriate. Accordingly, the restriction is excessive and not justified in the circumstances. He referred to the following decisions:

- *Canadian National Railway Company and Brotherhood of Maintenance of Way Employees; Kanary Grievance, CROA 944, 11 May 1982, J. Weatherill.*
- *Canadian National Railway Company and Brotherhood of Maintenance of Way Employees; L. Cartier Grievance, CROA 3250, 21 May 2002, M. Picher.*
- *Canadian Pacific Limited and United Transportation Union; Smith Grievance, CROA 1052, 12 April 1983, J. Weatherill.*
- *VIA Rail Canada Inc. and Brotherhood of Locomotive Engineers; Gould Grievance, CROA 1956, 12 October 1989. M. Picher.*

- *Canadian Pacific Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); Kopp Grievance, CROA 3166, 20 November 2000, M. Picher.*
- *Canadian Pacific Railway Company and Canadian Council of Railway Operating Unions (United Transportation Union); Christie Grievance, CROA 3225, 16 November 2001, M. Picher.*
- *Canadian Pacific Railway Mechanical Services and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 101; Kusen Grievance, 12 July 2004, M. Picher.*
- *City of Lethbridge and International Association of Fire Fighters, Local 237, (1988) 34 L.A.C. (3d) 165 (Beattie).*

Further, the restriction amounted to a financial penalty because the Grievors lost the opportunity to work overtime assignments on the Road Repair Truck.

It is inappropriate for the Employer to impose multiple penalties for the same offence.

Accordingly, Mr. McDonagh submitted that the grievances should be allowed in their entirety, and the Grievors should be fully compensated for all lost wages, benefits and other losses, including interest.

## **V. AWARD**

For the following reasons, I have come to the conclusion that the grievance must be allowed in part.

I want to make it clear that the Company had just cause to discipline the Grievors for being on the south track without authority. I do not accept the Grievors' belief that the TOP authorized them to be on the south track. There is no doubt whatever that the Rules provide that where there are two main tracks they must be designated "north" and "south" (or "east" and "west"), and there is also no doubt whatever that the double tracks here were clearly labelled "north" and "south". I do not accept the Grievors' explanation that they believed they were on the "main line" and that the "north line" was simply a branch line. The bottom line is that the Grievors had no authority to be on the south track, should have known that, and should not have been there.

Violations of TOP authority create safety risks to life, limb and property. The TOP rules must be complied with strictly in each and every circumstance. Safety is compromised whenever an employee makes an assumption or acts contrary to the TOP rules. Safety is not negotiable. The fact that an accident did not occur is fortuitous, but does not reduce the gravity of the Grievors' breach of the TOP rules.

Although Moon was the foreman who obtained the TOP, Fadi was also responsible for ensuring that the TOP was complied with. In these circumstances, I am satisfied that the Company had just cause to impose discipline on both Grievors.

Turning my mind then to the appropriateness of the discipline, I am of the view that it was too severe in all of the circumstances. Although some of the cases indicate that 20 merits

might be a range for first-time breaches of the TOP rules, I am not inclined to reduce the number of demerits which the Company has imposed in light of the Grievors' respective records of previous discipline for violating these rules. Nor am I inclined to criticize the Company's decision to restrict the Grievors' ability to perform secondary assignments that would involve TOP authority until they demonstrated their complete understanding of the Canadian Railway Operating Rules and the importance of always complying with those rules.

However, the fact is that the Grievors took that course and successfully passed that examination in September 2004. In my view, that was sufficient to address the Company's legitimate concern that they demonstrate their understanding of the Operating Rules and their appreciation of the importance of complying with those Rules in every case without exception.

In the absence of an existing rule or clearly articulated policy to this effect, in my view it was not appropriate for the Company to impose a minimum 12-month restriction from secondary assignments involving TOP authorities. As indicated in the previous paragraph, the restriction should have been terminated when the Grievors completed the course and passed the examination in September 2004.

As a result, the Company is directed to compensate the Grievors for any losses they have occurred since September 2004.

I retain jurisdiction to determine the amount of the compensation, in the event that the Parties cannot agree.

**SIGNED, DATED AND ISSUED** at Edmonton, Alberta on 31 March 2005 by:

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D. P. Jones, Q.C., Sole Arbitrator