ARBITRATION

BETWEEN:

CANADIAN NATIONAL RAILWAY
(the "Employer" or the "Company")

- and -

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA (CAW–CANADA), LOCAL 100
(the "Union")

With respect to a Union grievance dated February 11, 2005 against the discipline imposed on car mechanics **C. D. Hauff** and **P. A. Perron** for a TOP violation on February 6, 2005.

AWARD

ARBITRATOR

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

REPRESENTATIVES OF THE UNION

Brian McDonagh . . . . CAW National Representative
Dennis Wray . . . . Regional V.P., Local 100
Chris Hauff . . . . Grievor
Phil Perron . . . . Grievor

REPRESENTATIVES OF THE COMPANY

Ron Campbell . . . . LRM, Prairie Division
Patricia Payne . . . . LRM, Edmonton
Jeff Whelon . . . . Manager, Operating Practices
Lloyd Redenboch . . . . Mechanical Supervisor

HEARD at Edmonton, Alberta on May 30, 2005.
AWARD ISSUED at Edmonton, Alberta on June 9, 2005.

I. BACKGROUND

The Grievors, car mechanics Chris Hauff and Phil Perron, were each originally issued 40 demerits and a restriction from performing secondary assignments and qualifying in the Canadian Rail Operating Rules for a period of at least 12 months, subject to review after 1 year, in connection with a Track Occupancy Permit (TOP) violation while performing work on rail car DTTX 54061 in a siding at Quibell, Ontario on February 6, 2005.

There is no material dispute about the facts. When the Grievors arrived at the siding, they locked the back track and parked the road repair truck on rubber on the back track east of the bell crossing. After wondering whether they should get a TOP for the siding, they walked to the car needing repair located on the siding about 10 cars west of the bell crossing at Quibell Station. On inspection, they noticed that number 3 brake beam was hanging down. Without obtaining a TOP or blue-flagging the car on the siding, Phil Perron crawled under the car and removed one brake pin and the brake beam, lever and rods, while Chris Hauff watched for traffic. They dragged the brake beam out from underneath the car and Phil went back to the road repair truckto get some wire to tie down the rod and lever to the car. When Phil returned, they called the Rail Traffic Controller–Mechanical in Edmonton to find out what to do with the car as they could not replace the wheels at that location. RTC indicated that the car would be returned to Symington for repair, so they released the car and drove back to Canora, Ontario. When the dispatcher realized that they did not have a TOP, they were held back from service and interviewed. In the course of their respective interviews, Mr. Hauff and Mr. Perron acknowledged that the application of Rule 805 meant that they should have obtained a TOP from RTC–Edmonton and should have blue-flagged both the car on the siding and the road repair truck on the back track. Both Grievors described their failure to do so as “an error of judgment” which would not be repeated.

Both Grievors have long service since the mid-1960s with excellent records. Mr. Hauff received his initial certification for Protection of Track Units and Track Work in September 1997, and Mr. Perron received it in April 2000. Both have received subsequent re-certification training; and both wrote and passed the Rules exam in 2003.

The Employer imposed discipline for 3 Rule violations:

1. The Grievors' failure to obtain a TOP prior to working on the car on the siding, contrary to Rule 805 of the Canadian Operating Rules.

2. Failing to blue-flag the car on the siding, as required by Appendix 1, Regulations for the Protection of Employees while Inspecting, Servicing, Repairing and Working in and about Cars and Locomotives, Item 4 of Agreement 12.

3. Failing to blue-flag the road repair truck on the back track, as required by Appendix 1, Regulations for the Protection of Employees while Inspecting, Servicing, Repairing and Working in and about Cars and Locomotives, Item 4 of Agreement 12.

The Union filed this grievance on February 11, 2005, alleging that there was no just cause for the quantum of discipline assessed.

As a result of the issuance of an arbitration award I issued in the *Moon and Fadi* case on March 31, 2005,[1] the Company on April 20, 2005 on a without-prejudice basis reduced the number of demerits assessed to each of the Grievors from 40 demerits to 20 demerits, and

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1. *Canadian National Railway Company and the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW/TCA Canada), Local 100; Moon and Fadi Grievance* (23 March 2005; D.P. Jones, Q.C.; SHP 594.

allowed them to perform their secondary assignments in light of the fact that both of the Grievors had by then successfully completed a full day of mentoring and an examination on the Operating Rules.

For reasons unrelated to this grievance, both of the Grievors resigned from the Company at the end of April 2005.

II. SUBMISSIONS FOR THE EMPLOYER

The Employer's position is that the 3 Rules were clear, and were clearly known to the Grievors; the Rules relate to safety; the violation of the rules was serious; safety is not negotiable or optional; safety rules must be complied with every time without exception; it was not the Grievors' place to exercise any judgment not to obey the safety rules. After referring to a number of previous cases which it said suggested that 40 demerits was the appropriate range for a violation of the TOP Rules, the Employer referred to my recent decision in *Moon and Fadi* (SHP 594) to justify the revised discipline of 20 demerits and 2 1/2 months suspension from performing secondary assignments that would involve TOP authority until they demonstrated their understanding of the Canadian Operating Rules and the importance of always complying with those Rules. The Company submitted that this revised discipline was appropriate; was a single multi-faceted penalty, and not multiple penalties for the same infraction; and was in compliance with the Company's obligations under Attachment C of the Memorandum of Agreement dated March 14, 2004 to "reinstate the discipline system and standards that were in effect at the commencement of the previous collective agreement, in accordance with past practice and jurisprudence".

Accordingly, Mr. Campbell submitted that the grievance should be dismissed.

III. SUBMISSIONS FOR THE UNION

Mr. McDonagh submitted that even the revised discipline was too severe in the circumstances of the present case.

With respect to the back track, the Grievors had protected the back track by a lock and derail, which provided significant protection for the back track even though they had not blue-flagged it. If they had set the blue flag at an appropriate place, it would have protected both the siding and the back track. The amount of time required for Mr. Perron to go under the car to remove the brake beam was very short, and Mr. Hauff was maintaining a visual lookout which covered at least half a mile in each direction. The effect of the breach of the Rule was *de minimis*. Further, when the affected car was set out in the siding, a General Bulletin Order would have been issued to all operating crews to inform them that something was occupying that siding, making it unlikely that anything would have come onto the siding.

Secondly, the assessment of both demerits and a suspension from doing supplementary work amounted to both multiple discipline and a demotion.

The previous long service of the Grievors and their previous good records should have been taken into account in determining the amount of discipline.

IV. DECISION

Notwithstanding the long service and previous good records of the Grievors (for which they are to be commended), I have come to the conclusion that the revised discipline imposed by the Employer in this circumstance was appropriate.

There is no doubt whatever that the Grievors' actions breached the safety rules in the three respects identified by the Employer. The Grievors acknowledge that.

As I said in the *Moon and Fadi* case (SHP 594) (at page 12):

> 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.

It is simply inadmissible for an employee to say that they made "an error of judgment" in not complying with the safety rules. Employees are not expected to exercise judgment in whether or not to comply with the safety rules; rather, they are expected—indeed required—to comply with those rules in every case.

In dismissing this grievance, I would make this observation. In *Moon and Fadi*, I recognized the legitimacy of the Employer's requiring employees who breached the TOP Rules to be retrained and successfully re-examined in the Canadian Operating Rules, and to prevent those employees from performing supplemental duties which required them to comply with the Canadian Operating Rules until this had been accomplished. In the *Moon and Fadi* case, those steps had occurred some months prior to the arbitration hearing, and I indicated that

the Employer should have reinstated them to those duties once they had successfully completed those steps. In the present case, I am satisfied that the Employer acted with appropriate celerity after receiving my decision in the *Moon and Fadi* case in order to revise both the number of demerits assessed to these Grievors and to re-instruct and reexamine them in the Canadian Operating Rules. I do want to make it clear that whenever the Employer reasonably perceives a need to re-instruct and reexamine employees who have breached the Operating Rules, it should do so with due diligence.

V. AWARD

The grievance is dismissed.

SIGNED, DATED AND ISSUED at Edmonton, Alberta on June 9, 2005 by:

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