CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4192

Heard in Montreal, April 9, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of discipline assessed to Conductor Ben Cormier in the form of a 90-day suspension on November 25th, 2010.
Appeal of discipline assessed to Conductor Ben Cormier in the form of a 7-day suspension on August 31st, 1012.
Appeal of discipline assessed to Conductor Ben Cormier in the form of discharge on October 1st, 2012.

JOINT STATEMENT OF ISSUE:

The grievor, Ben Cormier, was assessed a 90-day suspension for "Violation of CROR Rule 439 on October 31, 2010 at Deersdale, Napadogan Sub" by way of from 780 on November 25th, 2010. On August 31st, 2012, the grievor was assessed a 7 day suspension by way of CN form 780 for "The violation of CROR Rule 113, GOI Section 8, item 12.10 and failing to comply with the instructions of General Notice issued Feb. 12, 2012 (Hump Switching into E001 to E004). On October 1st, 2012, the Grievor received a Form 780 that assessed him discharge for "Violation of GOI Section 8, items 12.4 and 12.5 at track E054 while working conductor of L53911-17 on September 17th, 2012" thereby terminating his employment.

The Union contends that the investigations were not conducted in a fair and impartial manner as per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Conductor Cormier be made whole. The Union further contends that the discipline assessed is unjustified, unwarranted, discriminatory and excessive in each instance. The Union contends that the assessment of a 90-day suspension for the incident on October 31st, 2010 at Deersdale on the Napadogan Sub was far too severe given the mitigating factors and as such seek the penalty to be removed in its entirety. In the alternative the Union seeks to have the penalty reduced as the Arbitrator sees fit. The Union contends that the assessment of a 7-day suspension for the incident on August 31st, 2012 was excessive given the facts. The Union seeks to have the 7-day suspension assessed to Mr. Cormier removed in its entirety and he be made whole and be compensated for all wages and benefits lost during his suspension. Failing that and in the alternative the Union seeks to have the penalty reduced as the Arbitrator sees fit. The decision to terminate Mr, Cormier was unwarranted, unjustified, discriminatory, disproportionate and grossly excessive in all of the

circumstances based on the facts. The Union contends that the Company has failed to allow the grievor a fair and impartial hearing into the incidents under investigation. The Union contends that the Company violated Articles 82, 84, 85.5 and addendum 123 of the 4.16 Collective Agreement. The Union requests that the discipline be removed entirely from Mr. Cormier's record, and that Mr. Cormier be made whole and compensated for all lost wages and benefits incurred as a result of this discipline. The Union further requests that Mr. Cormier be reinstated with no loss of seniority. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position

The Company disagrees with the Union's contentions and denies the Union's request

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) A. Daigle**
General Chairperson	**For J. Liepelt**
	Senior Vice President, Eastern Region

There appeared on behalf of the Company:

A. Daigle	– Manager Labour Relations, Montreal
D. Gagné	– Senior Manager, Labour Relations, Montreal
M. Marshall	– Senior Manager, Labour Relations, Toronto
V. Paquet	– Manager, Labour Relations, Toronto
S. Dale	– Assistant Superintendent, Toronto
P. Haineault	– Manager Workers Compensation Board, Toronto
D. Larouche	– Manager Labour Relations, Montreal

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
J. Robbins	– General Chairperson, Sarnia
G. Gower	– Vice General Chairperson, Belleville
J. Lennie	– Vice General Chairperson, Port Robinson
C. Oulette	– Vice Chairperson, Moncton
B. Cormier	– Grievor, Moncton

AWARD OF THE ARBITRATOR

As is evident from the Joint Statement of Issue, there are three heads of discipline to be considered herein. Firstly, the record confirms that on October 31, 2010, the grievor, while assigned as conductor on train L535, was involved in his train going by a stop signal at Deersdale, in clear violation of CROR 439. As a result of that incident

both the grievor and his locomotive engineer were assessed ninety day suspensions. At the time of that incident the grievor's prior disciplinary record stood at fifteen demerits.

On the whole, the Arbitrator can see no basis for reducing the penalty in that case. CROR 439 is among the most critical of cardinal rules and it is plainly hazardous for employees to violate the rule in a manner which could have substantial consequences for the health and safety of employees and the protection of Company equipment. The facts before the Arbitrator would indicate that the grievor was somewhat distracted, apparently intent on closing a door on his locomotive as his movement moved at excessive speed towards the stop signal which was violated. I can see no basis for the reduction of the penalty assessed and this aspect of the grievance must therefore be declined.

The second event involves the grievor working as a Conductor on train L537 on August 15, 2012. Along with his locomotive engineer he was required to switch into tracks E001, E003 and E004 at Moncton. Because of the grade at that location the Company had instituted a rule which prohibited the free rolling of cars into those tracks. Rather, as reflected in the notice re-issued on February 12, 2011, employees were directed that they must first shove into the track approximately twenty to twenty-five car lengths and secure the movement with a handbrake. Once that is established the ensuing cars entering the track can be allowed to roll free. It would appear that that device was established to prevent the excessive movement and possible derailment of cars entering those tracks, which are saucer-like in their grade.

There can be no doubt but that the grievor failed to adhere to the rule established by the Company. During the ensuing investigation he admitted having knowledge of the rule, although he claimed that he believed that it had been cancelled. The Arbitrator has some difficulty with that explanation, as it appears that the rule was in any event posted on the lunch room wall in the workplace. Even accepting that it may have been missing from the binder, the grievor had no reason to believe that it had been cancelled and, if in any doubt, should have inquired as to the status of the rule. As the evidence confirms, there was in fact a derailment as a result of crossed draw bars in track E001.

I am satisfied that in the circumstances the grievor and his workmate were in violation of CROR 113 and G.O.I. 8-12.10 as well as being in violation of the general notice of February 12, 2012. As a result of the ensuing investigation the grievor was assessed a seven day suspension while his locomotive engineer received twenty demerits.

The Arbitrator must agree with the Union that it is difficult to understand the differential treatment of the two employees in the circumstances. At the time in question the grievor had no demerits on his own record. It is less than clear to the Arbitrator on what basis he should be viewed as more culpable than his locomotive engineer. I am satisfied that a suspension was not appropriate in the circumstances. I therefore direct that the grievor be compensated for his wages and benefits lost in respect of his seven day suspension and that his disciplinary record be amended to show the assessment of twenty demerits for the incident of August 15, 2012.

The third head of discipline concerns the actions of the grievor on September 17, 2012. It is not disputed that on that occasion, while spotting a car at a ramp in Ahmerst Mr. Cormier did fail to observe the requirements in relation to riding equipment in or near an area of restricted clearance. He plainly did so in violation of GOI 8.12.4. Following an investigation the Company discharged the grievor solely on the basis of that action.

The Union argues that the grievor was denied the benefit of a fair and impartial investigation in relation to the various heads of discipline here being examined. The Arbitrator cannot sustain that position. The mere fact, as the Union alleges, that suggestive questions were put to the grievor and he might be asked why he violated a particular rule does not necessarily confirm prejudgement or unfairness on the part of the investigating officer.

In dealing with the event of September 17, 2012 the Arbitrator has some difficulty with the degree of discipline assessed against Mr. Cormier. Firstly, as a mitigating factor, it is not disputed, that there was no posted indication at the time in Amherst to give prior notice to the grievor that his movement was entering a restricted clearance area. That said, its difficult to reject the Company’s assertion that an observation of the ramp area would have made it clear to the grievor that he was dealing with a restricted clearance and that it was incumbent upon him to detrain in advance of arriving at the ramp, which he failed to do. I am compelled to agree that that did constitute a serious

safety violation on the grievor's part as he effectively placed himself in a position, still riding the side ladder of his leading rail car, where he could have become wedged between the car and the wall of the ramp. His action of simply climbing the ladder to step on to the ramp was plainly hazardous and contrary to G.O.I. 8 12.4 and 12.5.

In the Arbitrator's view a substitution of penalty albeit a serious one, is appropriate in that circumstance. This aspect of the grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and with his disciplinary record to stand at thirty-five demerits. The time between his termination and reinstatement shall be recorded as a suspension for his violation of the G.O.I. on September 17, 2012 at Ahmerst.

April 15, 2013

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MICHEL G. PICHER
ARBITRATOR