CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4485

Heard in Edmonton, September 13, 2016

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Assessment of twenty demerits to Conductor Spain (PIN182466) for speeding while working as a Conductor on train M31841-15 on November 17, 2015 and the resulting discharge for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On November 17, 2015, Conductor Michael Spain is ordered at 05h55, on duty time 06h10, for train M31841-15. This train operates between Capreol and Toronto on the Bala and York Subdivisions.

That day, RTC Center receives an alert from the Wy-Tronix system of the lead locomotive CN2527, indicating that his train was operating in excess of 35 MPH.

Conductor Spain was assessed 20 demerits for speeding. The assessment of 20 demerits resulted in the discharge of Conductor Spain for accumulation of demerits, effective December 7, 2015.

The Union contends that the discipline assessed is unjustified, unwarranted, discriminatory and in any case excessive. The Union further contends that the discipline assessed is in violation of the 4.16 Collective Agreement and in particular Articles 82, 85, 85.5 along with Addendum 124, the Brown System of Discipline. It is the Union's position that the Company is also in violation of arbitral jurisprudence in this matter.

The Union seeks to have Conductor Spain reinstated without loss of seniority and made whole for all lost wages and benefits. The Union further seeks to have the Company remove any/all records of discharge from Conductor Spain's personal and discipline history.

It is the Union's position that given the violations of the Collective agreement a Remedy is applicable in the circumstances consistent with Addendum 123 of the Collective Agreement.

The Company disagrees and declines the Union's requests.

The Company's position is that Mr. Spain was responsible for the speed violation by failing to properly inform his locomotive engineer that their train was exceeding the 35 MPH speed restriction while operating on the Bala Subdivision. Such a failure to ensure the safe passage of his train, in full compliance with all speed limitations and restrictions at all times cannot be taken lightly and is in the forefront of the Company's approach to ensuring the safety of its employees and its train operations.

On the whole, given the nature of the culminant incident, the discharge of Conductor Spain is the only appropriate measure of discipline to consider.

The Company is not in agreement that Addendum 123 is applicable or that collective agreement was violated, as alleged by the Union. Thus, the Company denies this allegation.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) O. Lavoie**
General Chairman	**Labour Relations Manager**

There appeared on behalf of the Company:

O. Lavoie	– Labour Relations Manager, Montreal
A. Daigle	– Labour Relations Manager, Montreal
B. Glass	– Senior Engine Service Officer, Toronto
C. Michelucci	– Labour Relations Director, Montreal
D. Larouche	– Senior Manager Labour Relations, Montreal

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
R. Hackl	– National V. P., Saskatoon
R. Donegan	– General Chairman, Saskatoon
J. Holliday	– General Chairman, Vancouver
J. Lennie	– Local Chairman, Port Robinson

AWARD OF THE ARBITRATOR

Train M314 was a key train running from Capreol near Sudbury to Toronto. Mr. John Bartley was the Locomotive Engineer and the grievor, Mr. Michael Spain, the Conductor. The speed limit governing the train was 35 MPH because it was in a “special dangerous zone” between units 274 and 261 on the Bala Subdivision in Ontario. There is no dispute that within that 35 MPH zone, automatic detection clocked train M314 going 53.8 at one point, and in excess of the limit at two other check points.

Mr. Spain acknowledged that conductors and engineers are equally responsible under Rule 106 for ensuring the speed rules are met. When asked during his investigation whether they complied, he replied:

> We understand the rule but we forgot our location to the SDC zone so, no we did not comply.

Both Mr. Bartley and Mr. Spain knew the concepts and rules governing key cars and "special dangerous zones". However, it is useful to recap them briefly. The key train concept was introduced following the Lac-Megantic tragedy in 2013. Trains are designated as Key Trains when they involve tank cars loaded with poisonous or toxic hazards or ammonia, spent nuclear fuel or high level radio active waste or twenty or more loaded tank cars containing crude oil which include one of the older style cars. Before the key train policies came into force, trains carrying dangerous commodities were only limited to 35 MPH when there was a high density population along the right of way. Otherwise, they were able to travel at regular track speeds. Now, there is a universal 50 MPH limit for key trains, reduced to 35 MPH in these "special dangerous zones".

Mr. Spain offered, during the investigation that:

> I was a bit tired having to adjust my sleep hours coming into work because I just switched my pool job from working through the night to working days. We discussed our paper work. We talked about having a key train and we also knew that we had a special dangerous car. We covered our train length and all the pertinent information regarding our train. We also went over our tgbo's and we signed the train journal.

Despite conceding he knew they had a key train, and knowing the applicable Rules, twenty-four minutes after leaving Capreol the train was exceeding the speed limit

by 18 MPH because they forgot they were in a SDC. Speeding at one part lasted six minutes twenty-nine seconds and at another eleven minutes fifteen seconds.

In **CROA&DR 2951** Arbitrator Picher held:

> Needless to say, this Office has long recognized that speeding infractions can be the basis for a serious measure of discipline (see, e.g., CROA 1053, 1176, 1285, 2092, and 2158). In the instant case there is little reason to depart from the generally established principles with respect to this kind of infraction. It is significant, in my view, that the grievor's movement was operating in an urban industrial area, thereby increasing the risk of aggravated consequences in the event of any unforeseen mishap. In all of the circumstances the Arbitrator is satisfied that the twenty - five demerits assessed against Conductor Hamer fell within the appropriate range of discipline, …

In **CROA&DR 3233** Arbitrator Picher noted that twenty demerits would usually be an appropriate penalty for speeding but due to that grievor's exemplary twenty-seven year record he reduced the penalty down to ten points.

The Employer suggests that Mr. Spain, with his prior "second chance" is in the same position as the grievor in **CROA&DR 3653** where it was held:

> The Arbitrator notes that the grievor previously received a deferred dismissal for accumulation of demerits in 1998. The grievor has, through the system of discipline, essentially been given a second chance already. He has been on notice since that time, and particularly recently with his record of fifty demerits, that continued safety breaches of the kind that occurred here could lead to his termination. Despite his twenty-two years of service, this is unfortunately not a case where the Arbitrator sees fit to alter the penalty imposed for the incident.

The Union notes that there was no damage in this case. It refers the arbitrator to the collective agreement's description of the Brown System of Discipline. I note particularly the following two paragraphs:

> An employee who has close to 60 demerit marks and who is again subject to discipline may be suspended when a thorough review of the case indicates there are exceptional circumstances which warrant that a further opportunity be given the employee.
>
> …
>
> Discharge is a recognition of the employee's inability or unwillingness to bring his/her performance to an acceptable level. Discharge will most frequently be the culmination of a number of progressive corrective disciplinary actions, but may be the consequence of a single act.

The Union suggests there is nothing corrective in the Employer's decision to assess points that would result in the grievor's dismissal. It suggests instead they could have demoted him to brakeman status.

The Union provided a series of demerit point assessments from key train speeding violations in the ten to fourteen demerit point range. I have reviewed each of these, along with the authorities presented by the Employer. Given the range of circumstances and varying prior records I am not persuaded that this is a case of uneven treatment, or a discriminatory discipline.

Locomotive Engineer Bartley was also assessed twenty demerits although, as the Union notes, it was his second speeding infraction that year. How comparable his record was to that of Mr. Spain was not disclosed.

Mr. Spain has no prior record for speeding. However, his career disciplinary record shows a total of two-hundred-forty-four demerits, relieved by credit for discipline free years down to its current forty-nine demerits. Over his career he has had tweleve written reprimands and six suspensions. His active record at the point of termination included two written reprimands and a suspension.

Mr. Spain has been the subject of CROA proceedings before. In 2007 in **CROA&DR 3674** he was discharged for the accumulation of demerit points. Arbitrator Moreau felt a twenty demerit point assessment was too heavy for what he viewed as a technical violation of the Personal Protection Policy. He replaced it with a warning, which resulted in the grievor's reinstatement.

In 2010, Arbitrator Picher found thirty demerits too severe for an incident he too categorized as primarily a technical violation, substituting ten points in its stead and ordering the grievor reinstated. He noted at that time:

> Mr. Spain does have a fairly substantial record of discipline over his years of service, that record is generally devoid of cardinal rules violations of the kind which typically will justify the termination of an employee.

In 2013 the grievor was once again terminated for the accumulation of points, the offence being walking in front of a stationary car without the requisite clearance. Then, Arbitrator Picher noted the grievor's "unenviable" prior record and the fact that twice before discharges had been reduced. He said:

> "Given the length of the grievor's service and the nature of the culminating incident, … this is an appropriate case for a substitution of penalty, albeit subject to a severe measure of discipline."

The points were reversed and the grievor reinstated without compensation.

Mr. Spain is fifty-one years old. He started working for CN on April 23, 1984 and is thus a long-term thirty-one year employee. That is a very strong mitigating circumstance. Obviously discharge will have a serious impact on his income and future prospects.

I have weighed the fact that there was no injury or accident here, that is Mr. Spain's first speeding infraction, and that he has in the past had extended periods without discipline. However, against this must be weighed the grievor's very poor record and particularly the "second chances" he had already been afforded. It is true that the aim of the Brown system is primarily corrective. However, there comes a point where the repeated reduction in penalties to avoid the system's ultimate sanction only serves to undermine the system's preventative aspects. This is not a situation where there are sufficient mitigating factors to, yet again, relieve Mr. Spain of the consequences of his failure to take heed of prior warnings about the tenuous nature of his employment. This is not a technical violation. Significant speeding, in a special dangerous zone, when operating a key train, is a serious matter. Considering all these factors the grievance must regretfully be dismissed.

October 24, 2016

ANDREW C. L. SIMS
ARBITRATOR