

# **CANADIAN RAILWAY OFFICE OF ARBITRATION**

## **CASE NO. 2763**

Heard in Montreal, Thursday, 11 July 1996

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

### **DISPUTE – BROTHERHOOD:**

The Company assessed discipline in the form of a discharge to Track Maintenance Foreman A. Gervasi, P.I.N. 871950, for a motor vehicle High-Rail accident he was involved in where no injuries occurred.

### **DISPUTE – COMPANY:**

Track Maintenance Foreman A. Gervasi, PIN 871951, was assessed discipline in the form of discharge for his involvement in a hy-rail accident on January 11, 1996.

### **BROTHERHOOD'S STATEMENT OF ISSUE:**

The Brotherhood contends that the Company violated the collective agreement under article 18.6 of Agreement 10.1 when they unjustly treated Mr. Gervasi by assessing his record a discharge for a vehicle accident. The Brotherhood further contends that the company's assessment of discharge was extremely excessive and that the discipline of discharge assessed to Mr. Gervasi is "not consistent" with the discipline assessed to other employees who have been involved in similar type accidents.

The Brotherhood requests that Mr. Gervasi be reinstated to his position of track maintenance foreman without loss of seniority immediately and that he be compensated for any and all lost pro-rata and punitive wages since his removal from service. It is further requested that Mr. Gervasi be compensated for any and all lost negotiated benefits since his removal from service.

The company has denied the Brotherhood's contention and declined the Brotherhood's request.

### **COMPANY'S STATEMENT OF ISSUE:**

The Company discharged A. Gervasi for the following violations: Unsafe operation of a hy-rail as per the General Notice of CROR; non compliance with General Rule A; Unsafe operation of a hy-rail as per General Rule C; Violating the CN Operating Manual section on Track Unit Speed; Not following the safe operating practices as taught in the hy-rail vehicle and track unit safe operation course; Violating CN operating Manual section on Tack Units, rule 810; Violating CN operating Manual section on Track Units, section 814; Violating CN operating Manual section on Track Units, section 815, and Special instruction 815(1)(b); Failure to notify the RCTC of the incident, as per CN Operating Manual G.O.I., section 4.1.1(2); Delaying the RCTC's timely reporting of the incident to Transport Canada as per CN Operating Manual G.O.I., section 4.1.1(9) (Exhibit J/K/L).

The Company contends that Mr. Gervasi flagrantly disregarded the above rules and maintains the assessment of discharge was the appropriate discipline.

**FOR THE BROTHERHOOD:**

**(SGD.) R. F. LIBERTY**

**SYSTEM FEDERATION GENERAL CHAIRMAN**

**FOR THE COMPANY:**

**(SGD.) J. B. DIXON**

**ASSISTANT MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

- S. Michaud – Labour Relations Officer, Edmonton
- J. Dixon – Assistant Manager, Labour Relations, Edmonton
- D. Edison – District Manager – CN

And on behalf of the Brotherhood:

- P. Davidson – Counsel, Ottawa
- R. F. Liberty – System Federation General Chairman, Winnipeg
- D. Brown – Senior Counsel, Ottawa

**AWARD OF THE ARBITRATOR**

It is not disputed before the Arbitrator that Track Maintenance Foreman Gervasi violated a number of operating rules during the events leading up to the collision of his hy-rail vehicle with a speedswing operated by Permanent Machine Operator J.D. Bernier, when the latter was working within the grievor's TOP limits on January 11, 1996 at mileage 44.9 on the Redditt Subdivision. I am satisfied that the grievor was travelling at excessive speed, that he failed in his responsibility to know the whereabouts of Mr. Bernier's vehicle, that he did not follow proper procedures in respect of ensuring the copying of TOP instructions, that he failed to adequately test the brakes of his vehicle and proceeded at excessive speed, being unable to stop within one-half his range of vision at the point when the collision occurred. The real issue of substance in this case is whether the discharge of the grievor is an excessive measure of discipline, in the circumstances.

The Arbitrator is satisfied that it is. While the Company's representatives understandably stress the egregiousness of the errors committed by Mr. Gervasi leading up to the collision, the suggestion that he is beyond rehabilitation, and therefore unemployable, is difficult to sustain on the record of the Company's own treatment of this employee over many years. It is not disputed that Mr. Gervasi, an employee of twenty-four years' service with the Company, has previously been disciplined only once over the course of his career with the Company. That incident, which occurred in 1977, involved the assessment of ten demerits. There is, very simply, no record of progressive discipline to justify the assertion of the Company that Mr. Gervasi, who also served for a substantial period in supervisory positions as a roadmaster and a track supervisor, should be treated as being beyond redemption. There is no prior record to sustain that opinion, notwithstanding the gravity of his departures from the rules disclosed in the incident of January 11, 1996.

The material before the Arbitrator discloses that various forms of discipline short of discharge have been utilized in the past, and sustained by this Office, for similar sorts of infractions. Those have included the assessment of demerits, demotion, suspension or a combination of two or more of these sanctions. In this regard the Brotherhood draws to the Arbitrator's attention a number of prior awards including **CROA 1234, 1638, 1663, 1685 and 1717**. It also stresses the treatment of another employee who was involved in a near fatal collision in adjacent territory on the same day, who was junior to the grievor, who was assessed fifteen demerits. It does not appear disputed, however, that there may have been fewer rules violated in that case. It also notes the assessment of twenty-five demerits against employee L. Harrison in September of 1994 for his involvement in a collision between a tamper and spike puller and the thirty-five day suspension of employee E. Chuchmuch for a collision between a tamper and a stabilizer. Reference is also made to a six-month demotion assessed to employee M. Plante for unsafe operation of a track stabilizer and the assessment of ten demerits to employee D. Paul arising from the collision of a boom truck under his control with a crew cab.

It is, of course, impossible to draw precise comparisons between or among a number of incidents involving collisions of equipment. It is not, however, difficult to distinguish the equities in treatment where, as in the instant case, an employee who, by all objective evidence, has been a good employee of twenty-four years' service is summarily dismissed on the strength of a single incident. Even if the Arbitrator should disregard the Brotherhood's argument that the slippery track condition and history of brake difficulties recorded with respect to the hy-rail

vehicle, it is difficult to escape the conclusion that the discharge of the grievor was unduly harsh in the circumstances.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority, with compensation for wages and benefits lost attributable to one-half the period from the time of his discharge to the date of his reinstatement, with the balance of the period to be recorded as a suspension for his involvement in the collision of January 11, 1996.

July 12, 1996

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**