

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2876

Heard in Montreal, Thursday, 10 July 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of demotion and assessment of discipline on behalf of grievor, Mr. P.R. Byrne.

JOINT STATEMENT OF ISSUE:

On February 15, 1996, Mr. Byrne's record was assessed with 30 demerits and permanent demotion from his position of Foreman to a Bridgeman's position for his alleged failure to provide protection for employee and equipment within limits of CROR Rule 42 on October 21, 1995.

The Union contends that the discipline assessed was unwarranted and excessive in the circumstances.

The Union requests that: **1.)** Mr. Byrne be demoted to a Carpenter's position in Supplemental Agreement 10.9, a classification in which he holds seniority, rather than to a Bridgeman's position. **2.)** Mr. Byrne's demotion be made temporary, rather than permanent, in nature. **3.)** The demerit marks be expunged from Mr. Byrne's record.

The Company denies the Union's contention and declines its requests.

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY

SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. TORCHIA

FOR: VICE-PRESIDENT, CN WEST

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Officer, Edmonton
J. Torchia	– Manager, Labour Relations, Edmonton
G. Neave	– B&S Operations, Engineering, Edmonton

And on behalf of the Brotherhood:

D. Brown	– Sr. Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
P. Davidson	– Counsel, Ottawa
J. Brar	– General Chairman, Vancouver
J. J. Kruk	– Canadian System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was deserving of a serious degree of discipline for his failure to observe CROR Rule 42 on or about October 21, 1995. It appears that in providing verbal clearance to eastbound train CN 2433 East to proceed, Mr. Byrne overlooked the fact that a Pettibone crane was still operating within his work limits. Fortunately, the crane operator overheard the exchange and immediately radioed his situation to the grievor, who made a corrective direction, ordering the train to remain at the red flag. In the result, no mishap resulted, and eventually the train was able to proceed when the track was cleared.

It is not disputed before the Arbitrator that the grievor did commit a serious error in his instructions to train CN 2433 East, and that but for the intervention of the crane operator a serious accident could have resulted. The material before the Arbitrator further discloses that on a number of prior occasions the grievor was disciplined for rules violations, including violations of rule 42. One violation, in April of 1986, resulted in a train/truck motor car collision. The real issue in the case at hand is the appropriate measure of discipline. As indicated in the Joint Statement of Issue, Mr. Byrne was assessed thirty demerits and permanently demoted from his position of foreman to the position of bridgeman. The Brotherhood submits that a permanent demotion is excessive, that the grievor should, in any event, have been demoted to the position of carpenter. It also submits that the simultaneous assessment of thirty demerits, coupled with the demotion, is excessive in the circumstances. The Company maintains that the grievor's prior record demonstrates that he cannot be entrusted with the responsibilities of a foreman responsible for the safety of Company employees and equipment. It further maintains that the grievor does not possess the qualifications to hold a carpenter's position, notwithstanding that he was placed on the carpenters' seniority list by reason of his prior standing as a B&B foreman.

The Arbitrator deals firstly with the issue of demotion. Based on the material filed, and in particular the grievor's prior record of apparent inattention or indifference to operating rules which are safety sensitive, the grievor's demotion from the position of B&B foreman is amply justified. While the demotion is said to be permanent, the Arbitrator is satisfied that the comments made in **CROA 1697** and **CROA 2877** with respect to the ongoing discretion of the Company to return the grievor to a foreman's position, should he demonstrate in the future that he has the attributes to safely discharge that function, apply in this case. On the whole, the Arbitrator cannot disagree that the Company was justified in removing the grievor from the duties and responsibilities of a B&B foreman.

The next issue becomes whether the simultaneous assessment of thirty demerits is justified in the circumstances. As acknowledged in Canadian arbitral jurisprudence, demotion is an extraordinary form of discipline, tending as it does to abridge seniority rights and permanently impact an employee's earning capacity (*see, e.g., Re Toronto Electric Commissioners and Canadian Union of Public Employees, Local 1 (1990), 19 L.A.C. (4th) 105 (Springate)*). The Company has drawn to the Arbitrator's attention three prior awards of this Office in which violations of Rule 42 resulted in the assessment of demerits or, alternatively, a demotion from the rank of foreman (*see CROA 1236, 1622, and 1735*). Significantly, however, no case is drawn to the Arbitrator's attention in which an employee has suffered both the serious consequence of a permanent demotion and the simultaneous assessment of a substantial measure of demerits for the same infraction. A review of the decisions of this Office indicates that over many years the general industry practice has been that demotion stands alone as discipline, and is not augmented by demerits (*see, e.g., CROA 558, 715, 1038, 1321, 1664, 1698, and 1779*).

The purpose of industrial relations discipline is not to punish or inflict hardship for its own sake. Discipline is to be fashioned so as to protect the legitimate interests of the employer and to rehabilitate the employee by bringing to his or her attention the need to take corrective action by avoiding the conduct or errors of judgement which prompted the discipline. In the case at hand, the permanent demotion of Mr. Byrne from the position of B&B foreman has substantial financial consequences for his future earnings. I have little doubt that the imposition of that demotion will, of itself, serve to communicate to him in clear terms the need to exercise greater care in all aspects of his work within the track maintenance forces of the Company while also protecting the Company against any similar incidents. I must agree with the Brotherhood that in the circumstances of this case the apparently unprecedented assessment of demerits superimposed upon the permanent demotion of the grievor is excessive. The interests of the Company are sufficiently served by the removal of the grievor from a position in which he might again cause a risk to persons or equipment. As noted above, the rehabilitative message to Mr. Byrne is amply communicated in the ongoing reduction of his earning and earning capacity by reason of his demotion. For these reasons I am satisfied that the

further assessment of thirty demerits is not warranted in the circumstances, and that the demerits in question should be removed from the grievor's record.

The final issue to be resolved is whether the grievor should have been demoted to the higher rated position of carpenter, rather than to that of bridgeman. Upon a review of the material before me, I am satisfied that, at a minimum, the grievor should have been given an opportunity to demonstrate that he is qualified to perform the work of a carpenter, albeit not a bench carpenter, in the performance of B&B repair work in the field. The unchallenged representations of the Brotherhood's representatives indicate that for many years, in his capacity as a working foreman, Mr. Byrne has worked closely with carpenters in field maintenance operations. On many occasions he has himself used the tools and performed the actual work in question. Given the differential in wages between the position of carpenter and that of bridgeman, it appears to the Arbitrator that it would have been appropriate to demote the grievor the carpenter's position on the condition that he demonstrate, within a reasonable time, that he is qualified to do that work. In the result, the Arbitrator directs that the grievor be given an opportunity, by way of an appropriate test, to demonstrate his ability to be assigned as a carpenter. Should he successfully pass such a test, he shall further be subject to a three month period of probation to demonstrate that he can properly carry out the work of a carpenter in the field. In the circumstances, however, given the grievor's record, I do not deem this to be an appropriate case for the awarding of compensation.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator confirms that the Company had reasonable grounds to demote the grievor from his position as a B&B foreman, and that it was appropriate to do so. The coupling of the assessment of an additional thirty demerits as a further penalty was, in the circumstances, excessive and those demerits are to be removed from the grievor's record. Further, the grievor is to be provided an opportunity to demonstrate, by way of a test, and if successful, a further three-month probationary period, that he is qualified and capable of performing the work of a field carpenter in the Bridge & Building Department. Finally, while the grievor's demotion is properly qualified as "permanent", the Company obviously retains the discretion to return the grievor to the position of foreman should his future performance and record justify such an adjustment. The Arbitrator further directs that should the grievor be successful in demonstrating his qualifications to work as a carpenter, that he nevertheless be restricted in that position from not being temporarily assigned to any foreman's responsibilities, particularly in relation to the holding of track occupancy permits or similar responsibilities, until such time as the Company directs otherwise.

July 16, 1997

(signed) MICHEL G. PICHER
ARBITRATOR