

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
CASE NO. 3397**

**Heard in Montreal, Tuesday, 13 January 2004**

**concerning**

**CANADIAN NATIONAL RAILWAY COMPANY**

**and**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
EX PARTE**

**DISPUTE - BROTHERHOOD:**

Claim involving the assessment of 40 demerits and the resulting dismissal (for an accumulation of demerits) of Mr. Wayne Smith.

**DISPUTE - COMPANY:**

Alleged violation of Article 18.6 of Agreement 10.1 when the Company assessed 40 demerits to Mr. Wayne Smith's discipline record May 26, 2003 resulting in his discharge from service due to an accumulation of demerits in excess of 60 for a total of 90 demerits.

**BROTHERHOOD'S STATEMENT OF ISSUE:**

On May 22, 2003, the grievor was assessed with 40 demerits for, in the words of the applicable Form 780, "violation of CROR Rule 40.1 and General Engineering Instruction 6.1 when you failed to properly protect your crew working at Mile 0.5 Ashcroft Sub on 2nd May 2003 by removing the red flag before work was complete; failure to ensure a proper job briefing was conducted at the work site on 2nd May 2003; failure as a foreman to take all necessary precautions to ensure the safety of employees under your protection." As a result of this assessment of discipline the grievor was dismissed for having accumulated 90 demerits. A grievance was filed.

The Union contends that: **(1.)** The grievor was never at any time without CROR protection; **(2.)** Mitigating factors existed that should have served to reduce the amount of discipline assessed; **(3.)** The grievor is a long service employee; **(4.)** The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the grievor be reinstated forthwith without loss of seniority and with full compensation for all financial losses incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

**COMPANY'S STATEMENT OF ISSUE:**

The grievor was assessed 40 demerits for violation of CRO rule 40.1 and General Engineering Instruction 6.1 when he failed to properly protect his crew working at mile 0.5 Ashcroft subdivision on May 02, 2003 by removing the red flag protecting his crew before work was complete. Discipline was also assessed in part for his failure to ensure a proper job briefing was conducted at the worksite on May 02, 2003 and failure as a foreman to take all necessary precautions to ensure the safety of employees under his protection.

The Union contends in their *ex parte* statement of issue that: (1.) The grievor was never at any time without CROR protection; (2.) mitigating factors existed that should have service to reduce the amount of discipline assessed; (3.) The grievor is a long service employee, (4.) The discipline assessed was excessive and unwarranted in the circumstances. The Union requests the grievor's [sic] be ordered reinstated forthwith without loss of seniority and with full compensation for all financial losses incurred as a result of this matter.

The Company contends there was no violation of Article 18.6 as the grievance procedure was properly administered in accordance with the collective agreement. The Company also contends that decision to assess the grievor's discipline record with 40 demerits was justified and is supported by arbitral jurisprudence.

Additionally, the Company contends the Union has added to the initial grievance in their *ex parte* statement of issue by including: (1.) The grievor was never at any time without CROR protection; (2.) Requesting full compensation for all financial losses incurred as a result of this matter; and finally, (3.) A failure to reveal what mitigating factors they are relying upon in their statement of issue that should have served to reduce the amount of discipline assessed thereby restricting the Company's ability to prepare its arguments or otherwise consider such factors.

FOR THE BROTHERHOOD:                      FOR THE COMPANY:

(SGD.) R. S. DAWSON      (SGD.) K. MORRIS

SYSTEM FEDERATION GENERAL CHAIRMAN FOR:      VICE-PRESIDENT,      WESTERN  
CANADA REGION

There appeared on behalf of the Company:

K. Morris - Manager, Human Resources, Edmonton  
R. Bateman - Sr. Manager, Labour Relations, Toronto  
J. Lowe - Manager, Bridges & Structures,  
A. Y. DeMontigny - Sr. Manager, Labour Relations, Montreal  
T. S. Urbanovich - Manager, Operating Practices

And on behalf of the Brotherhood:

P. Davidson - Counsel, Ottawa  
R. Paulin - General Chairman,  
D. W. Brown - Sr. Counsel, Ottawa  
W. Smith - Grievor

#### **AWARD OF THE ARBITRATOR**

The record discloses that during the course of his duties as a foreman overseeing work on and around a bridge located in Kamloops Yard the grievor, Mr. Wayne Smith, failed to provide adequate protection for employees working under his charge in accordance with CROR rule 40.1. That rule requires the placing of red flags at either end of a work block. In fact, as his crew was winding up its duties the grievor removed a red flag at the west end of the bridge as his crew was in the process of finishing work and removing equipment at the east end. It appears that he placed the flag in a truck, and then observed an eastbound train entering his work limits in the direction of the men under his supervision. Mr. Smith then grabbed the red flag from the truck and ran towards the train, causing it to stop some one hundred feet from where the track equipment was located. No damage occurred as a result of the incident.

Following an investigation the Company assessed forty demerits against Mr. Smith's discipline record, resulting in his discharge from service for what was at that time an accumulation of ninety demerits and would have been, in light of the decision in **CROA 3396**, an accumulation of eighty demerits.

The record confirms that during a relatively short period of time Foreman Smith was involved in two serious safety violations, either of which might have caused serious damage, injury or death. On the basis of these incidents the Company has concluded that his employment should be terminated. While the Arbitrator can appreciate the perspective of the Company given the priority which must be attributed to safety, there are mitigating factors which must be considered.

The record discloses that the grievor had some twenty-four years of service at the time of his discharge. While he cannot claim an exemplary disciplinary record, safety violations and rules infractions were not recorded against him for a period of over twenty years, prior to 2002. The record also indicates that Mr. Smith had personal difficulty with issues of stress and anxiety, as a result of which he sought counselling assistance under the Company's EFAP program. There is reason to believe that Mr. Smith, who has been an otherwise acceptable employee over the years, has encountered substantial difficulty with the stresses associated with the duties of a foreman in the Bridge & Building setting, that he suffers feelings of victimization and has not entirely come to grips with certain of his own shortcomings in that regard. In the Arbitrator's view, that is also reflected in part in some of the statements made by the grievor during the course of the arbitration hearing.

In the Arbitrator's view this is an appropriate case for a substitution of penalty, albeit a penalty fashioned to protect the interests of the Company as well as the grievor. The Arbitrator therefore directs that Mr. Smith be reinstated into employment, without compensation for wages and benefits lost, with his disciplinary record to stand at forty demerits as a result of the award in **CROA 3396**. Additionally, the grievor shall be reinstated subject to a demotion out of the position of foreman for a period of not less than two years, in the discretion of the Company, and he may be assigned to work other than in the Bridge & Building Department, also at the discretion of the Company. The grievor's reinstatement shall, however, be conditional upon his agreeing to undergo anger and stress management with a counsellor mutually agreed upon by the Company and the Brotherhood. Such treatment shall be for not less than two years, absent any contrary recommendation by the counsellor, with the grievor's attendance to be confirmed to both parties in writing by the counsellor on a quarterly basis. The grievor's return to a foreman's position, at any time in his employment, shall be conditioned upon the positive recommendation of his counsellor.

February 19, 2004

(signed) MICHEL G. PICHER  
ARBITRATOR