

CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4278

Heard in Montreal, January 15, 2014

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

On November 30, 2012 Mr. Groulx was involved in an incident while employed as a Qualified Train Operator (Locomotive Engineer) while operating GO equipment 486.

JOINT STATEMENT OF ISSUE:

Following an investigation and statements held on December 6th and December 19, 2012, the company issued a letter to the grievor dated December 20, 2012 informing him that his employment was terminated, as follows:
This letter is in reference to an investigation held on December 6, 2012 in connection with an incident whereby you and your crew, while operating Equipment 486 allegedly passed a stop signal without authority and ran through a switch onto an established route identified for another train. It was also alleged that you did not conduct a running brake test. Subsequently, the Company alleged that you were in violation of CROR 439, 114A, 114B, CROR General Notice, and you failed to comply with GO Bombardier Manual Sec 2.4 (6), and GOI Sec 7.15.

The investigation revealed that during your tour of duty on November 30, 2012 you did in fact run through stop signal and ran through a switch onto track that was designated for another train. As such, the Company has found you to be in violation of the CROR 439 rules and policies as outlined above.

As a result of this non-compliance, the company has no alternative but to terminate your employment effective December 20, 2012.

The union appealed the dismissal on the grounds it was excessive and that the employee be reinstated once a more appropriate suspension had been fulfilled.

The company declined the union's request.

FOR THE UNION: (SGD.) G. Macpherson General Chairman	FOR THE COMPANY: (SGD.) A. Brown Manager Human Resources
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There appeared on behalf of the Company:

M. Horvat	– Counsel, Norton Rose, Toronto
A. Brown	– Human Resources Manager, Toronto
D. Mitchell	– General Manager, Toronto,
R. Dean	– Manager Train Operations, Toronto
M. Robinson	– Manager Contracts and Administration, Toronto

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. MacPherson	– General Chairman, Toronto
G. Vaughan	– Vice General Chairman, Toronto
D. Groulx	– Grievor, Toronto

AWARD OF THE ARBITRATOR

There is no dispute that on November 30, 2012, while operating GO Train E496 heading west from Union Station, that Mr. Derek Groulx (“the Grievor”) committed a Rule 439 violation. He was discharged for that cardinal rule violation, together with other less serious ones referenced in the Joint Statement of Issue. In May 2009, the Company imposed a 60-day suspension for the grievor’s first Rule 439 violation. At the time of the grievor’s discharge the only other discipline on his record was a 2-day suspension for failing to have a proper job briefing, which ultimately resulted in a train delay. The grievor had also failed to wear Personal Protective Equipment while crossing the tracks.

The only issue in this case is whether discharge is the appropriate penalty.

Bombardier (“the Company”) hired the grievor on February 4, 2008. He was hired as a Commuter Train Operator (“CTO”), to be trained as a Qualified Commuter Train Operator (“QCTO”) during the transitional period when CN lost the contract to the Company for the provision of rail and maintenance services to GO. Prior to joining the Company, the grievor worked for CN. He had joined CN in the Track Maintenance Department in 1995. He became a conductor 2 years later. During the grievor’s tenure at CN, his disciplinary record was commendable.

Within days of the Company suspending the grievor for 60 days for his first Rule 439 violation, CN banned him from its property and consequently the Company terminated his employment. By way of a negotiated settlement in April 2010, the grievor was reinstated without loss of seniority. He was required to and successfully re-qualified as a QCTO and continued working for the Company until his discharge on December 20, 2012.

The facts surrounding the Rule 439 violation that led to the grievor’s discharge are agreed. In essence, shortly after leaving Union station with a restricting signal, the grievor did not stop at red light signal 605 because he had turned his attention away from the track to perform double checks and check the volume and station of his radio. By the time the grievor refocused his attention, his train had passed the stop and had run through a switch not properly lined for his train. As a result, his train veered off course. By that time the grievor saw slow to clear and limited to clear signals on the established route for GO train 929, which was then departing from Union Station. The Train Movement Director (“TMD”) at John Street attempted to contact the grievor eight or nine times. However, the grievor did not hear him because he was trying to call the foreman for an upcoming Rule 42 on his route. The passengers on GO train 929 were not in danger as the signal dropped when the grievor’s train veered off course.

In addition to the grievor’s inattention leading to the Rule 439 violation, the grievor also acknowledged that he was not fit and rested to report for duty on November 30, 2012. He later explained that he had felt fit when he reported for duty for the A Portion of his assignment in the morning, but had become tired as he was progressing through the B Portion of his assignment in the afternoon. Also, the grievor was unable to explain why the running brake test was not performed after the standing brake test had been performed at Union Station.

As set out above, this was the grievor’s second Rule 439 violation. The circumstances of his first, which led to the grievor’s 60-day suspension were described by the Union. According to the grievor, he had run through a stop signal at Cherry Street when he became focussed on contacting Commuter Central because he was concerned that an individual close to the tracks was contemplating suicide.

In assessing whether the grievor’s discharge is the appropriate penalty, each case must be assessed on its facts. There is much jurisprudence from this Office concerning Rule 439 violations. There are degrees of difference in terms of the quantum of discipline to be assessed in cases involving this cardinal rule violation. I have reviewed those cases put before me by the parties.

The Union directed me to what I understand to be the only awards of this Office where the Arbitrator has substituted the Company’s assessment of discharge as the appropriate penalty for a second Rule 439 violation. They are **CROA 3972** and **3866**.

As in the case before me, in case **CROA 3972** the most aggravating factor was that the Rule 439 violation was the grievor’s second one. In that case, the violation was due to the grievor’s inattention as he and his Conductor talked about a 25 mph slow zone they were approaching. In that case, the grievor’s previous Rule 439 violation had been seventeen years prior, and since that time he had received no demerit points for infractions of any operating rules. Considering the grievor’s then 35 years of service with CN, Arbitrator Picher reinstated the grievor without loss of seniority and without compensation for any wage and benefits lost. The time between the discharge and reinstatement was recorded as a suspension.

The error in judgment in this case is analogous to the one referenced in the case above. However, here the grievor committed his prior Rule 439 violation less than two years after being reinstated to employment in the circumstances described above after after having re-qualified as a QCTO. Moreover, on the grievor’s information, his prior Rule 439 violation was due to another serious error in judgment whereby he became inattentive while talking to Commuter Central in the circumstances described above. Even considering the grievor’s commendable record as a conductor with CN and his brief service as a QCTO with the Company, the grievor has been on the railroad for approximately 15 years compared to the 35 years of service of the grievor in case **CROA 3972**.

In **CROA 3866**, the grievor had some 29 years service with CN. His second Rule 439 infraction took place just 3 years after his first. However, the facts in that case did not reveal a mistake of inattention to the grievor’s responsibilities. The grievor had in fact stopped in advance of the stop signal. The grievor’s error occurred while attempting to move two road locomotives a very short distance for the purpose of clearing an obstructed level crossing. In contrast, the undisputed facts in this case reveal that both of Mr. Groulx’s Rule 439 violations involved serious errors in judgement due to inattention.

Having thoroughly reviewed the circumstances of this case, with particular consideration given to CROA cases **3972** and **3866**, I can come to no other conclusion that the Company was justified in dismissing the grievor. The main distinguishing feature is that in both cases the grievors had approximately double the grievor’s years of service (if one were to include the grievor’s years on the railroad as a conductor for CN). In case **CROA 3866**, where the grievor’s second Rule 439 violation was approximately 3 years before his first, that error was not one, like both the grievor’s errors here, due to inattention.

For the foregoing reasons, this grievance is dismissed.