

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4495

Heard in Montreal, October 11, 2016

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – Division 660

DISPUTE:

On February 9, 2016 D. Brillinger (Train Operator) and J. Podzyhun (Train Operator) were involved in an incident while operating GO939. Subsequently on March 16, 2016 their employment was terminated.

JOINT STATEMENT OF ISSUE:

Following an investigation and statements held on February 16, 2016 the Company issued letters to each of the grievors, dated March 16, 2016, informing them that their employment was being terminated, as follows:

This letter is in reference to an investigation held on February 16, 2016 regarding an alleged failure to comply with CROR Rules 406, 417, 33, 34, 35, 125 and 106 and General Rules A (iii). The investigation revealed that during your tour of duty on February 9, 2016 you in fact failed to comply with CROR rules outlined above. As a result of this non-compliance, the Company has no alternative but to terminate your employment effective March 16, 2016.

The Union appealed the Company's action on the grounds that the dismissals were excessive and failed to take into account important mitigating circumstances. The Union requested that employees Brillinger and Podzyhun be returned to the employ of Bombardier and that the discipline records be adjusted to better reflect a more reasonable and appropriate level of discipline. The Union and Company discussed the files at a Step 3 meeting on May 19, 2016 without resolve and the Company has yet to issue a letter of response to the Union's Step 3 appeal.

FOR THE UNION:
(SGD.) G. Vaughan
General Chairman

FOR THE COMPANY:
(SGD.) A. Ignas
Manager, Human Resources

There appeared on behalf of the Company:

A. Gallop – Counsel, Norton Rose Fulbright Canada LLP, Toronto
A. Ignas – Manager Human Resources, Kingston
R. Dean – Manager Train Operations, Toronto
D. Mitchell – GM Operation, Toronto
A. Nguyen-Quang – Human Resources Advisor, Montreal

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
G. Vaughan – General Chairman, Toronto
D. Brillinger – Grievor, Toronto
J. Podzyhun – Grievor, Toronto

AWARD OF THE ARBITRATOR

1. The parties have raised two issues for resolution: i) what is the proper characterization of the events which transpired on February 9, 2016? and ii) should the penalty of discharge be modified?
2. The arbitrator accepts, as do both parties, that a serious situation occurred on February 9, 2016, but has been satisfied that a penalty other than termination should be substituted in the circumstances.

What is the proper characterization of the events which transpired on February 9, 2016?

3. The parties described the events of February 9, 2016 differently: did it involve a cascading series of events, as Bombardier maintained, or was it a single event occurring within a short time frame, as the TCRC suggested?
4. In Bombardier's view, this case does not involve a single event of carelessness or poor judgment. Rather, a series of events occurred and the grievors demonstrated repeated carelessness and poor judgment for each one.
5. In Bombardier's view, the initial error occurred when the distracted grievors' train passed over a crossover at 71 mph, when the maximum speed limit was 45 mph. Despite realizing their mistake, they then failed to put the train into emergency brake application. Moreover, they ought to have then initiated an emergency radio broadcast and preserve the tracks, so that they could be inspected to ensure there was no risk to other trains.
6. In the TCRC's view, the situation involved a single incident of speeding and the disciplinary sanction should reflect that fact. The TCRC accepted that the grievors' train exceeded the speed limits for the crossover in Burlington, Ontario, despite their being aware of the signal indication. Engineer Brillinger throttled down and the train rolled to a stop at the Burlington GO Station. The crew then attempted to contact the RTC within a couple of minutes of passing over the crossover, but ended up speaking to the GTCC.
7. Neither side contests that the situation warrants discipline. The arbitrator is satisfied that this is not merely a speeding situation. It is a speeding situation with several aggravating factors. Those factors must also be taken into consideration when examining the discipline imposed.

Should the penalty of discharge be modified?

8. Bombardier urges the arbitrator to analyze this case, *inter alia*, by considering the aftermath of the tragic incident in Lac Mégantic, Québec. Because of that horrendous accident, only employees' strict compliance with Railway Operating Rules and Procedures will prevent termination.
9. Bombardier also submitted various past CROA&DR cases in support of the grievors' discharges. Bombardier emphasized that actual damage, which admittedly did not incur in the instant case, is no longer a factor when examining discipline in a post Lac Mégantic world.
10. The TCRC suggested other comparable Bombardier discipline situations involving speeding did not result in discharge and argued there was an uneven imposition of discipline in this case. It also referred to past CROA&DR cases which noted that only specific types of rule violations would lead to outright termination.
11. Bombardier has not persuaded the arbitrator that due to the Lac Mégantic tragedy, there is now a new paradigm when this Office examines discipline. Each case must still be analyzed on its own facts. Discipline is warranted in this case, but termination was excessive in the circumstances.
12. What factors support this conclusion?
13. The grievors' interviews demonstrate how forthright they were following the events. Messers Brillinger and Podzyhun admitted they were in error. They should not have travelled at that rate of speed over the crossover. They should have initiated an emergency broadcast to the RTC. They expressed remorse for their failings and fully realized how fortunate they were that no damage occurred and no one was injured.
14. The TCRC noted that this was Mr. Brillinger's first rules violation in nearly eight years. Bombardier raised Mr. Brillinger's relatively recent sixty-day suspension for an altercation with another employee. Mr. Brillinger also has about as much seniority as anyone can have given that Bombardier commenced operating the GO trains in 2008. Mr. Podzyhun, while a short service employee, has no record of prior discipline.
15. In reviewing the past CROA&DR decisions the parties submitted, [CROA&DR 2356](#), by analogy, is the most helpful. That case demonstrated how discipline may vary depending on whether a repeated offence is in issue, if significant damage occurs, or if employees try to avoid responsibility for their actions.
16. None of those situations is present in the instant case. Indeed, the grievors' candour about their errors distinguishes their situation from those in various decisions submitted, such as [CROA&DR 4290](#) and [CROA&DR 4101](#). Their remorse suggests they can be more attentive in the future and perform their duties safely.
17. Accordingly, the grievors shall be reinstated in their employment, without compensation or loss of seniority, with the time between their termination and the date of this decision to be recorded as a suspension arising from the events of February 9, 2016. The arbitrator remains seized of any issues resulting from this decision.