

CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4408

Heard in Montreal, June 10, 2015

Concerning

BOMBARDIER TRANSPORTATION

And

**TEAMSTERS CANADA RAIL CONFERENCE –
DIVISION 660**

DISPUTE:

The appeal of a sixty-day suspension on other punitive conditions to employees Donovan Chen (QCTO), Alain Lashley (CTO) and Ismael Shquier (Throttle Trainee) were involved in an incident while operating GO E252.

JOINT STATEMENT OF ISSUE:

On December 16, 2013 the above mentioned employees were involved in an incident while operating GO E252.

Following an investigation and statements held during December of 2013 and January of 2014, the Company issued letters to each of the grievor's dated January 28, 2014 informing them that they were being assessed a sixty-day suspension without pay as well as other punitive conditions to be applied upon their return to work, as follows in part:

- Allegedly operated by Signal 47N at Toronto West Diamond which was indicating stop and as such, the Company alleged you were in violation of CROR Rule 439.

- The Investigation revealed that during your tour of duty on December 16, 2013 you did in fact operate past Signal 47N at Toronto West Diamond and as such, the Company has found you to be in violation of the CROR rule cited above.

As a result of this non-compliance, the following will be assessed against your personal record:

- Suspension without pay for sixty-days to be served from December 17, 2013 to February 14, 2014 inclusive. This discipline will remain on your personal record for 730 calendar days.
- Upon returning from suspension you will spend one week reviewing and successfully passing a CROR rules exam and a signals progression test; conducted by a Certified Rules Instructor.
- You will become a focus employee for one year from your date of return. For the first six months, four e-tests will be conducted per month, six of which must be on CROR 439 compliance. Two rides per month with a Supervisor of Train Operations. For the remaining six months, two e-tests per month by a Supervisor of Train Operations.
- You are further advised that any future conduct, which is similar in nature, may result in further disciplinary action up to and including dismissal.

The Union appealed the Company's action on the grounds that the Company had failed to establish the burden of proof sufficient to determine that the grievor's were in violation of CROR 439.

The Union requested that the discipline be removed from the grievor's record with redress of any loss of wages and benefits and that the restrictions/conditions noted in the letter of discipline be deemed null and void.

The Company declined the Union's request.

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

M. Horvat	– Counsel, Norton Rose Fulbright, Toronto
A. Ignas	– Human Resources Manager, Toronto
D. Mitchell	– General Manager, Toronto
R. Doan	– Manager Train Operations, Toronto

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
G. Vaughan	– Vice General Chairman, Toronto
I. Shquier	– Grievor, Toronto
D. Chen	– Grievor, Toronto

AWARD OF THE ARBITRATOR

1. The Company's claim is that the Grievors, while operating GO Train E252 westward on the Weston Subdivision on December 16, 2013, passed a stop signal (signal 47N) without authority. The Grievors dispute this. They say that all three of them saw the signal as authorizing them for "clear to slow" movement – yellow over yellow. They communicated with each other at the time, and all three confirmed the "clear to slow" signal entitling them to proceed. When the crew were stopped, following what appeared to be their breach of authority in disobeying the signal, they immediately confirmed they were operating on a clear to slow signal.

2. Signal 47N is situated on a CN line shortly before it meets a crossing CP line. The signal on the CP line is 57-1. The Company claims that, at the time the Grievors breached to stop signal at 47N on the CN line, the crossing CP line signal 57-1 displayed permission to proceed (red/red, yellow). This suggests that the 37N signal on the CN line showed a stop signal, as the Company alleges.

3. The Company determined that the stop signal had been crossed when CP's Rail Traffic Control (RTC) received a CRO Rule 439 automatic alarm that the line had been breached without authority. CP's RTC office contacted the Company. It also contacted the CN RTC office, which confirmed that its alarm had also been triggered.

4. There is no evidence of a malfunction in the alarm system for unauthorized entry on the CP line. The Union relies on two factors. The first is that the Grievor's evidence is consistent that they called after identifying the signal and that all three confirmed that it authorized them to proceed, slowly. The second is the "silent witness", the videotape recording made from the camera on the front of the engine. The Union suggests it shows the signal lights were yellow above yellow, meaning "Clear to Slow".

5. The Grievors admit, and the silent witness confirms, that the sunlight glare off the snow was extremely bright that morning.

6. Each of the Grievors had a good work record. Grievor Shquier had no discipline, the others had minor unrelated discipline.

7. I accept the bona fides of the conclusion reached by the Grievors. They genuinely thought they had seen a clear to slow signal. Mr. Chen, a locomotive engineer, has very substantial experience over twenty years previously with CN.

8. I have viewed the silent witness, particularly at the critical signal N47 which the Grievors encountered at 9:22:50 that day. Early on in their journey there were signals where the red signals and the flashing yellow signals can be clearly seen. However, the critical signal (N47) that is disputed, is apparently not red, as the Union asserts. The red signals earlier on the journey are clearly red in the video images, but signal N47 is not clearly red in the same way. It looks white on the video, not a recognized signal, perhaps from the brightness of the glare. Consequently, the silent witness is not determinative.

9. There appears to have been no malfunction in the CP's alarm system. The system was checked after the incident and was found to be functioning normally. Further, when testing signal 47N, CP attempted to simulate the signal claimed by the Grievors and confirmed that it could not create a yellow / yellow signal at 47N when the next signal (57-1) was displaying a permissive signal (red/red yellow).

10. So, there is evidence of the following: signal 57-1 on the CP line (against the direction of the Grievor's train) was permissive; the alarm was triggered for breach of the 47N stop signal on the CN line; a permissive signal 47N on the CN line cannot be displayed simultaneously with a permissive signal 57-1 on the CP line; and there was no malfunction of signal 47N. This evidence leads to the conclusion that the 47N signal the Grievors saw was red, requiring them to stop.

11. Against this is the following: the clear belief by all three Grievors that they saw a permissive signal, yellow on yellow; their immediately communicating to each other of what they were seeing; their consistent, bona fide belief in what they had seen and their lack of doubt at the time or subsequently; and the silent witness which does not contradict them.

12. When the crew were stopped after they breached the red signal, there was mention to the investigating manager that the extremely bright sunlight might have obscured their vision as a possible explanation for their missing the red signal. It appears this was speculation as to why they might have made an error of judgment.

13. In **CROA&DR 4156** Arbitrator Picher was faced with facts similar to those in this case. He found in favour of the Grievor's. He said the following:

Turning to the merits of the grievance, I have more substantial difficulty with the position of the Company. The Company bears the burden of proof in these proceedings. Among the evidence tabled before me are unchallenged statements relating to other occasions, involving different signals, where a permissive signal has unexpectedly dropped to being a red stop signal without any warning and, it appears, where the Rail Traffic Controller could give no explanation for what occurred. In the instant case, extraordinary as it may be, three employees testified independently that they all saw a green permissive indication being displayed by Signal 1175D as they proceeded through the siding. The grievor, who has thirty-four years of service and an exemplary disciplinary record, as well as his locomotive engineer who had thirty-nine years of service and retired immediately thereafter, stated consistently during their respective investigations, as did the more junior assistant conductor, that all of them saw the green indication and that they verbally called it among themselves as required by the operating rules. I find their evidence to be credible. I also accept the account of Conductor Love who relates that the stop indication of the dwarf signal at the west end of the siding was seen only at the very last moment, when it was obviously too late for their train to stop to avoid going past it. While technically, in these circumstances, it is clear that the grievor and his crew did operate their train past a stop signal, these are not facts which, in my view, would justify the assessment of any discipline for violations of either CROR 439 or CROR 34. While I appreciate that the Company must rely upon the integrity of its equipment, including the result of the signal download which it conducted, in the unique circumstances of this case, I am prepared to conclude, on the balance of probabilities, that the accounts of all three employees are to be believed.

14. I come to the same conclusion. The integrity of the equipment shows that the Grievors operated their train past a stop signal, but, in the unique circumstances of this case, the accounts of all three employees are to be believed. The question is whether misconduct has been established. It has not. The grievances must therefore be allowed. The Grievors are to be compensated for all wages and benefits lost by reason of their suspensions, and the suspension are to be removed from their records. The conditions of their suspension are also set aside.

June 25, 2015

CHRISTOPHER ALBERTYN
ARBITRATOR