

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and -

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

JOINT STATEMENT OF ISSUE

DISPUTE:

Appeal of the dismissal of Conductor Kelly Fryklund of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Fryklund was dismissed for the following:

"Please be advised that you have been DISMISSED from Company Service effective February 21, 2018 as a result of your three (3) e-test failures (CR123.2, CRT11 and CRT24) during your tour of duty on the K36-02 at Belle Plaine, Saskatchewan on February 2, 2018. A violation of Train & Engine Safety Rule Book, T-11 Entraining and Detraining Equipment & T-24 Riding Equipment; and CROR 123.2 Switching by Radio.

Notwithstanding that the above mentioned incidents warranted dismissal in and of itself, based on your previous discipline history and last chance leniency agreement signed on December 29, 2017; this incident also constitutes a culminating incident which warrants dismissal."

UNION POSITION:

The Union contends the Company has failed to establish the abovementioned incident warranted dismissal, or that it constitutes a culminating incident worthy of discharge. The Union further

contends that Mr. Fryklund's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union submits that Mr. Fryklund was wrongfully held from service in connection with this matter, contrary to Article 39.06 (Formerly Article 70.05) of the Collective Agreement.

The Company did not appropriately respond to the Union's grievances.

The Union requests that Mr. Fryklund be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

The Company disagrees and denies the Union's request.

Prior to his offenses, the Grievor agreed to be placed under Last Chance Leniency Reinstatement Agreement. The Company maintains the Grievor's culpability was established during the fair and impartial investigation and the discipline was properly assessed.

In regards to allegations concerning proficiency testing, the Company maintains that it is in no way restricted from conducting a formal investigation based on the result of a failed proficiency test.

Further, given that the Grievor was on a Last Chance Leniency Agreement, any violation of Company policy or operating rules put his employment in jeopardy. As such, the Union's alleged violation of Article 39.06 (formerly Article 70.05) of the Collective Agreement is without merit.

The Company's position continues to be that the discipline that was assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:

FOR THE COMPANY:

Dave Fulton
General Chairperson
TCRC CTY West

Sharney Oliver
Manager, Labour Relations
CP Rail

August 12, 2019

There appeared on behalf of the Company:

Sharney Oliver	-Manager, Labour Relations, Calgary
Lauren McGinley	-Assistant Director, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	-Counsel, Caley Wray, Toronto
D. Fulton	-General Chairman, Calgary
D. Edward	-Senior Vice-Chairman, Calgary
D. Hariniuk	-Local Chairman, Moose Jaw
W.Pitts	-Vice General Chairman, Moose Jaw
K. Fryklund	-Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

The grievor was working on assignment starting at 07:00 with Locomotive Engineer Rick Bozak on February 2, 2018 at Belle Plaine, Saskatchewan. The assignment prepares and switches cars for customers in the vicinity of Kallum Spur. It was a cold morning, the recorded temperature in the area registering at -17/-19 C.

About halfway through his shift, as the movement started westward, the grievor entrained the tail-end car of the movement and rode the side ladder of the car as required by Company policy. After the movement travelled westward approximately 70 or 80 cars, the grievor's hands became increasingly numb due to the cold weather conditions. The grievor decided to climb up on to the platform cage located at the end of the hopper car from his position on the side ladder of the car. He did so in order to release his grip from the side ladder and allow his hands to warm up.

Unknown to him at the time, the grievor was being observed and efficiency tested by Assistant Superintendent Jason Leedahl. Assistant Superintendent Leedahl initially observed the grievor from a distance of about 20 train cars. He followed the movement in his vehicle to validate his observation of the grievor. Mr. Leedahl said that the grievor noted the presence of his truck and reacted by climbing back out of the cage and returning to ride the side ladder of the tail-end car. Mr. Leedahl knew that the movement was about to stop and felt that the grievor was no longer in danger. For this reason, he did not radio the Locomotive Engineer to stop the train's movement.

Mr. Leedahl noted that he did not overhear the grievor radio to his Locomotive Engineer the locomotive number nor the route to be used when switching. Nor did the grievor advise his Locomotive Engineer that he would be detrainning the equipment while he was switching. Mr. Leedahl decided not to report these observations in real time because he did not feel it was safe to reach for his hand-held radio microphone while driving his truck. He also added that he did not report the grievor's rule breaches immediately as he did not want to take more time off to speak to the crew.

The Company alleges the grievor failed three proficiency tests: being inside the end platform of a hopper car (CRT 24 Riding Equipment); failing to communicate to the Locomotive Engineer that he was detrainning (CRT 11 Detrainning Equipment); and, not using assignment or locomotive numbers or route to be taken (CRT 123.2 Radio Communication).

The Company notes that the grievor had just returned to work on January 17, 2018 on a last chance reinstatement agreement after serving a 339 day suspension for inappropriate behaviour at a rest facility in Swift Current on February 10, 2017. The Company also notes the grievor, as he confirmed at his investigation, was cautioned less than a month earlier for the same T-24 Riding Equipment violation, as noted below:

To whom it may concern:

On January 23, 2018 while at Belle Plaine-I noticed CP conductor Kelly Fryklund riding in the inside cage of a salt hopper car while proceeding westward down the siding.

I called Moose Jaw trainmaster and informed him that he needed to have a conversation with Mr. Fryklund as I was concerned over his safety.

Thank you
Jason Ross

Superintendent Cando Rail Service

The Union submits that there was in fact no Last Chance Agreement in place. It notes in that regard that there is only one post-reinstatement ground on which the Company can justify terminating the grievor under the Agreement; that is, that the grievor will be restricted to working local assignments. There is no allegation of a breach of this kind by the Company. Further, the Union asserts Company policy regarding proficiency tests reflect that they are to be used for counselling and not disciplinary purposes. In this case, the purpose of the efficiency test performed by Assistant Superintendent Leedahll was to determine whether the grievor met the required level of proficiency and to issue corrective action-not discipline-where required. Further, the grievor was not removed from service after his conversation about the failed efficiency tests which indicates a lack of urgency concerning the events that morning.

The arbitrator finds that the key event which led to the grievor's discipline is the observation of the Assistant Superintendent of the grievor riding inside the cage. The Assistant Superintendent indicates in his Memorandum of the incident that he *"...was just about to stop the train's movement to correct the behaviour when Mr. Frylund looked back and saw me observing him, he then immediately came out from the end platform and rode the side of the car which is the proper procedure."* He goes on to say: *"When I advised Mr. Fryklund what I had observed he initially denied riding the car improperly, then I politely stated that I knew what I had seen, Mr. Fryklund then apologized and stated he was embarrassed that he had violated this rule as he is thirty (30) plus year employee and that he knows better."* Although the grievor failed two other proficiency tests of detraining and radio communication, I find these are incidental to the main concern over the grievor riding inside the cage instead of on the side of the rear car.

I note and accept the Union's point that efficiency tests, as set out in the "CP Proficiency Test Codes and Description", are planned procedures used to evaluate compliance with the rules and are not intended to be disciplinary tools. This makes sense as employees like the grievor are required in their every day duties to follow a multitude of rules with a view to maintaining safety at all times. Corrective action involving re-testing employees to ensure they understand the proper procedures is an effective method of ensuring a safe workplace.

Although the “C P Proficiency Test Codes and Descriptions” properly promotes counselling and communication where non-compliance occurs, the policy itself does not preclude a disciplinary response to a failed proficiency test:

“Proficiency testing is not intended to be a disciplinary tool. While this may be the corrective action required, depending on the frequency, severity and the employee’s work history, education and mentoring will bring about more desirable results”

What occurred here with the grievor climbing from the side of the hopper car to inside the cage located on the end platform of the car, while the train was moving, is of serious concern. The grievor was observed riding inside the end of the hopper car on the platform for approximately 20 car lengths. The Assistant Superintendent was, in his words in his Memorandum, “...*just about to stop the train’s movement to correct the behaviour when Mr. Frylund looked back and saw me observing him, he then immediately came out from the end platform and rode the side of the car which is the proper procedure*”.

The fact that the Assistant Superintendent was so concerned with the grievor riding inside the cage that he considered stopping the movement underlines the gravity and seriousness of the incident. The circumstances in my view clearly warrant discipline, particularly given the potential for injury to the grievor had he missed a step while climbing from the side of the car into the cage.

The grievor had been back at work for less than a month after a lengthy suspension when the incident occurred. Although his disciplinary record, including the lengthy

suspension, is relevant to the assessment of the proper disciplinary penalty¹, my overriding concern is that the grievor, an employee with over 30 years of service, was prepared to risk his job by repeating the same safety breach twice less than a month after he returned to work. It is also of concern that the grievor did not immediately come clean with the Assistant Superintendent when first approached about riding the car improperly. Although the grievor apologized and admitted to the offence when confronted, it was only after further prompting by the Assistant Superintendent stating to him “...I knew what I had seen” that the grievor apologized for the incident.

I understand the grievor was experiencing cold hands from the winter temperatures and wind chill. But the grievor, an experienced railroader, could have easily radioed his Locomotive Engineer to stop the train so he could warm up his hands. Instead, he chose to get out of the wind and warm up his hands by performing a risky move while the train was moving.

The grievor is in a safety critical position. He climbed into the cage of the hopper car while the train was moving after being warned less than a month before not to do so. By doing so, he twice flouted an important safety rule which is clearly and unambiguously set out in the T & E Safety Rule Book (T-24 Riding Equipment) not to ride “inside the end cage of equipment”.

¹ I agree with the Union that although the grievor’s return To work agreement of December 17,2017, does contain a the reference to “Offer of Last Chance Leniency Reinstatement Agreement...”, the “last chance” aspect of the Agreement is only intended to be a relevant consideration in the event of a further breach of the specific terms and conditions of the Agreement, and not otherwise.

The grievor also initially denied being inside the cage when confronted by the Assistant Superintendent and, as noted, only admitted to breaching the safety rule when the Assistant Superintendent called the grievor out on his denial. That lack of candidness coupled with the grievor's failure on two occasions close in time to stay out of the cage undermines the employment relationship to the point where the bond of trust in my view has suffered irreparable harm. The requirement for honesty and respect for important safety rules is particularly important for those employees who work independently within the ranks of the running trades, like the grievor.

Despite his lengthy service of some 30 years, the grievor unfortunately did not learn from his long period of suspension that he is expected to follow all the rules, particularly those which involve his own safety and that of others. That factor of long service alone is an insufficient basis for reinstatement under the circumstances.

For all the above reasons, the grievance is dismissed.



John Moreau QC

October 2, 2019