IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the “Company”)

AND

TEAMSTERS CANADA RAIL CONFERENCE-CONDUCTORS, TRAINMEN & YARDMEN

(the “Union”)

RE: GRIEVANCES OF GREG ARMILLOTTA

SOLE ARBITRATOR: John M. Moreau QC

Appearing for The Union:

Ken Stuebing	-	Counsel, Caley Wray
Dave Fulton	-	General Chairperson-TCRC, Calgary
Doug Edward	-	Sr. Vice-General Chairperson-TCRC, Medicine Hat
Jason Hnatiuk	-	Local Chairperson, TCRC Port Coquitlam
Greg Armillotta	-	Grievor

Appearing for The Company:

Don McGrath	-	Manager, Labour Relations
Sharney Oliver	-	Manager, Labour Relations

A hearing in this matter was held in Calgary, Alberta on November 7, 2019

DISPUTE:

Appeal of the 3 suspensions and dismissal of Conductor Greg Armillotta of Coquitlam, BC.

Five (5) Day Suspension

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Armillotta was issued a 5-day suspension described as "For failing to follow Company issued rules, procedures and instructions as substantiated with 6 failed proficiency tests recorded between the period of January 9, 2015 up to and including January 27, 2016. A violation of CROR General Notice, CROR General Rule A(i)(vi) at Coquitlam, Mile 111.9 Cascade Subdivision. Suspension to commence Monday, February 15, 2016 returning to active service 0001 Saturday, February 20, 2016."

UNION POSITION:

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Armillotta be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding many of the allegations outlined above. In the alternative, the Union contends that Mr. Armillotta's 5-day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline, and violates Company policy.

The Union contends that Mr. Armillotta was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

Accordingly, the Union requests the discipline be removed from Mr. Armillotta's employment record, and he be made whole for all associated loss 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.

The Company maintains its right to utilize proficiency tests which it is mandated to conduct as part of its safety management program and assess progressive discipline as required for rules violations.

The Company maintains the Grievor's culpability was established by his own admission and further established following the fair and impartial investigation into this matter and the discipline was properly assessed.

The Company has the unfettered right to assess suspensions as a method of progressive discipline. Jurisprudence has indisputably confirmed and upheld the Company's right to use suspensions as a method of progressive discipline.

The Company maintains the discipline assessed was justified, warranted and appropriate in this circumstance.

Ten (10) day suspension

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Armillotta was issued a 10-day suspension described as "For not properly riding equipment on March 20th 2017 resulting in an E-Test Failure; a violation of the Safety Rule Book for Train and Engine employees T-24 item 1 & 6."

UNION POSITION

The Union contends that Mr. Armillotta's 10-day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

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 requests that the discipline be removed in its entirety, and that Mr. Armillotta is made whole for all associated loss 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.

The Company maintains the Grievor's culpability was established by his own admission and further established following the fair and impartial investigation into this matter and the discipline was properly assessed.

The Company maintains the discipline assessed was justified, warranted and appropriate in this circumstance.

The Company has the unfettered right to assess suspensions as a method of progressive discipline. Jurisprudence has indisputably confirmed and upheld the Company's right to use suspensions as a method of progressive discipline.

The Company maintains its right to utilize proficiency tests which it is mandated to conduct as part of its safety management program and assess progressive discipline as required for rules violations.

Twenty (20) day suspension

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Armillotta was issued a 20 day suspension described as "Please be advised that you have received a Twenty (20) Day Suspension with time served for the following reason(s): For failing to walk in a safe location out of harm's way and instead walking on the end of the ties thereby putting yourself in a position of risk which could cause an accident or personal injury up to and including a fatality while working as the Conductor on RLF2RS on December 17, 2017 at Mile 111.9 Cascade Subdivision. A violation of Rule Book for Train & Engine Employees Section 2, Item 2.2 (a) (v) (vii) and Train & Engine Safety Rule Book Section T-20 On or about tracks, Item 2, 3." The Company did not appropriately respond to the Union's grievances.

UNION POSITION

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. In the alternative, the Union contends that Mr. Armillotta's 20 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty as well as the Company's discipline policy is contrary to the arbitral principles of progressive discipline.

The Union contends that the Company failed to advise Mr. Armillotta in writing of the discipline assessed within the time limits allowed, contrary to Article 70.04 of the Collective Agreement.

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

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 requests that the discipline be removed in its entirety, and that Mr. Armillotta is made whole for all associated loss 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.

The Company maintains the Grievor's culpability was established by his own admission and further established following the fair and impartial investigation into this matter and the discipline was properly assessed.

The Company has the unfettered right to assess suspensions as a method of progressive discipline. Jurisprudence has indisputably confirmed and upheld the Company's right to use suspensions as a method of progressive discipline.

The Company maintains its right to utilize proficiency tests which it is mandated to conduct as part of its safety management program and assess progressive discipline as required for rules violations.

The Company maintains the discipline assessed was justified, warranted, and appropriate in this circumstance and administered as per the Collective Agreement.

Dismissal

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Armillotta was dismissed which was described as "For failing to work safely and in a manner that may prevent accidents by not adhering to operating Bulletin No: BCO-009/17; a result of not being positioned outside of the cab of the Locomotive when the Locomotive was leading in the direction of travel in order for you to properly observe switch alignment while working on assignment RLF2RS on January 10, 2018. Notwithstanding that the abovementioned incident warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal." The Company did not appropriately respond to the Union's grievances.

UNION POSITION:

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Armillotta be made whole.

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. Armillotta'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 requests that Mr. Armillotta 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.

The Company maintains the Grievor's culpability was established by his own admission and further established following the fair and impartial investigation into this matter and the discipline was properly assessed.

The Company has the unfettered right to assess suspensions as a method of progressive discipline. Jurisprudence has indisputably confirmed and upheld the Company's right to use suspensions as a method of progressive discipline.

The Company maintains its right to utilize proficiency tests which it is mandated to conduct as part of its safety management program and assess progressive discipline as required for rules violations.

The Company maintains the discipline assessed was justified, warranted and appropriate in this circumstance.

AWARD

The grievor is a Trainman/Yardman and entered into the service of the Company on April 16, 1984 in Coquitlam, B.C. He worked as a qualified Conductor for his entire career at the Vancouver terminal. He was terminated from his employment on January 10, 2018 after 33 years of service.

The arbitrator heard several grievances including: a five-day suspension on February 9, 2016 for failing numerous proficiency tests; a ten-day suspension on March 31, 2017 for failing a proficiency test by improperly riding equipment; a 20-day suspension for failing a proficiency test by putting himself foul of the track while he was inspecting the track and switch points; and, his dismissal for failing a proficiency test by improperly positioning himself outside the cab of a moving locomotive.

THE 5-DAY SUSPENSION

Proficiency testing of employees (or Efficiency tests) is rooted in *Transport Canada's Safety Management System Industry Guideline*. It is a tool used to evaluate an employee's compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action. From the Company's perspective, the corrective action can take the form of verbal counselling through to disciplinary action. The Company also notes that these proficiency tests are often conducted randomly without the employee's knowledge.

The grievor attended an investigation on January 29, 2016 where he was asked about 4 proficiency test incidents that took place in 2015.

1) The grievor was asked about an incident that took place on January 9, 2015. The Company records indicate that the grievor failed to use proper radio

procedures while switching. The grievor admitted to the incident indicating that he had *"used the engineer's name during switching on [that] occasion and trainmaster Langford explained that to me..."* The grievor further indicated that he *"…temporarily lost his focus and [did] not follow the instructions."* The Company records indicate that the grievor was given verbal coaching and was re-tested within 7 days.

2) The grievor was asked about an incident that took place on March 23, 2015. The Company records indicate that the grievor turned outward and stepped down while detraining. The grievor admitted to the incident indicating that *"…he turned around on the last step, and stepped forward off the locomotive and did not detrain properly".* He further added: *"I temporarily forgot to use the proper method".* The Company records indicate that the grievor was given verbal coaching and was re-tested more than 7 days later.

3) The grievor was asked about an incident that took place on October 15, 2015. The Company records indicate that the grievor was observed walking between cars with less than 50 feet of separation between the cars. The grievor said that he thought the distance was greater than 50 feet. He indicated that he had to cross over between the cars *"in order to open the knuckle on the car we were making the joint on".* The grievor further indicated that *"…he misjudged and thought there was more than 50 feet".* The Company records indicate that the grievor was given verbal coaching and re-tested more than 7 days later.

4) The grievor was asked about an incident that took place on December 15, 2015. The Company records indicate that the grievor failed to check the points before lining a switch. The grievor said that he did in fact check the points from a distance and that he did discuss the incident with the Assistant Trainmaster. The Assistant Trainmaster told the grievor he did not check the points according to the safety rules. The Company records indicate that the grievor was given verbal coaching and re-tested more than 7 days later.

The grievor was asked at the same investigative interview on January 29, 2016 about a more recent incident that occurred on January 27, 2016. At that time, two trainmasters noted that the grievor was not riding the point of his movement down the B10 extension. The grievor was approached by one of the trainmasters, Brian Galloway, to discuss his failed proficiency test. The grievor was then observed by Mr. Galloway improperly lining the switch with one hand instead of two hands. The grievor explained at the investigation that he was blocked at the east end of the B lead extension and decided to address a fogging issue inside the cab windows. That was the reason he was not on the footboard. The grievor also admitted that he *"…should have used both hands to line the switch".*

The Company maintains that the assessment of a 5-day suspension was appropriate. The Company emphasized in that regard that the concept of educational deterrence is of critical importance. Deterrence is necessary, in the

Company's view, in order to ensure safe and consistent conduct, and that employees adhere to all the workplace rules. This is of particular importance in the largely unsupervised environment where the grievor is employed. According to the Company, the assessment of a suspension for the numerous violations in this case acts as a clear and necessary deterrent to all employees.

The Union maintains that that the Employer did not conduct a fair and impartial investigation. It points to several concerns. First the Union maintains that the Notice to Appear itself is insufficient and excessively broad covering a period of some 12 months of various proficiency test incidents. No details of the specific incidents are set out in the Notice leaving the grievor having to guess the nature of the offense. In addition, the delay in bringing the incidents to the grievor's attention breaches the grievor's right to a timely hearing without undue delay. It is noteworthy that each of the four 2015 incidents were dealt with by corrective coaching and the grievor was re-tested in each case. Further, the Union notes that the Investigating Officer should not conduct the disciplinary interview if he or she is a witness to the incident. The Union notes in that regard that Trainmaster Doig was a witness to the October 15, 2015 incident. See: **CROA 1720.**

After reviewing the grievor's interview, it is clear to me that Mr. Doig, at the very outset, asked the grievor whether he wished to have the assistance of an accredited union representative. The grievor declined the offer and further

confirmed that he was prepared to continue with the investigation without an accredited person from the union. The grievor also waived his right to 48 hours written notice of the investigation. Mr. Doig then again asked the grievor if he was prepared to continue with the investigation and the grievor confirmed that he was. The grievor was provided with Appendix C, which set out the dates and a description of each of the four failed 2015 proficiency tests. The grievor proceeded to answer questions about each of the four incidents as well as the recent January 27, 2016 incidents.

Although the proficiency tests were spread out over the previous year (2015), the grievor was able to provide clear and succinct answers to each of the incidents. At no time did the grievor, from my reading of the investigative interview, ever ask for clarification of any of the alleged proficiency violations, nor did he indicate that the questioning was inappropriate. The grievor in fact admitted at the end of the interview to being *"embarrassed that these failures have occurred and I will do everything in my power to comply with all the rules and instructions issued by the company going forward".* I would add that the fact that Mr. Doig was a witness to one of the proficiency violations is an insufficient basis in these circumstances to find that the whole interview should be set aside for unfairness. That is particularly so given that no issue of that kind was raised by the grievor during the investigation and that the entire tone of the interview appears to be otherwise respectful of the grievor. In short, the grievor was evidently prepared "to go it alone" and answer the Company's

questions as they came up, with an unhesitant apology for his mistakes at the end of the interview. The grievor was not prejudiced by the manner in which the interview was conducted. Accordingly, there has been no breach of article 39.04, as alleged by the Union.

Turning to the merits, I agree with the Employer that the grievor has an unenviable record of discipline, including a termination in December 2013 as a result of an accumulation of demerits under the Brown System of Discipline. The grievor was later reinstated with a record of 55 demerits on June 11, 2014 after having served a 203 Day Suspension. The grievor was also assessed a 5-day deferred suspension on May 11, 2015 for arriving 50 minutes late for his train-an offence the grievor has repeated on numerous occasions during the course of his 33 years of service. Given the previous record of suspensions and bearing in mind the principles of progressive discipline, I would normally be inclined to uphold the 5-day suspension. The incidents, however, all involve failed proficiency tests.

The purpose of proficiency tests is clearly set out in “CP Proficiency Test Codes and Descriptions” which reads in part in the Introduction:

> An efficiency test is a planned procedure to evaluate compliance with rules, instructions, and procedures, with or without the employees knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action. Efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required depending on the frequency, severity and the employee’s

> work history, education and mentoring will often bring about more desirable results.

In reviewing the above, I note Arbitrator Sims' recent comments on efficiency tests as a basis for discipline set out in **CROA 4621**:

> Third, arguments are repeatedly being advanced about the invocation of disciplinary sanctions as a result of efficiency testing. The Employer cites this arbitrator's ruling in **CROA 4580:**
>
> > This policy [cited above], while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage.
>
> To the extent it might be assumed that this licenses formal discipline any time an efficiency test is failed, any such assumption would be wrong. The exception should not replace the rule, and not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline. Concerns in this respect are heightened by the Employer's seeking to introduce efficiency testing records as part of a grievor's record, as more particularly addressed below.

All the alleged breaches were the result of efficiency test failures, failures to which the grievor readily admitted to in his statement. On each occasion of the four offences in 2015, the grievor, according to the Company records of the incidents, was given "verbal coaching". He was also re-tested subsequent to each offence. I take the same view of the documented failed proficiency test on January 27, 2016 when Trainmaster Larson observed the grievor lining the lead switch and the

divider switch with only one hand instead of two hands. The grievor readily admitted that he should have used both hands to line the switch.

The Company's approach, on each occasion, consistent with the above policy, was to correct the grievor's breaches. For example, the grievor's manner of detraining was observed, brought to his attention and corrected. Walking between cars with less than 50 feet of clearance was another incident that was also dealt with at the time it occurred. Normally, I would agree with the Union that these types of individual rule breaches should attract counselling rather than a disciplinary response. On the other hand, I am compelled to agree with the Company that the series of five documented offences, spanning some 12 months, when viewed cumulatively, constitute sufficient grounds for discipline. Employees like the grievor working in safety sensitive positions must perform their duties in keeping with the established rules at all times while on duty. To find that the events that took place are collectively not worthy of discipline would send the wrong message on the importance of adhering to safety rules.

I do, however, find that a 5-day suspension is excessive given that we are dealing with a series of proficiency test failures for which the grievor was properly counselled on each occasion. I also consider the grievor's willingness to admit to each of the alleged breaches at his interview-some of which stretched back over a year-to be a mitigating factor in his favour in addressing the issue of penalty.

The grievance is upheld to the extent that the 5-day suspension is to be removed from the grievor's record and substituted with a written warning. He shall otherwise be made whole for his losses.

THE 10-DAY SUSPENSION

The grievor was subject to another proficiency test on March 20, 2017. The grievor had just performed a coupling and then instructed the movement to move westward. He was observed to entrain the wrong end of a grain hopper car as the movement tracked westward. He was also then observed to be travelling on a locomotive facing away from the unit, a violation of another safety rule. The grievor indicated that the reason he was facing away from the unit at the time was because he was looking out for the Trainmaster, who had radioed him to say that he would meet the grievor at the west end of the yard for a discussion. In his interview, the grievor admitted to getting on the wrong end of the car. The grievor said he thought about detraining when he realized his mistake-what he termed was a "mental lapse"-but was faced with having to do so at 4 mph. He decided instead to just stay on the equipment. The grievor was coached by the Trainmaster over the incidents and then resumed his duties.

The Company contends that the grievor's conduct is deserving of discipline and that the suspension imposed of 10 days is consistent with the principles of

progressive discipline and the need for deterrence of this type of inattentive behaviour.

I note once again that the two infractions that were brought to the grievor's attention arose as part of the Company's typically unannounced proficiency tests. It is worth noting that these tests, as noted in the Company's own policies, are meant to be corrective in nature with the infraction being immediately brought to the employee's attention once they are discovered. That is what occurred once again in this case.

Given the purpose and nature of the proficiency tests to educate and mentor an employee, I am unable to conclude based on these facts that this is an appropriate case for discipline. I make that finding in particular given that some 15 months had passed since the last incident in January 2016 when the grievor used two hands on a switch instead of one. The grievor was also forthright about what occurred on March 20, 2017 and allowed to complete his shift. On the whole, I view this incident as a one-off failure of a proficiency test which was dealt with by counselling at the time rather than an ongoing pattern of rule violations as occurred in 2015 which, for the reasons set out above, merited a disciplinary response.

The grievance is upheld. The 10-day suspension shall be removed from the grievor's record and he shall be reimbursed for his losses.

THE 20-DAY SUSPENSION

The grievor was working his road switcher assignment on December 17, 2017 at the Port Coquitlam yard. He had detrained from his locomotive and was walking up the lead and inspecting the switch points at the Track 2 switch prior to lining the switch. His movement was stationary and he had not yet signalled to his Locomotive Engineer to move the locomotive.

The grievor was observed by the Assistant Superintendent walking foul of the track on the ties in violation of the Train & Engine Safety Rule Book. Rule T-20 states in part:

> 3. “Do not walk between rails or foul of track, except when duties require and it is safe to do so”

The Assistant Superintendent confirmed in a file memorandum that same day that he counselled the grievor immediately after observing the grievor walking on the ties:

> “I immediately stopped and spoke with Mr. Armillotta about the violation and explained to him that is exactly how an employee could get struck by equipment. And this is very concerning given this is a focus topic in safety briefings and we had just experienced a fatality within the company where an employee was struck by equipment”

The grievor admitted at his investigation that he inadvertently put himself foul of the track while he was inspecting the track and switch points. He confirmed that, in addition to receiving coaching after the incident by the Assistant Superintendent

on December 17, 2017, he also had a safety briefing that day with the Superintendent on the importance of the rule and the dangers of walking on the ties. The grievor was then sent home.

The Union alleges at the outset a breach of article 39.05 for the Company's failure to issue the Form 104 disciplinary notice within 20 days of the date the investigation was completed. The Union notes that the grievor was present at work on January 8 and 9, 2018 for Rules and First Aid training and could have been served with the disciplinary Notice, which is dated January 5, 2018, at that time. I accept the submission of the Employer, as set out in their Step 2 Reply, that it was the grievor's own request to acknowledge receipt of the Form 104 on January 10, 2018, one day beyond the 20-day notice period, rather than having to return from his residence to sign his acknowledgement of receipt. The grievor did in fact acknowledge receipt on January 10, 2018 which I find was the date it was mutually agreed that he was to be served with the Form 104. Accordingly, I find there was an agreement to waive the 20-day prescribed time limit for service and no further breach of article 39.05.

Turning to the merits, this is another example of the grievor being spoken to on the job about a failed proficiency test. The Company has every reason to be concerned when an employee like the grievor does something which breaches an important safety rule like walking foul of the track. I agree with the Company that the safety rules are in place for a reason and that the grievor put himself potentially

at risk by walking on the ties even though he had not signalled for the locomotive to move. Although the grievor was coached on the spot for having failed a proficiency test, I accept that the breach in this case-what the Assistant Superintendent described as a “focus topic in safety briefings”-is significant. The grievor has over 30 years of experience and clearly made a careless and potentially dangerous decision when he decided to deliberately foul the track by walking on the ties. For these reasons, I find there is cause for discipline.

Given the assessment of this arbitrator of a written warning for the multiple proficiency failures in 2015, I accept that a suspension of 5 days is appropriate under the circumstances based on the well-known principles of progressive discipline. The grievance succeeds to the extent that a 5-day suspension is substituted for the 20-day suspension imposed by the Company.

THE DISMISSAL

The grievor, as noted, returned for his first day of work on January 10, 2018 after serving a 20-day suspension and attending Rules and First Aid training on January 8, 9, 2018. The grievor was assigned RLF2RS along with Brakeman Jordan Smith and Locomotive Engineer Dan Delacherois. Mr. Smith was a “green-vest” employee with little experience working in the New Westminster yards. Mr. Smith was apparently feeling ill while on duty and advised the grievor of his

condition. For this reason, the grievor decided to hold a briefing inside the cab of the locomotive.

The grievor, along with the Brakeman and Locomotive Engineer Delacherois, were observed by three Managers, who were positioned on an overpass conducting efficiency testing, to travel over two switches while all three crew members were inside the cab of the locomotive. Bulletin No. BCO-009/17 states that train crews working in yards, other than the Locomotive Engineer, must be positioned outside the cab when the locomotive is leading in the direction of travel.

The three Managers stopped the crew and spoke with the three individuals about their observations. Brakeman Smith received a Notice to Appear for a formal investigation on January 24, 2018. The grievor received a Notice to Appear for the following day, January 25, 2018.

Both the grievor and Mr. Smith indicated at their respective investigations that they were not outside the cab observing the switches as stipulated in the Bulletin because the grievor was conducting a job briefing while he was observing the switches. Mr. Smith claimed that *"…he had a momentary lapse of judgment and was caught up in the job briefing"* while the grievor, for his part, admitted that he understood the rule *"…and am committed to adhering to it and if the duties require me to be in the cab I will stop the movement".* The grievor was terminated from his

employment because of his previous work history on February 5, 2018 while Brakeman Smith was given a 5-day suspension.

The Union claims that the investigation was fatally flawed and should be declared *void ab initio* because neither Mr. Smith nor the grievor were notified to attend or respond to each other's investigation contrary to article 39.01(4). Nor was the Locomotive Engineer summoned for an investigation.

I note that Mr. Smith was provided with a letter on January 22, 2018 requesting his presence for an interview on January 24, 2018. That letter sets out the documents that would be introduced as evidence in the proceedings, which included a copy of the CMA Tie up on January 10, 2018 as well as a memorandum from one of the Managers who conducted the efficiency test. The letter also contains the following paragraph:

> The Company does not plan to call any witnesses at this investigation. You have the right to request witnesses on your behalf. Please advise prior to investigation if you intend to exercise this right.

Mr. Smith evidently did not advise the Company that he intended to call any witnesses at his investigation, including either the grievor or the Locomotive Engineer. Neither Mr. Smith nor his accredited union representative raised any issues at the January 24, 2018 investigation concerning the absence of the grievor as a witness. Similarly, there is no evidence before me that the grievor either notified the Company of his intention to call any witnesses nor did he or his union representative raise any objection or concerns at the January 25, 2018

investigation regarding the absence of either the Locomotive Engineer or Brakeman Smith. In the absence of such evidence, I find that the grievor cannot now claim that he suffered prejudice because of the absence of either the Brakeman or the Locomotive Engineer. The failure to call such witnesses falls on his shoulders and not the Company in these circumstances. The comments of Arbitrator Hornung in **CROA 4636** are appropriate here:

> I accept the principle in **CROA 3221** that a failure to conduct a fair and impartial investigation results in any ensuing discipline being declared null and void. However, the Grievor's investigation was neither unfair or impartial as the Union suggests. The Company is required to investigate the incident and to make the Grievor aware of the evidence on which it relies; and, to provide him with any documents with respect to the same. In this case the Company did just that. As it is compelled to do, pursuant to Article 23.01(3), the Company provided the Grievor with the appropriate notification and "…all available evidence, including a list of any witnesses … whose evidence may have a bearing on the employee's responsibility".

This is another case of the grievor failing an efficiency test. Although the fact that the grievor was efficiency tested on his first day back to work after he had completed a 20-day suspension raises suspicions that he was being targeted for potential rule breaches, the fact remains that the grievor was readily observed with the Brakeman to be inside rather than outside the cab while the locomotive was in motion. The grievor acknowledged his culpability at his interview and undertook to stop the movement if he was required, in the future, to be inside the cab instead of outside to observe the switches. I find that discipline was appropriate here given the importance of the rule and the need for the grievor to set an example for the inexperienced Brakeman who was part of the crew. Following the principles of

progressive discipline, I find that a 10-day suspension to be the proper disciplinary response under the circumstances.

SUMMARY

1) The 5-day suspension is substituted with a written warning;
2) The 10-day suspension grievance is upheld (no discipline);
3) The 20-day suspension is substituted with a 5-day suspension;
4) The dismissal is substituted with a 10-day suspension.

The grievor shall be reinstated forthwith without loss of seniority and compensated for any losses. I shall retain jurisdiction should any issues arise with respect to the implementation of this award.

The grievor should be aware that his job is clearly at risk if he continues to either ignore or flout the Company safety rules.

Dated at Calgary, this 19th day of November, 2019

JOHN M. MOREAU, Q.C.
ARBITRATOR