

IN THE MATTER OF ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY

(the “Company”)

and

TEAMSTERS CANADA RAIL CONFERENCE

(the “Union”)

Dismissal of Austin Buchholz

Arbitrator:

Richard I. Hornung, Q.C.

For the Company:

Sharney Oliver	Manager Labour Relations
Don McGrath	Manager Labour Relations – Calgary
Ryan Mayman	Assistant Superintendent Operations – Winnipeg
Poonam Sheemar	Labour Relations Officer - Calgary

For the Union:

Michael Church	Counsel
Dave Fulton	General Chairperson
Doug Edward	Senior Vice-General Chairman – Medicine Hat
Brian McGiven	Local Chairperson – Revelstoke
Trent Haug	Local Chairperson – Calgary
Austin Buchholz	Grievor

Hearing

March 2, 2020
Calgary, Alberta

Award

1. On April 4, 2018 Austin Buchholz (the “Grievor”) was dismissed from the Company for:

...equipment left unsecured causing cut of cars to roll contacting locomotives, in addition to not being truthful in completing a release test during your initial conversation with Company Officer.

... (Company Tab 1)

2. The Union grieved the dismissal contending, *inter alia*, that the Company:

Has failed to meet the burden of proof regarding all of the allegations outlined...or that the incident itself is worthy of discharge.

3. On March 1, 2018, the Grievor was called in for a yard assignment at Calgary’s Alyth Yard - along with Yard Helper Mitchell Guinn - for a Remote Control Locomotive Systems (RCLS) assignment related to switching activities in the yard.

4. During the crew’s operation cars which were placed on a track rolled uncontrollably and contacted the side of their locomotive. Fortunately, no injuries or fatalities occurred as a result.

5. The evidence established that the Grievor failed to fulfill a safety critical and operational obligation, inherent in his position, while operating the RCLS in that:

... he failed to secure equipment resulting in the cut of cars rolling uncontrollably before contacting the locomotive.

6. In the investigation which followed, the Company interviewed the Trainmaster, Ryan Mayman, who provided the following Memorandum and Analysis:

*At approximately 23:55 Friday March 2nd, the CE31 east end switcher shoved a cut of 13 cars into the east end of VT06. The crew stated that they put 2 hand brakes on the track, **tested the effectiveness of the brakes** and pulled out to the lead. While they were on the lead waiting for the VT09 switch to be unlocked by the car department the cut of cars they put into VT06 rolled eastward making contact with their locomotives. Upon*

review of the download the crew shoved the cars into the track. Stopped, and then pulled eastward. There is no evidence of a proper brake test.

7. At the first investigative hearing on May 5, 2018, the Grievor stated both that he left the cut of cars “*without doing a release test*” (Q.22) and that he did not tell Mitchell Guinn, that he released and tested the handbrakes on the cut of cars.

8. In his statement, on the same date, Mitchell Guinn was specifically asked (Q.23):

Q23. *Did Foreman Buchholz communicate to you that the handbrakes were applied, then released and tested on the cut of cars in VT06?*

A.23. *I do not recall, I was getting us a lineup.*

9. Having regard to the conflict of facts, the Grievor was re-interviewed as part of the investigation on March 14, 2018. The following exchange took place:

Q8. *Do you wish to comment on or refute any evidence contained in these documents?*

A8. *After the second reading of TM Mayman’s memo, I would like to rebut where he says I told him I did a release test. As evidenced in my initial employee incident report. I only said I shoved the cars in, put on two brakes, and then departed the track. I am not by any means saying that TM Mayman is not telling the truth, I am only saying he must have misunderstood my explanation. I honestly never said I did a release test. The employee statement in my opinion proves that. It was provided right away, well in advance of the download being obtained.*

Q9. *Referring to TM Ryan Mayman’s memo, do you agree that you originally told him that you had release tested the handbrakes in VT06?*

Union Objection: Unfair question. In Ryan Mayman’s memo, it states the crew tested the effectiveness of the brakes. It does not specify which crew member he was talking to. Mr. Buchholz never denied once that he did not do a release test during the entire statement process.

Company officer: Duly noted.

A9. *No*

Company Officer: *At this time I would like to call Trainmaster Mayman. Trainmaster Mayman stated "I stand by my memo".*

Q10. This question is referring to answer 22 of your original statement where it says "Upon shoving the cars into VT06 I tied two handbrakes on and left without doing a release test".

Can you please explain why you originally told TM Mayman that you did a release test in VT06. Then in answer in question 22 of your first statement you said you left the track without doing a release test?

Union objection: *We are here to determine the facts.*

Company officer: *Duly noted.*

A10. *I did not tell TM Ryan Mayman that I did a release test. I did tell him that I applied two handbrakes. I did say to him that he will probably see it on the download. TM Mayman must have misunderstood me. I honestly never told anyone that I did a release test. **In fact I wrote in my original incident statement that I did not do a release test.** I have honestly never tried to hide anything.*

10. Following the investigation, the Company concluded that the Grievor had not been forthright and honest because he denied telling Mr. Mayman that he had performed a brake release test.

11. In its brief, the Company maintained the position it took in the original Form 104 in the following terms:

*As will be further demonstrated in the Company submission the grievor was not honest or truthful when formally questioned during the investigation process - which directly contradicted other misleading comments made to his Trainmaster immediately after the incident as part of the initial fact-finding process. **The grievor's dishonesty surrounding the incident was a monumental aggravating factor that justified the decision to terminate his employment.***

12. As noted in Q.10, above, the Grievor also states that he: *"wrote in my original incident statement that I did not do a release test".*

13. The Company did not produce the IRR either at the investigation or at the hearing.
14. While it did not deny its existence, or the fact that the Grievor completed it following the incident, the Company advised that notwithstanding its best efforts it could not locate it.
15. The onus falls to the Company to prove, on a balance, that the Grievor was dishonest, at the investigation stage, when he denied making the statement regarding the brake test to Mr. Mayman.
16. The absence of the Initial Incident Report is critical. The Grievor was compelled to file it with the Company following the incident, which he did. There is no dispute that the Company originally had it in its possession. And, finally, the Grievor referred to it in the investigation and relied on it to corroborate his statements.
17. The Union did not suggest (and neither do I) that the Company purposely withheld the IRR. Nevertheless the consequent reality is that its absence, given that it is relied by the Grievor as exculpatory, compels me to draw an adverse inference relative to the failure to produce it here.
18. Accordingly the Company has not proven, on a balance, that the Grievor was dishonest in his reporting to Trainmaster Mayman; and, therefore, the "*monumental aggravating factor*" upon which the Company based the dismissal has not been established. Accordingly, the determination of dismissal cannot be sustained.
19. That said, the above finding relates only to the extent of the discipline imposed and is not determinative of the remaining issue of whether or not any discipline is appropriate having regard to the Grievor's admitted conduct in causing the cut of cars to roll down the track and cause the collision.

20. The Union asserts that the failure of the Company to produce the IRR at the investigative stage constituted a lack of a fair and impartial investigation and therefore should result in the grievance being allowed in full and any discipline set aside as void *ab initio*.
21. I disagree.
22. The Company did not improperly withhold the IRR. Rather, it provided a reasonable explanation for its inability to produce it (either at the investigation or the hearing) notwithstanding the Union's requests for the same. As a consequence, it was unable to establish a critical aspect of its case to support dismissal as an appropriate disciplinary response. The absence of the IRR, accordingly, did not deprive the Grievor of a fair and impartial hearing.
23. The question therefore remains: what is the appropriate discipline?
24. The Grievor had been working with the Company since November 3, 2014, with 40 months of service at the time of his dismissal. Prior to his dismissal, he was assessed a caution for his role in a derailment in 2016 (Company Tab 1).
25. Mr. Guinn, his Helper was assessed a 20-day suspension for his role in the incident.
26. The Grievor allowed, in his answer at Q.32:

During that tour of duty, I had a lapse in judgment of not doing a release test in an effort to be more productive which was an error on my part. Going forward I will ensure I follow the rules and work safely and efficiently as I can.
27. There is no doubt that his conduct was negligent and deserving of discipline. However, dismissal in the circumstances is not warranted having regard to the fact that the Company failed to prove the aggravating circumstance on which it relied.

28. I am satisfied that a significant suspension will focus the Grievor's mind, going forward, and I accept that he intends to comply with his obligations in the future. I am also mindful that the Grievor was candid, prompt in admitting his error and appeared remorseful.
29. Finally, having regard to the fact that Mr. Guinn was assessed a 20 day suspension for the same incident, I impose a suspension of 45 days and direct that the Grievor be reinstated and made whole.
30. I shall retain jurisdiction with respect to the application, implementation and interpretation of this award.

Dated at Calgary, Alberta this 2nd day of April, 2020.

A handwritten signature in black ink, appearing to read "R. Hornung", with a stylized initial "R" and a long horizontal stroke.

Richard I. Hornung, Q.C.
Arbitrator