

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**BOMBARDIER TRANSPORTATION CANADA INC. (BTC)**

**And**

**TEAMSTERS CANADA RAIL CONFERENCE (TCRC)**

**Yevgen Lystukha - Permanent Demotion to Different Craft**

**Date:** October 23, 2020

**Arbitrator:** Graham J. Clarke

**Appearing for BTC:**

D. McDonald: Counsel, Norton Rose Fulbright

A. Ignace: Human Resource Manager

C. Henripin: Human Resource Advisor

**Appearing for TCRC:**

A. Stevens: Counsel, Caley Wray, Toronto

W. Apsey: General Chairperson, Smiths Falls

Heard via videoconference on October 20, 2020

# Award

## BACKGROUND

1. The parties are members of the Canadian Railway Office of Arbitration and Dispute Resolution ([CROA](#)). Exceptionally, they decided to proceed by way of Ad Hoc arbitration to plead four separate grievances on October 20, 2020.
2. On April 28, 2014, BTC hired Mr. Yevgen Lystukha. He qualified as a conductor at the end of November 2018. Following an incident on August 7, 2019 when a commuter train's speed resulted in an emergency stop, BTC demoted Mr. Lystukha permanently from his conductor position to that of a maintainer.
3. The TCRC accepted that BTC had grounds to impose discipline. However, it argued that Mr. Lystukha's permanent demotion was excessive, especially given that the engineer, who had been alone in the cab operating the train, had received a lesser penalty (originally a 6-month suspension).
4. BTC maintained that Mr. Lystukha, who already had a May 2019 5-day suspension in his record, could not provide a reasonable explanation for the incident and demonstrated he was unaware of certain critical safety regulations. BTC argued safety justified the permanent demotion.
5. For the following reasons, the arbitrator has decided to reinstate Mr. Lystukha as a conductor. Railway arbitrators frequently examine situations involving the relative fault between or among crew members for an incident.
6. At the time of the incident, Mr. Lystukha was elsewhere performing duties when the engineer realized he was speeding and initiated an emergency stop. Given the engineer's responsibility, and despite Mr. Lystukha's admitted failings, *infra*, the arbitrator agrees with the TCRC that a permanent demotion constituted an excessive disciplinary response.

## FACTS

7. The Record sets out the facts in detail. The arbitrator will therefore highlight those facts which are relevant mainly to the issue of the appropriate penalty.

8. The engineer's investigation interview (TCRC Brief; Tab 2) confirms that Mr. Lystukha was not in the cab at the time of the incident. Unlike the situation for freight trains, a conductor in a commuter train has other duties, such as opening the doors, which require him/her to leave the cab. Nonetheless, he/she still needs to be operationally aware of the train's progress and regularly communicate with the engineer.

9. The engineer admitted he had not advised Mr. Lystukha of signal 149S, despite the requirement to do so in [CROR 578](#) (QA 16-18; page TCRC030). He further decided himself to use the emergency brake in advance of the crossing because his speed exceeded the required 30 mph (QA 20-22). He stated he had been distracted by the train's faulty windshield wiper.

10. Following the emergency stop, the engineer, who the RTC had contacted directly, asked Mr. Lystukha to inspect the train. The engineer accepted responsibility for the incident and noted that in the future he would be more vigilant and call all signals (QA 31-33).

11. In Mr. Lystukha's first investigation interview on August 13, 2019 (TCRC Brief; Tab 3), he noted he was not in the cab due to other train duties and could not have seen signal 149S. He could not recall if the engineer had communicated with him about that signal. He did not realize the train had been speeding or that the engineer had initiated an emergency stop. He alleged he learned of those facts only after returning to the cab following his inspection of the train (QA14-24).

12. Mr. Lystukha indicated he did not communicate with RCT because the engineer was already doing so when he returned to the cab following the inspection.

13. On August 19, 2019, Mr. Lytukha provided a letter to BTC in which he acknowledged his unacceptable complacency during the incident (Page TCRC072). He noted that his role went beyond merely opening doors and required that he always be aware of his train's situation. He noted in the future he would ensure that he and his colleagues respected all their obligations when operating a train.

14. BTC held a second investigative interview with Mr. Lystukha on August 22, 2019 in part to discuss the August 19, 2019 letter (TCRC Brief; Tab 4). BTC also held a

second interview with the engineer on August 22, 2019 (TCRC Brief; Tab 5) following receipt of an August 21, 2019 letter from him in which he commented further about the incident (Page TCRC078). The engineer acknowledged that he had minimized the information he provided to the RTC and realized that that could have had serious safety consequences (QA 7-11).

15. The engineer advised how he would act differently in the future, including by advising his conductor that he had made an emergency stop and by providing the full details to the RCT (QA 13).

16. By letter dated September 3, 2019, BTC advised Mr. Lystukha that, on a permanent basis, he would no longer work as a conductor (TCRC Brief, Tab 6). Instead, he would be demoted to his former position of a maintainer. BTC imposed a 6-month suspension on the engineer (TCRC Brief, Tab 7). The parties later settled the engineer's grievance, but the arbitrator has no knowledge of those confidential details.

## **ANALYSIS AND DECISION**

17. The TCRC did not dispute that the August 7, 2019 incident merited the imposition of discipline<sup>1</sup>. A commuter train travelling at an excessive speed required emergency braking. What aggravated the situation was that both the engineer and Mr. Lystukha were less than forthcoming with BTC about the incident, at least initially.

18. They later both wrote letters to BTC, acknowledging their responsibility, and indicating how they would act in the future. BTC then followed up with supplemental investigation interviews.

19. BTC demoted Mr. Lystukha for several reasons, including his previous 5-day suspension, his failure to advise the RTC of the incident and his alleged lack of knowledge about his responsibilities following an emergency stop (BTC step 2 response; TCRC Brief tab 10).

20. Why has the arbitrator decided to modify the disciplinary penalty?

21. First, while Mr. Lystukha's admitted complacency when operating a commuter train merits discipline, the TCRC satisfied the arbitrator that the engineer played a

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<sup>1</sup> For a somewhat analogous case involving these parties and the applicable analysis, see [CROA 4495](#) at paragraphs 15-16.

greater role in the incident. Despite this situation, BTC imposed on Mr. Lystukha a greater penalty by permanently demoting him out of his conductor position and into a lower paying position.

22. But for the engineer's inattentiveness, the incident might not have occurred. Similarly, the Record appears to support Mr. Lystukha's position that he only later learned of the emergency braking.

23. The arbitrator accepts, however, that had Mr. Lystukha been monitoring the train's situation as he was supposed to do, then he might have helped prevent the incident by remaining in constant contact with the engineer.

24. Factually, the situation seems similar, though clearly not the same, to that decided for these same parties by Arbitrator Moreau in [CROA 4710](#). In that decision, Arbitrator Moreau noted that different degrees of responsibility justified the different penalties assessed to an engineer and a conductor:

**The Union also adds that the termination penalty imposed on the grievor is discriminatory given that a relatively short suspension of seven days was imposed on the conductor, who also failed to perform the required inspection and initiate an emergency radio broadcast.** The arbitrator notes that it was the grievor who was distracted and solely responsible for driving the locomotive through the crossing at an excessive speed. Further, the conductor explicitly asked the grievor over the radio about performing an inspection after the train was stopped, as required by the rules. It was the grievor who instructed the conductor, contrary to the rules, that they would do so at the next station. **Under the circumstances, I do not find there is a basis to conclude that the two employees engaged in similar conduct that constitutes discriminatory discipline.**

25. [CROA 4608](#) examined a situation where the facts justified different discipline for the crew:

44. The lower discipline handed out to Conductor Lemoine and Brakeman Truong did not demonstrate unequal treatment. This Office has often differentiated discipline between crew members depending on the situation: CROA&DR 4499 and CROA&DR 4610. The conductor and the brakeman both communicated the stop signal. Their subsequent actions were not perfect,

hence the imposition of suspensions, but that did not exonerate LE Madubeko from running through stop signal.

26. BTC did not satisfactorily explain why Mr. Lystukha's lesser responsibility merited a harsher career penalty than that meted out to the engineer.

27. Second, the arbitrator accepts that in exceptional situations an employer can demote or terminate an employee for performance reasons. In the non-disciplinary context, the arbitrator in [CROA 4602](#) dismissed a grievance contesting a finding of an employee's unsuitability as an engineer. The process leading to that conclusion had involved significant training and constructive feedback.

28. A demotion may also be imposed in situations where the conduct merits discipline. However, in the instant case, BTC permanently demoted Mr. Lystukha to another position. There did not appear to be any suggestion that he might one day return to his position (TCRC Brief; Tab 6).

29. In [CROA 3300](#), Arbitrator Picher, when evaluating an employee with multiple disciplinary measures for negligent behaviour, noted a demotion could not normally be justified as a permanent measure.

**It is important to stress, however, that demotion, involving as it does an effective curtailment of an employee's seniority rights, cannot normally be justified as a permanent measure. Nor does it appear that the grievor's demotion in the case at hand is intended to be indefinite or irreversible. The discipline form addressed to the grievor expressly indicated that his demotion would be reviewed in twenty-four months.** It should be stressed that in the Arbitrator's view should the grievor maintain a record of good service over that period, and in particular should he incur no further discipline for rules or safety infractions, the onus will be upon the Company to justify any further continuation of his demotion beyond that point. With respect to that issue the Arbitrator retains jurisdiction.

30. Mr. Lystukha's lesser responsibility for the August 7, 2019 incident does not support a permanent demotion to his former position of maintainer<sup>2</sup>. In most cases, a demotion had a specific time period attached to it.

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<sup>2</sup> See also [CROA 1299](#), [CROA 1697](#) and [AH268](#).

31. In sum, BTC did not demonstrate that Mr. Lystukha's conduct, while deserving of discipline, merited a permanent demotion to his former position of maintainer. His lesser responsibility for the August 7, 2019 incident and his candour, albeit delayed, merits instead a suspension.

32. The arbitrator remits to the parties the issue of the length of the suspension given that they have already settled the engineer's grievance on mutually acceptable terms. The parties may return before the arbitrator if they are unable to agree on the appropriate penalty and ancillary remedies.

33. BTC may follow the same process for Mr. Lystukha that it used for the engineer regarding retraining and familiarization (BTC step 2 response; TCRC Brief Tabs 7 and 10).

## **DISPOSITION**

34. The arbitrator accordingly reinstates Mr. Lystukha to his position as conductor.

35. The arbitrator thanks the parties for using compiled PDFs for their Briefs along with their use of Bookmarks and/or Bates Numbering. Those features greatly assist an arbitrator who often must review voluminous digital Records under the parties' expedited process.

36. The arbitrator retains jurisdiction for any remedial issues arising from this award.

SIGNED at Ottawa this 23<sup>rd</sup> day of October 2020.



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Graham J. Clarke  
Arbitrator