

IN THE MATTER OF AN AD HOC ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And
CANADIAN PACIFIC RAILWAY COMPANY (CP)

AH 752

DISPUTE

Appeal of the 10 demerits assessed to Conductor Jeffrey Johnston.

JOINT STATEMENT OF ISSUE

Following an investigation, on May 6, 2020 Mr. Johnston was disciplined as shown in his discipline letter as follows,

“Please be advised that you have been assessed with ten (10) demerits for your failure to check the switch points before and after lining the switch for the St. Mary’s spur, while working as Conductor on Assignment T69-06 on April 6, 2020. Violation of Section T-26 Switches Item 3 prior to operating switches, check the switch rods and switch point and T-26 Item 5 Ensure switch points fit properly prior to”.

UNION POSITION

For all the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the Union’s position of an assessment of 10 demerits is unnecessary and the continuation to discipline before or even when education of the employee takes place.

The Company as per the own E-Test Policy should have followed education, re-test for compliance, but instead discipline was always where it was going to end up.

The Company throughout the process the Union believes did not prove without a doubt that Mr. Johnston was culpable of the alleged violations. The Company’s position is not stated as such within the rules.

The Union further believes Mr. Johnston did not receive a “fair and impartial” process as provided within the grievances.

The Company did not respond to the Union’s Step 2 grievance; therefore, the Union is not in possession of any further position of the Company on the matter and this leaves the Union at a disadvantage. In the Union’s view this is a violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA.

The Company has unreasonably disciplined Mr. Johnston. The facts of the investigation do not warrant, nor justify this quantum. Education should be promoted not penalty as well as following the provisions of the CBA when conducting an investigation.

The Union requests that the discipline assessed to Mr. Johnston be removed. 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 during a fair and impartial investigation that the grievor was found culpable of violating Train & Engine Safety Rule Book Section T-26, Items 3 and 5. The Company maintains the discipline assessed was in line with the Hybrid Discipline & Accountability Guidelines.

Discipline was determined following a review of all pertinent factors, including all mitigating and aggravating factors.

For all the reasons brought forth through the grievance process, the Company’s position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

FOR THE COMPANY:



Ed Mogus
General Chairperson LE East

Don McGrath
Manager Labour Relations CP

October 19, 2021

Hearing: November 17, 2021. In person and videoconference.

APPEARING FOR THE UNION:

Ken Stuebing – Counsel, Caley Wray
 Ed Mogus - General Chairperson LE East
 Joe Bishop - Sr. Vice General Chairperson LE East
 Jeffrey Johnston - Grievor

APPEARING FOR THE COMPANY:

Lauren McGinley, Assistant Director Labour Relations
 Elliot Allen, Manager, Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

[2] The Company raised a preliminary issue with respect to the arbitrability of the grievance. It argues that the grievance was in fact submitted some 72 days from the assessment of discipline and 12 days beyond the time limits contemplated within the grievance procedure. I reviewed the correspondence between the Local Union representative and the Company regarding the request for an extension of time limits. Given the correspondence, I advised the Company that in my view this was an appropriate case for the exercise of my discretion to extend the time limits and find the matter is arbitrable.

BACKGROUND

[3] On April 6, 2020 the Grievor was observed by Trainmaster Kerrie Urbanoski during his tour of duty on assignment T69-06. The Trainmaster wrote the following memo:

Memo to File Efficiency Test Failure CRT26.3

Jeff Johnson Employee #930317

April 6, 2020

At approximately 13:15, Assistant Superintendent Damian Kwiatkowski and I observed Brakeman Jeffrey Johnston Riding trailing end of the units out of the scale track. Upon dismounting off locomotive to throw switch for the St. Mary's spur he did not check the switch points to ensure no debris was present and after throwing the switch he did not check the points to confirm they were

flush against the rail. When approached and asked why he did not check the switch points he said he did. At which time it was discussed further that he could not have as he dismounted off the locomotive and directly went to throw the switch showing no body movements to inspect the switch. Mr. Johnston was advised of the exception and that we would continue to observe him to be re-tested.



Kerrie Urbanoski

Southern Ontario Trainmaster

940 Elias St. London Ontario. NSW 3P2

[4] On April 30, 2020, the Grievor was required to attend an investigation in connection with his assignment on April 6, 2020. Trainmaster Urbanoski and Assistant Superintendent Damian Kwiatkowski appeared as witnesses regarding her memo and observations of that day. On May 6, 2020, the Grievor was assessed with 10 demerits.

ANALYSIS AND DECISION

[5] Trainmaster Urbanoski was driving in her truck with Assistant Superintendent Damian Kwiatkowski when she observed the Grievor not checking switch points to make sure it was clear of debris. She said that she was 200 feet from the Grievor at the time. Mr. Kwiatkowski said the truck was moving at the time and said it was 200 to 250 feet from the Grievor. The Grievor maintains that he properly inspected the switch before moving it.

[6] The Train and Engine Safety Rule book provides:

T-26 Switches

1. Keep your body, hands, and feet clear of all moving parts and out of the path of the switch handle.
2. Do not apply force with your foot on a switch/derail handle.
3. **Prior to operating switches, check the switch rods and switch point for ice, ballast, or any other debris that may prevent the switch from lining freely. Check if the switch has been spiked.**
4. Remove the switch point lock pedal, where equipped, before operating switch
5. **Ensure switch points fit properly prior to allowing a movement to pass.**
6. Reapply the switch lock or keeper after the switch has been lined.
7. Never use excessive force while operating a switch.
8. Use both hands while operating the switch handle to align the switch points or derail. **Emphasis Added**

[7] The Trainmaster was questioned during the investigation as to how she determined that the Grievor had not checked the switch:

KUQ03: Could you clearly see that Brakeman Johnston did not check the gap between the points and stock rail, before attempting to throw the switch?

KUA03: Yes, that is correct. As the locomotive was going forward he got off the locomotive at the switch and would not have had an opportunity to see the points, plus he made no body movements to indicate he was checking the switch points before and after, to make sure the switch points were clear, than flush against the rail.

[8] During the investigation, the investigating officer asked the following:

Q08: Are you familiar with T&E Safety rule T-26 items 3 and 5 which read,

3- Prior to operating switches, check the switch rods and points for ice, ballast, or any other debris that may prevent the switch from lining freely. Check if the switch has been spiked.

5- Ensure switch points fit properly

A08: Yes

Q09: How do you inspect a switch to make sure it is clear of debris and safe to throw before beginning the action?

A09: I use my eyes, and observe

Q10: Do you understand that the only reason for this rule is to protect employees from injury if the points bind up due to an obstruction?

A10: Absolutely, I would also like to add I do not work in an unsafe manner and would not jeopardize myself that way.

[9] Neither Trainmaster Kerrie Urbanoski or Assistant Superintendent Kwiatkowski reported checking the switch for debris or finding any obstructions. They did not advise the Grievor of the proper body movement they believed was required or demonstrated the proper method before beginning action. The Company offered no evidence that the requirement for a specific body movement represented a consistent application of the rule.

[10] The Union maintained that no specific body movement is required in T26. When a specific body movement is required, it is specified in the rule. The Union submitted evidence that a recent Operating Bulletin confirmed the use of observation when determining if switch points are free of debris. The Operating Bulletin does not specify a specific body movement. However, pointing of the hand is specified as required towards the switch target and desired route. In contrast pointing of the hand, bending over or any other body movement is not specified for observing if switch points are free of debris.

[11] I take notice that safety rules can require specific body angles as clearly set out in the Train & Engine Safety Rule Book T-20 On or About Tracks Item 13. However, a specific body movement is not specified in T-26.

[12] I believe good judgment, professionalism and strict adherence to the consistent application of the rules can further ensure a safe workplace. An Arbitrator's decision regarding discipline for

a rule violation must be exercised with a view to ensure safety. In my opinion, the effective and consistent application of the rules is required absent is a good reason to do otherwise. Allowing for discretionary and subjective interpretation of safety rules, as in this case, can undermine consistent application and safety.

[13] The Grievor stated that he properly inspected the switch as required by the rule. He did so by observing with his eyes. The rule does not stipulate a specific body movement is required. In this case, Trainmaster Kerrie Urbanoski and Assistant Superintendent Kwiatkowski made their observations while driving in a truck over 200 feet away. I cannot find that a violation of the rule was established.

[14] In view of all of the foregoing, the grievance is allowed. The 10 demerits will be removed from the Grievor's record.

I remain seized should there be any dispute with respect to any aspect of the interpretation, enforcement or implementation of this award.

Dated this 20th, day of December, 2021

A handwritten signature in black ink, appearing to read "Tom Hodges". The signature is written in a cursive, flowing style.

Tom Hodges

Arbitrator