

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

And
CANADIAN PACIFIC RAILWAY COMPANY (CP)

AH 753

DISPUTE

Appeal of the 20-day suspension assessed to Conductor Jeffrey Johnston.

JOINT STATEMENT OF ISSUE

Following an investigation, on June 25, 2020 Mr. Johnston was disciplined as shown in his discipline letter as follows,

“Please be advised that you have been assessed with a twenty (20) day suspension for crossing between equipment, failed to request 3 point protection and crossed over directly in front of the knuckle in London Yard, while working as the Conductor on Train 141-28 on May 29, 2020.

Violation of Train and Engine Safety Rule Book T-20 item 5 Allow at least 15 feet when passing around the end of standing equipment unless proper protection is provided and T-27 3 Point Protection. Your suspension date will start on June 28, 2020 and end on July 17, 2020, inclusive.”

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 20-day suspension 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, and a re-test for compliance. Further, the Company’s unilateral “Hybrid Discipline Policy” is not what is provided for within the agreed upon terms of the CBA.

Note: The Company’s Hybrid Discipline & Accountability Guidelines is currently under a separate appeal by the TCRC.

The Union believes the Company has subjected Mr. Johnston to intimidation, harassment, and undue scrutiny.

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 and he be compensated all loss of wages, benefits 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 during the fair and impartial investigation that the grievor was found culpable of violating Train & Engine Safety Rule Book Section T-20, Item 5 and T-27.

The Company maintains the discipline assessed the grievor 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:



Ed Mogus
General Chairperson
LE East

FOR THE COMPANY:



Don McGrath
Manager Labour Relations

October 19, 2021

Hearing: November 17, 2021. In person and video conference.

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*.

BACKGROUND

[2] On May 29, 2020, the Grievor was working as the Conductor on London yard assignment Train 141-28. During the assignment, the crew was required to make a joint in track BT12 while being observed by Assistant Trainmaster Chris Van Eck. The Assistant Trainmaster submitted the following memo to file:

MEMORANDUM TO FILE

May 29, 2020

Jeffrey Johnston - #930317 - Exception to Rule CRT20

At approximately 0945, May 29, 2020, I was in London yard observing Train 141-28. I was at the west end of the yard directly beside and in line with the joint that they were about to make in track BT1 2. Approximately 100ft away with clear view of work being performed. Conductor Johnston had his movement all lined up previously, and was riding the locomotive on the north side, as the conductor was counting down the engineer, he shortened him up to stop short of coupling for a safety stop. Once stopped he detrained and walked to the west end of the car he was about to make a joint onto. At this point, Jeff crossed between the equipment without requesting 3 point, and chose to cross over directly in front of the knuckle, to close the angle cock on the south side of the car. And returned to north side. Instructed his engineer to back up 1 car to a joint, and within the same transmission, corrected and stated "more like 50ft". Once the coupling was made, conductor Johnston went to remove hand brakes and at this point, I entered the yard and approached the conductor.

Chis Van Eck
Assistant Trainmaster

[3] On June 4, 2020, the Grievor received a Notice of an Investigation to take place on October 30, 2018, in connection with the May 29, 2020 tour on Train 141-28. The investigation took place on June 9, 2020. On June 25, 2020 the Grievor was assessed with a 20-day suspension as a result of the incident.

ANALYSIS AND DECISION

[4] The Grievor was disciplined for two rule violations, violation of Train and Engine Safety Rule Book T-20, Item 5 and T-27 3-Point Protection.

[5] Assistant Trainmaster Van Eck and the Grievor appear to agree that the movement in question occurred when the Locomotive was 50 feet or more from a car not coupled to a locomotive.

[6] Rule T-20 On or About Tracks provides:

5. Allow at least 15 feet when passing around the end of standing equipment **unless proper protection is provided.**

Emphasis Added

[7] Rule T-27 3- Point Protection provides:

Provide 3-point protection if cares are **connected to locomotives** and working on the ground

Emphasis Added

[8] The Grievor noted that he performed a Safety Stop with his engine when he was at least 50 feet away from the standing car. Since the car was not connected to a locomotive, he believed he was properly protected.

[9] Assistant Trainmaster Van Eck explained the rule to the Grievor at the time of the incident. He indicated that he had a conversation and coached the Grievor on the three rules. He said in response to questions from the Grievor's Union representative:

UQCVO1: Mr. Van Eck, based on your answers to investigating officer questions 1,2&3 your perceived understanding Mr. Johnston understood the rule, **did this perception come before or after you approached him** about his exception and explained what he had allegedly done wrong.

UACVOJ: My perception was **after, when I told him what I saw and explained that he needed 3-point and 15' around equipment, he did not disagree.** I remember telling him you need to focus on the little things, and focusing on the little things would prevent this from happening.

Emphasis Added

[10] Mr. Van Eck clearly described that he brought the rule to the attention of the Grievor, explained the rule with coaching and the Grievor accepted. However, in written submissions, the Company maintained that the Grievor knew and understood the rules, yet failed to comply with them and provided no valid rationale as to why he chose to act so irresponsibly. Accordingly, the Company maintains the Grievor was culpable for the reasons listed in his Form 104.

[11] Clearly after the incident, the Grievor accepted the interpretation of Mr. Van Eck. At the completion of the investigation, the Grievor also indicated that he would do his best to ensure it did not happen again.

[12] During the investigation, the Grievor was asked about his previous understanding and information he had received regarding the rule:

Q08: Do you read the changes that the Summary Bulletin details when rules and procedures are changed?

A08: Yes

Q09: Did you obtain and keep a copy of SOSA region summary bulletin effective 00:01 April 1st, 2020?

A09: Yes

Q10: What do you understand T-20, item 5 Allow at least 15 feet when passing around the end of standing equipment unless proper protection is provided, to mean?

A10: I assume that it only applied to equipment connected to a Locomotive, and not standing cars.

Q11: Have you safety conversations about the on or about tracks rules with managers?

A11: No, other than the fed ex letter. I have gone through it on my own time in the safetybook.

[13] The Investigation revealed a number of undisputed facts. The Grievor received a Summary Bulletin by FedEx effective April 1, 2020. He familiarized himself with the Bulletin. He misunderstood the requirements of T-20. He did not receive any further instruction from CP after he received the Bulletin.

[14] The Union referred me to CROA 2959, 4621, 4098, 4604, Etobicoke General Hosp. and Nurses' Association (1977) 15 L.A.C. (2d) 172. The Company referred me to CROA 4580, 4621, 4728, 4756, William Scott & Co. C.F.A.W., Local P-162 (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B.),

[15] The Company maintained that it is subject to Transport Canada regulatory oversight and provided Safety Management Systems Industry Guidance which provides in part:

Employee knowledge

- **Railway companies must ensure that employees who perform essential duties have knowledge of the following to carry out their duties safely:**
- the requirements from the list of instruments (see the list requirement that forms part of the process for ensuring compliance);
- any federal legislation that may affect railway safety; and

- **any of the railway company's procedures (including those mandated by the Regulations), standards, instructions, bulletins or other internal documents that may affect railway safety.**

Emphasis Added

[16] The Employer's submissions also contained CP's Executive Vice President of Operations notice to employees regarding Hybrid Discipline and Accountability Guidelines which provided in part:

In an effort to improve accountability, safety/education, and performance while fostering a more positive working relationship with employees, we believe accountability should focus on Major/Life Threatening Offences, Non-Major offences and Attendance. In this regard, on a trial basis over the next 12 months, in certain circumstances, we will also include the use of demerits in addition to educational letters, suspensions and where warranted dismissal, if necessary, to address employee accountability. The intent of our discipline process is to progressively influence and correct behaviors that do not comply with required standards.

Emphasis Added

[17] The Company and Transport Canada are in agreement on the value of improving employee knowledge of rules and the use of education in that effort. Proficiency Tests are part of that effort.

[18] The Company submitted that following a fair and impartial investigation, the Grievor was found to have violated the Train & Engine Safety Rule Book Rule T-20, Item 5 and Rule T-27. The Grievor's culpability in the matter was established. The Company maintains that the Grievor knew and understood the rules, yet failed to comply with them and provided no valid rationale as to why he chose to act so irresponsibly.

[19] Given the facts above, I cannot find that the Grievor knew and understood the rules. The Company did not provide any follow up coaching on the rule. The Grievor received rule information by courier until the intervention by ATM Van Eck. The Grievor provide rationale for his misunderstanding and there is no evidence that he chose to act irresponsibly. He accepted the interpretation and there is no evidence he failed a retest or displayed any other lack of knowledge regarding the rules.

[20] The rule violation was in a low risk setting given the locomotive was 50 feet away and the car was secured by a hand brake as well as not coupled to an engine. ATM Van Eck properly brought the issue to the attention of the Grievor.

[21] The Union pointed me to CROA 4098 suggesting Arbitrator Picher described a violation of the 50-foot rule as "relatively minor". I do not find that Arbitrator Picher described the rule to be "relatively minor". Rather, he was referring to specific facts, the nature of the infraction and noting errors by both the Grievor and the Company stating:

I am satisfied that the discharge of the grievor is excessive given the relatively minor nature of each of the infractions here examined. As has been previously recognized in this Office, in substance the grievor's actions do not involve flagrant violations of safety rules and procedures so much as a failure

to follow best practices. In my view there were errors of judgement committed both by the grievor and by the Company.

[22] I am concerned regarding the 50-foot rule being considered relatively minor by the Union. I also note the undisputed comments of the Grievor as stated by Mr. Van Eck regarding “petty fails”.

[23] The Grievor has a significant discipline record. Suggesting that Mr. Van Eck’s concern for his proximity to a draw bar is not petty. It could be lifesaving in the future. The Assistant Trainmaster brought the rule to his attention properly and potentially avoided a repeat of his practice in a more serious situation.

[24] It is unfortunate that he was not given clear training on the rule earlier. I agree with the Union that the coaching he received may have sufficed. However, his experience, discipline record and regard for this rule as petty confirm that some discipline is appropriate. Equally concerning, in my opinion, is that others may have the same interpretation and also have had no education on the rule.

[25] The Company referred me to CROA 4728 and the comments of Arbitrator Hornung regarding T-20 when he said:

However, by any standard, what he did was dangerous and an egregious breach of an obvious rule. I am concerned that the Grievor, while he may be well intentioned, has shown an almost cavalier regard for safety rules. This is his third violation of a safety rule (two of which relate to his personal safety). Accordingly, I am of the view that a severe discipline is warranted in order to bring home to the Grievor the necessity for him both to pay attention to and follow the established safety rules in this safety sensitive industry.

[26] The Grievor’s discipline record and his apparent attitude towards rules and procedures give rise to concerns. His violation of the rule was not intentional or egregious.

[27] The Union set out the issues on behalf of the Grievor at Step One and Two. The Company did not respond at Step Two. The Company maintains that the remedy is for the Union to proceed to the next Step. While I agree with the Company, I am concerned that the rules in question deserve a better review than what took place in the investigation or the Grievance process.

[28] The issues reviewed by the Union in the grievance process were significant. The response of the Company at Step One is of significant concern providing:

September 14th, 2020
 Jeremy Mc Murphy
 Local Chairman TCRC Division 528

Subject: Jeff Johnston 6/25/20

Mr. Mc Murphy,

After reviewing the transcript Mr. Johnston was observed by ATM Chris Van Eck crossing under the required 15FT around the end of equipment.

Rule CRT -20 is considered a critical safety rule and violation of the rule is a major offence. **The 20 demerits assessed are in line with CP’s Hybrid**

Discipline policy for an employee’s first major infraction.

Emphasis Added

As such the grievance is declined and the suspension assessed will stand.

Brandon Billingsley
Superintendent Southwest Ontario
940 Elias Street
London ON N5W 3P2

[29] The Superintendent suggests that he read the transcript of the investigation. He also appears to suggest that 20 demerits was appropriate but chose to allow the 20 day suspension to stand. Given all of the foregoing, I find it difficult to believe he read the grievance letters or the investigation transcript thoroughly. Particularly considering questions and answers 8 through 11 of the investigation. Receiving rule information by courier without follow up is reason to mitigate discipline. Of equal concern is that while ATM Van Eck addressed the clarification with the Grievor, it is clear other employees may have a similar interpretation of the rules.

[30] The Grievor has a significant discipline record. He had the opportunity to seek clarification of any rule he did not understand. The rules in question are not petty or relatively minor. They require compliance in order to ensure employee safety. Training and coaching are also recognized as required. Similar to the comments by Arbitrator Picher in CROA 4098, I find that in this case and in my view there were errors of judgement committed both by the Grievor and by the Company.

[31] In view of all of the foregoing, the grievance is allowed in part. The discipline is reduced to 20 demerits and the 20 day suspension is removed. The Grievor will be compensated for lost time and benefits accordingly.

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.



Tom Hodges
Arbitrator