IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANA

DA RAIL CONFERENCE (TCRC)
And
CANADIAN PACIFIC RAILWAY COMPANY (CP)

2021 CanLII 138891 (CA LA)

AH 754

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer Chris Kouri of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE

Following an investigation on October 23, 2019, Engineer Kouri was dismissed on November 12, 2019, for the following reasons,

Please be advised that you have been DISMISSED from Company service for the following reason(s):

Your tour of duty on 5K53-19 on October 19, 2019, more specifically the events surrounding your violation of CROR 110 while working as a Locomotive Engineer; whereby you failed to get out of the locomotive cab to do a pull-by inspection of passing train 292-18 at Pasqua, SK near mile 129.1 on the Indian Head Subdivision.

Summary of rules violated:
Type Rule/Section Subsection(s) Description
CROR 110 INSPECTING PASSING TRAINS

UNION'S POSITION:

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above. In the alternative, the Union contends Mr. Kouri's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. The Union must first point out that given the evidence in this case the Company has not met the burden of proof to establish that Engineer Kouri was culpable of violating any rules. The facts of the investigation revealed that while Train 292-18 was about to pass eastward on the south track, Engineer Kouri at the time, understood that he would need to apply the air brakes before leaving the cab to do the inspection. That procedure has since been rescinded.

Based on those facts, clearly, there was no intentional rule violation but rather a misunderstanding of a procedure that had recently changed. Even if he is found to have misinterpreted the rule, the Union contends it is not worthy of the ultimate penalty of dismissal.

Following the failed proficiency test, Engineer Kouri was allowed to continue to work right up until he received his Form 104 dismissing him from Company service. Obviously, the Company took no issue with his job performance and at the time did not inform him that his job was in jeopardy.

Further, the Union relies on CROA 4366 as an example of a similar event, the Arbitrator reduced the discipline to a far more reasonable amount. As a result, the Union contends the discipline imposed is unjustified, unwarranted, and extreme in all circumstances.

For the reasons stated above and those identified within our grievances, the Union contends that the discipline imposed was excessive, unjustified, and unwarranted.

The Union requests that the Arbitrator reinstate Engineer Kouri without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION

The Company disagrees with the Union's contentions and denies the Union's request. The company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances and in line with the principles of progressive discipline.

Failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:	FOR THE COMPANY:
Signed:	Signed
________________________	________________________
Greg Edwards General Chairman TCRC LE – West	Lauren McGinley Assistant Director, Labour Relations CP Rail

November 4, 2021

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Heard November 18, 2021. In Person and by Videoconference.

APEARING FOR THE UNION:

Ken Stuebing, Counsel, Caley Wray
Greg Edwards, General Chairperson
LE West, Calgary
Harvey Makoski, Sr. Vice General Chairperson
LE West, Calgary
Greg Lawrenson, Vice General Chairperson
LE West, Calgary
Chuck Ruggles, Vice General Chairperson
LE West, Calgary
Chris Kouri, Grievor

APEARING FOR THE COMPANY:
Elliot Allen
Labour Relations Officer
Lauren McGinley
Assistant Director Labour Relations

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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 October 19, 2019, the Grievor was working as the Locomotive Engineer on Train 5K53-19 which was stationary in the inspection track at Pasqua, SK. The crew was completing a #1 brake test as required before departing for Moose Jaw. At the same time, Train 292-18 was approaching Pasqua traveling eastward on the south main track. Assistant Superintendent Devin Cole was a passenger on board.

[3] Mr. Cole contacted the Grievor on the radio to inquire why the crew was not in position to perform a passing train inspection of Train 292-18 as required by rule. The Grievor stated that conductor Goodwin was with a carman restoring the derail, and that he was getting ready to release the brake so he could depart.

[4] Mr. Cole provided the following memo of the incident:

> October 19th, 2019 Memorandum to File,
>
> At approximately 840 October 19, 2019 while performing a train ride on train 292-18, I came across train 5K53-19 in the Pasqua Inspection Track. Engineer Chris Kouri and Conductor Brayden Goodwin did not take up a position to perform a pull by inspection. While passing by, I observed Engineer Kouri in the Engineer seat with the window open without PPE leaning back in the chair, and saw no sign of Conductor Goodwin. When I got on the radio to inquire as to why they did not perform a pull by Engineer Kouri replied that he was getting ready to release the brake so he could depart. They would not have been able to depart as we were travelling eastward on the south track impeding his ability to depart out of the South track. Engineer Kouri also replied that Conductor Goodwin was with a carman in a truck getting the derail. I noticed that there was a carman truck on the west end of the inspection track that had a clear view of our oncoming train.
>
> Devin Cole
> Assistant Superintendent- Sask South

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[5] In the investigation flowing from Mr. Cole's memo, the Grievor explained the incident:

Ql5 Please explain in your own words, your location when 292-18 was passing by.

Al5 I was in the cab of the locomotive, I had just released the automatic break before I saw 292 approach my location. Remembering an incident involving Engineer Woodrow in Estevan, It was my understanding that I had to set a 15 psi reduction with the automatic brake prior to detraining. While I was waiting for the brake pipe to charge, 292's headend cleared my headend. I got out of my seat to put on my PPE in preparation to inspect their train when I heard Assistant Superintendent Cole call on the radio. I have since reviewed the summary bulletin and understand that I no longer am required to set the automatic brake. Upon arrival into Moose Jaw, I reported to the ATM as directed by Mr. Cole. Torin told me that Mr. Cole would put a failure in on my file.

ANALYSIS AND DECISION

[6] The Grievor is a long service employee who began service with CP in May 2005. In the four years prior to his dismissal, he had four incidents resulting in 87 days of suspension. At arbitration, this arbitrator reduced the discipline assessed in two decisions.

[7] Compliance with the rule for performing passing train inspection is essential to railway safety. In this case, given the Grievor's discipline record, the memo of Mr. Cole if undisputed could result in discipline including termination.

[8] The rule violation in question provides:

> 110. INSPECTING PASSING TRAINS AND TRANSFERS (a) **<u>When duties and terrain permit,</u>** at least two crew members of a standing train or transfer and other employees at wayside must position themselves on the ground on both sides of the track to inspect the condition of equipment in passing trains and transfers. When performing a train or transfer inspection, the **<u>locomotive engineer will inspect the near side</u>**. **<u>Emphasis Added</u>**

[9] The Union argues that the Grievor brought himself into the exception in the rule. I disagree with that approach to a rule. It is not for an employee to bring himself into compliance by finding an alternate duty to rely on for making him unable to perform an inspection. He is either in compliance or not dependant on duties or terrain permitting.

[10] The rule recognizes that other duties and terrain can require employees in those situations to continue with essential duties. The rule also recognizes the need for locomotive engineers to remain close to the engines. In my opinion, balancing both duties require a commitment to planning and rule compliance in order to maximize safety.

[11] In this case, the Company is properly holding the Grievor to a high degree of accountability and forthrightness. As I have stated in other arbitration decisions, the Company can also expect to be held to a higher degree of accountability when assessing discipline.

[12] The Union objected to the introduction of documents relating to non-disciplinary exceptions being introduced after discipline has been assessed. I agree with the Union as it is easily provided by the Company at the time of the investigation if it is required. When an employee's job is on the line, consistency and fairness are essential if dismissal is to be upheld.

[13] The Union relies on railway authorities CROA 3711, 4366, 4381, 4604, 4621, 4686 and AH 695. The Company relies on William Scott & Co. v. C.F.A.W., Local P-162 (1976), [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B.); Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586., railway cases CROA 4381 and SHP 595.

[14] The Union makes a significant accusation that the Grievor was targeted by the Company for discipline given the facts. It maintains that the Grievor's concern for securing the train was justified based on a previous Bulletin which provided:

> If all crew members will be vacating the cab of the locomotive to perform a passing train inspection, a sufficient brake application must be made to hold the train, unless locomotive brakes are sufficient to prevent movement.

[15] There are sound reasons to carefully consider the allegation and the previous Bulletin. The Union maintained that the procedure in the Bulletin was in response to an incident that took place at Estevan. In that incident, there was a Train in the siding, the Engineer detrained to perform an inspection and accidently released the Engine brake, the Train moved and collided with the passing Train. Shortly after this incident, to protect against a recurrence the Company specifically issued a Bulletin stating that if the Locomotive Engineer had to exit the Locomotive, a 15 lb air brake reduction must be made. The Union acknowledged that later, as the Summary Bulletins were issued, this requirement was not included.

[16] The Grievor had been warned at least twice that his job was in jeopardy following previous incidents and investigations that were brought before me. In a November 6, 2018 notice to appear from Mr. Cole for a previous investigation, the Company produced engine camera video snap shots, locomotive download records to verify brake pressure applications and employee work

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history. The Grievor was also advised of his right to call witnesses. In this case, the only information provided was train 5K53-19 crew information and Mr. Cole's memo.

[17] At the investigation, the Grievor confirmed his understanding of the purpose of the investigation when asked:

> Do you understand that investigations are conducted in an effort to get to the facts of any given situation or incident and Canadian Pacific expects its employees to answer all questions in a truthful manner and to give false or misleading information in an investigation will result in the appropriate disciplinary action being taken?

[18] The Grievor's Union Representative requested full disclosure of information stating:

> The Union requests full disclosure of all evidence, photographs, voice recordings, audio/video records, including any documentation whether paper or electronic, that has been utilized by, or is in possession of the company, and which may have a bearing in determining responsibility.

[19] The request was recorded in the investigation without response or comment from the investigating officer. The investigation proceeded as directed by the Company's investigating officer. Although no evidence was led with respect to this, I take notice of the fact that in evidence put forward by the Company in prior investigations before me included a large part, if not all of the information requested by the Union.

[20] Clearly, the relative simplicity of the request and the value of such information to an investigation have been part of investigation documentation in the past. In this case, the result was the dismissal of the Grievor. Absence of available information to substantiate the credibility of competing evidence can mitigate against the quantum of discipline assessed. I find that once the Company is in control of an investigation that can lead to dismissal, consistency is required to support the outcome.

[21] At the conclusion of the investigation, the Grievor acknowledged the violation of the rule saying:

> In light of how these events have transpired, I realize that how I completed the pull by inspection was incorrect. I have been enlightened on the proper order of duties when completing a pull by. When my train is stationary, and there is a passing train, they take priority for their inspection. I regret the choice that I made has led to today's investigation.

[22] The Union submits that this matter was appropriate and intended to be resolved on the basis of an Efficiency Test. The Company argues that the Grievor was in violation of a cardinal rule which it views as critical to the health and safety of the employee and the stakeholders of the rail operation. Given the Grievor's previous discipline record, the Company maintains that anything short of a dismissal for an infraction of this degree does not hold the necessary burden to prevent future cardinal rules violations.

[23] This rule violation may, at times, be a matter for an Efficiency Test. Given all the facts, I cannot find that it is appropriate in this case. The Grievor violated a rule for which compliance with the rule is critical to safety. I find that dismissal may be appropriated based the specific facts and circumstances of each case.

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[24] The Company pointed me to CROA 4381 supra, where Arbitrator Silverman addressed the importance of this rule stating:

> Pull-by inspections are crucial to rail safety and the Company is entitled to rely on its employees to conduct them. In this case, the grievor could have been expected to be more diligent and I am not satisfied that his efforts or explanation in that regard are entirely sufficient. In the investigation material CROA&DR 4381 – 7 – the grievor himself admitted that he did not plan ahead to find a proper inspection location. Discipline is warranted.

[25] However, I note that Arbitrator Silverman in CROA 4381 supra also went on to assess the mitigating factors leading her to reinstate the Grievor based on the particular facts of the case.

[26] The Company also relied on *William Scott supra* and the three part test for arbitrators assessing discipline discharge cases. In that regard, given the facts, I find discipline warranted. I now turn to consider what measure of discipline is appropriate.

[27] First, in this case there is no evidence before me to support the Union's contention of targeting or that the Company went out of its way to build a case against this particular Grievor for some improper purpose.

[28] The Union argues that while the Griever's discipline history is not without blemish, in his 14.5 years as a running trades employee his recorded prior infractions were of a relatively minor nature. I find the facts found in the Grievor's record do not support that contention. His record of rule violations is concerning. By his actions, explanations and excuses, I find the Grievor has deliberately minimized his responsibility for rule violations at the outset in this case and in the past.

[29] The Grievor did not testify on his own behalf. I have no indication that the Grievor takes responsibility for the magnitude of his actions in a safety sensitive position. The Grievor's disciplinary record would normally weigh against his reinstatement. However, in this case, the issues surrounding the investigation are significant.

[30] The Company maintained the Grievor's violation of Rule 110 of the Canadian Rail Operating Rules wasestablished through the fair and impartial investigation. The Grievor knowingly failed to be in position to perform a passing train inspection on Train 292-18. On this basis, the Company argued that dismissal was appropriate, warranted and just in all the circumstances.

[31] While the Grievor acknowledged his violation of the rule, I cannot find that the aggravating factors suggested by Mr. Cole were established. He did not participate in the investigation in person or by teleconference. He did not give evidence at the hearing. Similarly, those present at the time of the incident in question, such as carmen who could have substantiated the concerns of Mr. Cole were not required to provide Incident Reports. Similarly the Officer who met the Grievor on arrival in Moose Jaw did not provide an incident report. The information disclosure request of the Union Representative at the outset of the investigation was ignored. It could have given credibility to the statements of Mr. Cole in his memo.

[32] While discipline is warranted, I find the mitigating factors weigh heavily against dismissal. The Company cannot expect severe disciplinary penalties will be upheld if investigations are not conducted on a consistent basis necessary to ensure that the facts have been properly determined.

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Arbitrators are generally in agreement that if an employee's job is at stake, minimum rules of fairness require that the Union and Employee be given the opportunity to support their case. That right requires a level of consistency lacking in this case. In this case, it is sufficient to require a lesser penalty than dismissal.

[33] The seriousness of the violation was acknowledged by the Grievor late in the investigation. The acknowledgement at that time does not mitigate against progressive and significant discipline given his record. His previous discipline record points to the need for a level of disciple which demonstrates to the Grievor that his job remains in peril if he does not demonstrate a commitment to rule compliance.

[34] The Union pointed me to CROA 4604 supra. In that case, Arbitrator Clarke had difficulty with the credibility of the Grievor's reason for not complying with the need for a pull by inspection but reinstated him with a 30 day suspension. In that case, the Grievor's previous discipline record did not indicate the serious rule violations demonstrated in the case before me. I also find that the continued violation of the rule requiring train inspections is an indication the previous levels of discipline may not be having the necessary deterrent effect.

[35] The Grievor's case has been delayed in proceeding to arbitration. Subject to complex pension rules his full pension eligibility may be in jeopardy. The Union requests that he be reinstated with compensation of all lost time and benefits. Given all of the facts in this case I cannot agree to that remedy. However, in view of all of the foregoing the Grievor will be returned to service 30 days prior to the 2 year pension rule and compensated with a minimum amount necessary to maintain his original hire date for entitlement to the prior pension formula.

[36] I remain seized should there be any dispute with respect to any aspect of the interpretation, enforcement or implementation of this award including compensation owed to the Grievor.

Dated this, 20th, day of December, 2021.

Tom Hodges

Arbitrator

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