IN THE MATTER OF ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(the Company)

2022 CanLII 55012 (CA LA)

AH: 778

DISPUTE

Appeal of the 20-day suspension assessed to Conductor Wade Blackwood.

JOINT STATEMENT OF ISSUE

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

Formal investigation notice was issued to you in connection with the occurrence outlined below:

> "Your tour of duty while working as a Conductor on Assignment T10-22, while spotting a customer facility in Trenton observations were made and safety exceptions addressed in relation to not ensuring a minimum of 15 feet around the end of stationary equipment in addition to commencing the application of a handbrake from the ground at mile 101.5 Belleville Subdivision on April 22nd 2020."

Formal investigation was conducted on April 30, 2020 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that, investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- Train & Engine Safety Rule Book T-20 On or About Tracks Item 2, 3, & 5
- Train & Engine Safety Rule Book T-14 Handbrakes Item 2 & 3
- Rule Book for T&E Employees – Section 2 Item 2.2(a)

In consideration of the decision stated above, you are hereby assessed with a twenty (20) day suspension and a meeting with Superintendent Derek Harter to be determined.
Your twenty (20) days suspension will commence on Friday, May 7, 2020 at 09:00 until Thursday May 27, 2020 at 09:00.

Please note that your employment status is in jeopardy. Any further incident, which may occur where you may be found culpable, may result in your dismissal from Company service.
As a matter of record, a copy of this document will be placed in your personnel file."

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.

Mr. Blackwood took responsibility for his actions and provided that he would use the entire process as a learning tool to move forward. This is the process of the e-testing procedure, if fail happens, educate and retest, not punitive discipline.

The Company did not respond to the Union's Step 2 grievance as outlined in Article 40.03; therefore, the Union is not in possession of any further position of the Company on the matter and this may leave the Union at a disadvantage. The Union reserves the right to object, should the Company expand its position at Arbitration.

The Company has unreasonably disciplined Mr. Blackwood. The facts of the investigation do not warrant, nor justify this quantum.

The Union requests that the discipline assessed to Mr. Blackwood be removed and he be compensated all loss of wages/benefits. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY 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 Union suggests the Company has failed to respond to the step 2 grievance. The Company cannot agree with the Union's allegations pertaining to the step 2 grievance response. Moreover, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's intent to proceed to arbitration, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure. The Union has failed to identify what disadvantage may exist and as such, the Company reserves the right to object, should the Union expand its position at Arbitration.

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.

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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:

Wayne Apsey
General Chairperson
CTY – CP Rail East
TCRC

FOR THE COMPANY

Lauren McGinley
Assistant Director, Labour Relations
CP Rail

February 28, 2022

Hearing: March 30, 2022, by videoconference

FOR THE UNION:
Ken Stuebing, Caley Wray
Wayne Apsey, General Chairperson, CTY East
Brent Baxter – Vice General Chair, CTY East
Wade Blackwood, Grievor

FOR THE COMPANY:
Elliot Allen, Labour Relations
Lauren McGinely, Assistant Director Labour Relations

AWARD

JURISDICTION

[1] The parties agree I have jurisdiction to hear and resolve this dispute with all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*. This is an Ad Hoc 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.

BACKGROUND

[2] The background facts are not in dispute. On April 22, 2020, Mr. Blackwood was called to work as the Conductor with Chris Underhill as the Locomotive Engineer on train T10-22 out of Toronto Yard. Trainmaster Holden Duquette and Assistant Superintendent Ken Gough were out on the property routinely performing efficiency testing on employees to validate safety and rules

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compliance. While performing active observations of Train T10-22 spotting a customer, Mr. Duquette and Mr. Gough noticed irregularities and provided the following memo:

> After the crew was done spotting the customer I stopped them to have a conversation. I started by asking Wade if he knew why I was speaking to him, and he stated that he did not. We discussed the observations and addition to how we noticed that he walked around equipment within 15 feet, without 3 point protection. I asked Wade why he did not get 3 point protection or have 15 feet, and he could not answer. I proceeded to tell Wade that I noticed him applying a hand brake from the ground, and stated that the rule is if the handbrake is above shoulder height, that you must climb onto the end platform to apply the handbrake, this also prevents overexertion. I asked Wade to explain to me why he started applying the handbrake from the ground then decided to climb onto the car to finish applying it. Wade started that he realized he was doing it wrong and corrected it. Wade understood and stated that they were both because he hadn't worked T10 in a long time and was unfamiliar with the customer, he also stated that his mind was focused on how to spot the customer correctly and wasn't thinking straight. I told Wade that he needs to ensure that he is always focused on the job at hand, and to make sure that he is following all rules at any given time.

[3] As a result of the incident, an investigation held on April 30, 2020 established that the Grievor was in violation of:

- Train & Engine Safety Rule Book T-20 On or About Tracks Item 2, 3, & 5
- Train & Engine Safety Rule Book T-14 Handbrakes Item 2 & 3
- Rule Book for T&E Employees – Section 2 Item 2.2(a)

[4] Following the investigation, the Grievor was assessed with a 20-day suspension as a result of the rule violations. The Union initiated the grievance on behalf of the Grievor on July 15th, 2020. The Company denied the Union's grievance on September 5, 2020. The Union appealed at Step 2 by filing a grievance on September 27th, 2020. The Company denied the Step 2 grievance on November 28th, 2020, 2 days past the 60 day timeline.

[5] I have carefully reviewed the parties written submissions and case law. In keeping with the parties' process agreement, I will only specifically refer to the case law to the extent necessary for purposes of the determination required in this matter.

ANALYSIS AND DECISION

[6] The Company maintains that the investigation confirmed that the Grievor failed to maintain the required distance of 15 feet around the end of equipment without 3 point protection. It says the Grievor had an obligation to ensure his compliance with the rule. Moreover, he did not have an acceptable reason for not being in compliance.

[7] Train & Engine Safety Rule Book T-20 On or About Tracks Items 2, 3 & 5 provide:

(2) Look in both directions before:

- Fouling or crossing tracks

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- Getting on or off equipment; or
- Operating a switch

(3) Do not walk between rails or foul of track, except when duties require and it is safe to do so.

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

[8] The Company submits that the investigation also confirmed the Grievor applied a handbrake that was above shoulder height from the ground prior to correcting himself. He did not take the safest course of action when he was confused, nor did he seek clarification. It says the Grievor had an obligation to ensure his compliance with the rule. Moreover, he did not have an acceptable reason for not being in compliance.

[9] Train & Engine Safety Rule Book T-14 handbrakes Items 2 & 3 provide:

(2) When operating wheel-type handbrakes, always grip the brake wheel with your thumb on the outside of the wheel rim and never overexert.

(3) Do not apply or release wheel style handbrakes from the ground unless the bottom of the handbrake wheel is at shoulder height or below.

[10] Rule Book for T&E Employees – Section 2 Item 2.2 (a) provides:

(a) Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.

[11] CP maintains the Grievor violated a critical rule governing the safe operation of the railway. The conduct gave rise to discipline, for which the Company submits was properly assessed as a 20-day suspension. It says the discipline issued was not excessive having regard to all of the circumstances surrounding the situation. Crossing around the end of standing equipment is not a task to be taken lightly as there is significant risk involved in doing so. CP requires employees to take every precaution and to mitigate for any risks prior to proceeding with crossing.

[12] The Union argues that from any comparator group against which the Grievor's discipline is compared, this 20-day suspension is excessive and punitive in nature. It says the instant matter involves the unjustified assessment of a suspension for a single alleged efficiency testing failure.

[13] The Union maintains that this dispute arose as the result of an Efficiency Test or Proficiency Test. They are a form of unannounced monitoring of employee performance. It says that on April 22, 2020, Mr. Blackwood worked as the Conductor on assignment Train T10-22 with Locomotive Engineer Chris Underhill. Although he had not worked this assignment in a long time, the crew's assignment was uneventful. During the discussion with Trainmaster Duquette, Mr. Blackwood explained that he had not worked T 10 in a long time and was unfamiliar with the customer. Mr. Blackwood stated that that in his mind he was focused on how to spot the customer correctly. Regarding the application of the handbrake, Mr. Blackwood commenced applying a wheel type handbrake from the ground and about halfway through the application of the hand brake climbed onto the car to finish applying it. Mr. Blackwood noted that he realized what he was doing and stopped, refocused and entrained the car to apply the hand brake.

[14] The Union argues that Mr. Blackwood was clearly being subject to concerted and targeted scrutiny in April 2020. Just six days prior to this April 22, 2020 assignment, Mr. Blackwood had

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attended a formal investigation in respect of an alleged Proficiency Test failure. On April 22, the same day as the instant assignment, the Grievor was assessed 20 demerits. The Union noted that in February 2022, I heard argument in that case that cause for the assessment of the 20 demerits was not warranted on the balance of probabilities.

[15] The Union submits that Company policy regarding Proficiency Tests reflects they are to be used with the objective of education and counselling, as noted in the CP Proficiency Test Codes and Descriptions:

> A proficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure proficiency (knowledge and experience) and to isolate areas of noncompliance for immediate corrective action. Proficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results.

[16] The Union maintains it is clear from the record that there was a concerted focus on Mr. Blackwood in early 2020, after 16 years as an employee with little to no violations of rules or safety standards. By April 2020, Mr. Blackwood had become targeted for efficiency test exceptions and discipline. The Union argues that as a result of the investigation and 20-day suspension Mr. Blackwood lost wages in the amount of approximately $8,000.00. By comparison, even if formal discipline had been appropriate in these circumstances, recent CROA jurisprudence for T-20 and T-14 rules shows a 20-day suspension is patently unjust.

[17] The Union argues that the targeting of the long service Grievor with an excellent work record was recently triggered by his booking sick in November 2019. That matter was also recently heard by me.

[18] The Company maintains that the Grievor was not targeted and he did not misunderstand the rules. It says he simply took the seemingly easy road of ignoring the Rules.

[19] The Company maintains that safety rules are not suggestions or guidelines, or even idiotic as one Union General Chairman suggested during the last round of collective bargaining. They are certainly not an option for employees to freely choose whether or not to comply. Non-compliance with the rules often results in serious damage to equipment, injuries and in some cases, death. Due diligence and compliance is expected of all safety critical employees. In the present case, it is clear that the Grievor failed to meet this expectation.

[20] CP says the Grievor held the safety critical position of Conductor at the time of the incident. Given the paramount importance of safety in the railway and the high potential for catastrophic consequences resulting from non-compliance, the Company has an obligation to ensure it promotes a culture of safety that actively seeks to ensure all employees fully comply with all rules at all times. There is simply no room for casual assumptions, in the highly safety critical railway environment.

[21] The Company referred me to the following cases: 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 (ON LRB); CROA 4728; CROA

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4756 & SHP 595.Union referred to Etobicoke General Hosp. and Nurses' Association (1977) 15 L.A.C.; CROA 4621; 4098 & 4604.

[22] As noted above, the Union has alleged the targeting of employees for discipline and termination. The Company alleges the recent referral to safety rules by a Union General Chairman as idiotic. In my opinion, both of the alleged statements are relevant because they go to the state of the relationship between the parties. Relationships between employer and a union can become so frayed that a reasonable person would question if both sides can work together in matters of their mutual best interest. I believe this is such a case.

[23] In my opinion, these parties should be partners in ensuring their mutual interests for safety in this, one of the most safety sensitive industries. Ensuring safety is paramount to both parties' best interests as well as the public. It requires that there must be a relationship of mutual understanding and respect. A relationship where neither the Company nor the Union is likely to put the other's safety interests in jeopardy. By drawing attention to this concern and the current relationship, my hope is to begin a process for both parties to recognize a need for change that is in their best interest. A change that ensures the maximization of safety compliance efforts while balancing the Union's need for ensuring fair treatment of Union members.

[24] The Company claims that a fair and impartial investigation was conducted in this matter. The discipline assessed was reasonable in the circumstances. It says safety is paramount and referred to Arbitrator Jones comments in SHP 595:

> As I have noted before, safety is not negotiable and not optional; safety rules must be complied with 100% of the time.

[25] The Union claims the Grievor was targeted for discipline by the inappropriate use of Performance Testing. It says the targeting was triggered by the Grievor booking sick in November of 2019 resulting in a grievance brought before me. It relies on CROA Case No. 4621, in which Arbitrator Sims stated:

> Not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline.

[26] The comments of Arbitrators Jones and Simms above are a clear indication of the differences to be balanced between the parties. Alleged targeting and allegations of safety rules as idiotic are alarming. I do not believe that an arbitrator should reinvestigate an incident. However, given the allegations and concerns for the credibility of basic facts a thorough of the evidence is appropriate.

[27] After reviewing all the evidence, I find that some discipline was warranted. A 20-day suspension indicates the level of concern for the Performance Test failure in this case. It was formally investigated at the level in accordance with that of a Major Life Threatening incident. However, in assessing and reviewing the discipline assessed, I find mitigating factors were not considered appropriately.

[28] The long service Grievor had an excellent record prior to his booking sick in November of 2019 as argued by the Union. I find in this case that the Grievor was forthright and acknowledged violation of the rules from the outset of the Performance Test triggered by Trainmaster Duquette's Memo.

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[29] The evidence also shows a long history of excellent Performance Testing and Rides by CP managers with the Grievor. I note that Trainmaster Holden Duquette, Road Foreman Doug Elen, Trainmaster Kenneth Gough and Superintendent Greg Harter are significant in the Grievor's career Safety Report record. The overall Report indicates a 95.9 pass rate on 351performance tests.

[30] Trainmaster Holden Duquette's Memo set out the allegations of the Rule violations against the Grievor: His memo to file provided:

> On April 22nd, 2020, I was out observing T10 work at Trenton with Ken Gough. During the observations, **Conductor Blackwood walked around the tail end of his train 2 times without getting 3 point protection and failing to have 15 feet separation between him and the train.** Conductor Blackwood also while securing the first spot he started applying the hand brake from the ground and about half way through the application of the hand brake climbed onto the car to finish applying it. **Emphasis Added**

[31] Trainmaster Duquette's stated facts in the memo do not correspond with the Testing information he placed on the Grievor's record. The Grievor's Test record indicates he conducted four Tests of the Grievor in a fifteen minute period on April 22, 2020. Two of the four tests were for the 3 point protection and failing to have 15 feet separation between him and the train. Only one of the two Tests for the 3 point rule shows as a fail, not both as indicated in his memo. The other shows as a pass.

[32] Trainmaster Duquette also recorded 7 Performance Tests of the Grievor on June 6, 2020. All of the Tests were recorded as pass. One of the seven Passes was for the same 3 Point Rule. In addition, his memo indicates that Trainmaster K. Gough was also observing with him. The incident was formally investigated as Major Life Threatening Violations Safety Rule and a 20-day suspension assessed. However, despite the severity, Trainmaster Gough did not file an incident report or a memo. No incident report was filed by the Locomotive Engineer Chris Underhill and no statement was taken from him regarding the failure to properly protect. I note that rules violated are the responsibility of both Conductor and Engineer. I find the absence of corroboration from Trainmaster Gough and Locomotive Engineer Underhill given the formal investigation and conflicting facts are concerning.

[33] Doug Elan conducted the investigation into this incident. He also conducted numerous rides and performed 45 of the 351 Performance Tests on the Grievor in his career. In February of 2018, he complimented the Grievor for his compliance with the rule that he would later find the Grievor violated in this case. In October of 2019, he again passed the Grievor in a Performance Test on the same rule.

[34] Superintendent Harter assessed the 20-day suspension to the Grievor in this case on May 6, 2020. He reviewed the assessment and again upheld the 20-day suspension on September 5, 2020. However, on June 6, 2020, two months before that review, Mr. Harter performed three Performance tests on the Grievor. All the tests were passes. One of the passes was for the same rule he chose to assess and uphold the 20-day suspension in this case. All of the information above was available to Mr. Harter for his assessment of the 20-day suspension in the Grievance process.

[35] CP says in its written submissions that the rules are written in blood. The blood of those railroaders who let their guards down, and didn't follow the rules paid a terrible price. Yet, some employees, like the Grievor in this case, insists on doing things unsafely and attempting to bend

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the rules to justify their poor choices. It maintains that the purpose of Efficiency Testing is to allow the Company to evaluate an employee's compliance with rules, instructions and procedures, with or without the employee's knowledge.

[36] I agree with the Company on the history and the need for the establishment of today's rules. However, I cannot find evidence that the Grievor insists on doing things unsafely. To the contrary, his overall record indicates a very high degree of consistent compliance with the very rules the Company argues he has deliberately ignored.

[37] The Company maintains that the assessment of discipline in the present matter was appropriate and warranted based on the findings of the fair and impartial investigation. Moreover, the concept of educational deterrence is also of critical importance in this case. Deterrence is necessary in order to ensure safe and consistent conduct in accordance with the rules, particularly where a workforce is largely unsupervised. The assessment of discipline for the violations identified in this case clearly acts as a necessary deterrent for all employees. In this case and these facts, I do not find that deterrence in necessary for this Grievor. There is no indication of intentional or careless rule violation by this Grievor. While deterrence may be required for other employees this is not a credible example to place before other employees.

[38] The Company also says this incident was not an isolated incident, but rather the 4th in a series of rule/policy violations – some of which were highly dangerous. It says the Grievor's current situation was brought on himself by his previous violations. The Company maintains that the Grievor did not misunderstand the rules, and simply took the seemingly easy road of ignoring them. I have dealt with the previous cases noted by the Company and demonstrated that I do not agree.

[39] In this case, the experienced Grievor violated safety rules which were in his own best interest to properly follow. His previous record of compliance with these rules was known to all the Company officers involved in this Performance Test failure incident. Superintendent Harter had firsthand knowledge of the Grievor's compliance with the rule. He assessed the 20-day suspension and later upheld his own assessment notwithstanding his firsthand knowledge of the Grievor's record and the Grievor's compliance with the rule in his presence. He conducted a Performance Test on the Grievor for the same rule on June 6, 2020 and indicated pass.

[40] The Grievor is a long service employee. That said, he knew or ought to have known that his call and conversation with those in the Crew Management Centre when he book sick for November 6, 7, 8, 2019 had placed him in a position of concern and attention for the Company. In this case, he violated a rule which he could have easily complied with had he been more vigilant. He acknowledged his actions at the conclusion of the investigation stating:

> Q26: ls there anything you wish to add to this investigation?
>
> A26: I apologize for my actions and I am going to take this investigation as a learning experience and I will ensure that I always have the proper protection required and if I lose my situational awareness at any time I will stop what I'm doing and refocus to ensure my actions are safely performed.

[41] I cannot find that he simply took the seemingly easy road of ignoring to rule as submitted by the Company. The majority of the evidence established that the Grievor has a very consistent

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practice, of obeying the rules and this rule in particular. The evidence was known to all involved in the assessment and review of the facts.

[42] The Grievor is a long service employee with a good work record. However, long service is not a licence to assess whether a rule should be complied with based on feelings that day. In this case the preponderance of the evidence overwhelmingly demonstrated compliance with the rule in front of those who found him deserving of a 20-day suspension. It did not indicate intent, disregard or a repeated casual attitude of noncompliance towards rules.

[43] In this case, the investigation and the assessment of a 20-day suspension are a significant penalty. While I find that discipline was warranted, it is too severe. Superintendent Harter reviewed the investigation and set a 20-day suspension. He would later review his assessment of the discipline pursuant to the Grievance process. A review by the same officer who assessed it is a concern given the facts. More importantly, it gives rise to claims of targeting by the Union and undermines the credibility of the grievance process. In this case there is no indication that mitigating factors were considered.

[44] In view of all of the foregoing, the grievance is allowed in part. The discipline will be reduced to five days and the Grievor will be compensated accordingly for lost wages and benefits.

[45] I shall remain seized with respect to the application, interpretation, and implementation of this award.

Dated this 10th, day of May, 2022.

Tom Hodges
Arbitrator

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