

IN THE MATTER OF ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

AH:780

DISPUTE:

Appeal of the 30-demerits and subsequent dismissal of Conductor Wade Blackwood.

JOINT STATEMENT OF ISSUE:

Following an Investigation, Conductor Blackwood was dismissed as shown in his Form 104 as follows;

“A formal investigation was issued to you in connection with the occurrence outlined below:

“Your tour of duty on 100-19, more specifically it is alleged you were not fully cleared of L2/L3 crossover in Toronto yard before lining the L2 Portion back in normal position”.

The formal investigation was conducted on July 26, 2020 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of this investigation, it was determined the investigation record as a whole contains evidence proving you violated the following:

- CROR 104 (N) – Hand Operated Switches

In consideration of the decision stated above, you are hereby-assessed thirty (30) demerits. Further, this incident also constitutes a culminating incident and you are hereby **DISMISSED** from Company Service, effective August 1, 2020 for your accumulation of over 60 demerits as well as for having over five disciplinary infractions in a 12-month period, as per the Company’s Hybrid Discipline Guidelines.

As a matter of record, a copy of this document will be placed in your personnel file.”

UNION'S POSITION:

For all the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the Union’s position is that the discipline and dismissal of Mr. Blackwood was excessive, and unwarranted and in violation of the CBA.

The Company erred in its investigation and discipline as noted within our grievances. Mr. Blackwood was in a Yard, not on the Mainline but yet the Company pushed forward with their investigation and punitive discipline, albeit the wrong Rules were shown as being investigated and violated.

Mr. Blackwood has faced undue scrutiny as noted by the continuing of bringing him in for investigations and then punitively punishing him. Mr. Blackwood has been disciplined in violation as it clear with the Union's positions presented in our grievances that the Company wrongly assessed discipline using rules that did not apply to this situation thus the Company has not established Mr. Blackwood's responsibility.

Mr. Blackwood followed the Rules, the Company has clearly not proven otherwise. The Union argues the Company had a predetermined ending based on the Union's contentions at the statement, Mr. Blackwood's responses, and the fact that the Company was using the wrong rules throughout.

It must be further noted that the Company's Hybrid Discipline & Accountability Guidelines are the subject of a separate dispute.

The Company did not respond to the Union's Step 2 grievance therefore the Union is not in possession of the Company's further positions 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 Union requests that the 30-demerits and subsequent dismissal of Conductor Blackwood be expunged and he be returned to work forthwith, and he be made whole for his lost earnings/benefits with interest, without loss of seniority or pension, and he be allowed as with all employees an intimation free environment.

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 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 particularize any alleged disadvantage based on the foregoing. 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.

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 31, 2022 – By Videoconference

FOR THE UNION:

Ken Stubing, Caley Wray
Wayne Apsey, General Chairperson
Wade Blackwood, Grievor

FOR THE COMPANY:

Elliot Allen, Labour Relations
Lauren McGinley, 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 Company submits that on July 22, 2020 Mr. Blackwood was called to work as the conductor on train 100-19 from Mactier to Toronto. Upon arrival at McCowan Yard (MCC), Mr. Blackwood was provided yarding instructions in conversation with Trainmaster Lucas Duncan. Train 100-19 was built with two head end locomotives, and one tail end locomotive (robot) that

was required to be set off in the yard, as well as two cars. The Grievor and Trainmaster Duncan discussed the most efficient way to perform the set-off by using the L2/L3 crossover.

[3] CP maintains that, while Mr. Blackwood was performing the work, Assistant Superintendent Ken Gough was actively engaged in routine Efficiency Testing on the property to ensure all running trade employees and stakeholders are properly complying with operating rules and safety standards. Mr. Gough began to observe Mr. Blackwood and the crew of Train 100-19 perform the work using the crossover. Mr. Gough noted in his memo:

At Approx. 06:45 100-19 conductor just set off two cars in FL02W, stop, got off by the L2 X over switch, while his movement still pulling through the cross over Mr. Blackwood line the L2 portion of the crossover of L2/L3 in front of the GYO

[4] The Company says that Assistant Superintendent Gough asked Mr. Blackwood to join him in the building with his rule book to have a discussion about his recent observation. Mr. Gough notes further in his memo:

After reviewing the rule, Mr. Blackwood understood that he didn't wait for his movement to clear before lining the L2 portion of the crossovers. I asked Mr. Blackwood if he understood the rule before and he didn't have a clear understanding of it. Mr. Blackwood gave his commitment moving forward to following the rules.

[5] The Union submits that prior to the matters that have been under review before me, Mr. Blackwood's record reflected only two instances of discipline. His last discipline was in 2008. For the next 11 years, he received no discipline whatsoever until 2019. It says that starting in late 2019, the Company decided to build a discipline record with arbitrary and unwarranted penalties, including this grievance.

[6] The TCRC maintains that on July 22, 2020, Conductor Blackwood worked as the Conductor on Train 100-19 from Mactier to Toronto Terminal. Train 100-19 consisted of two locomotives on the head end, two railcars and a single locomotive on the tail end. The West Tower Supervisor instructed the 100-19 crew to leave the railcars on track L2 west of the road and to take the three locomotives to the diesel shop. In the course of their assignments in the past, Mr. Blackwood and Locomotive Engineer Marquette had performed similar moves many times. After a job briefing and a radio communication with the Tower Supervisor, it was determined that the safest and most expeditious move was to proceed on track L3 Eastward till the movement cleared the road that bisects L3 and track F1. There, Mr. Blackwood would secure and cut off the trailing locomotive and back the railcars through the L3/L2 crossover where he would secure and set off the railcars West of the road.

[7] The Union maintains that the Grievor performed the work as planned. Mr. Blackwood then restored the L2 switch before the two-locomotive consist had cleared the eastern half of the L2/L3 crossover to return to the third locomotive that Mr. Blackwood had left secured on L3. The Union says that while performing this yard work, Mr. Blackwood was surreptitiously observed by Assistant Superintendent Ken Gough. The Union argues that Mr. Gough was persistently targeting Mr. Blackwood in the months of late 2019 through the middle of 2020.

[8] The Union says Mr. Gough's presumption of a breach of Rule 104 (N) in the course of the crew's work is misplaced in these circumstances. It argues that the discipline and dismissal of Mr.

Blackwood was unwarranted and in violation of the collective agreement. It says the Company erred in its investigation and assessing discipline. Mr. Blackwood was in a Yard, not on the Mainline but yet the Company pushed forward with their investigation and punitive discipline, albeit the wrong Rules were shown as being investigated and violated.

[9] The TCRC maintains that the Grievor has faced undue scrutiny as noted by the continuation of bringing him in for investigations and then punitively punishing him. Mr. Blackwood has been wrongly assessed discipline using rules that did not apply to this situation. It says the Company has not established Mr. Blackwood's responsibility. It says Mr. Blackwood followed the Rules, the Company has clearly not proven otherwise. The Union argues the Company had a predetermined ending to the investigation based on the fact that the Company was using the wrong rules throughout. The Union argues that the Grievor has been targeted in this and a number of other grievances brought before me on his behalf.

[10] The Company referred to *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); SHP 595. The Union referred me to CROA Case No. 4248, 4604 and 4621.

ANALYSIS AND DECISION

[11] As I have in other cases, I advised the parties that I would carefully review the extensive submissions and evidence submitted in the time regulated and expedited arbitration process agreed to by the parties. 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.

[12] I have noted concerns and found the evidence of Mr. Gough problematic in previous awards. I also note that CP is consistent in providing date and time information in most documents that I are put before arbitrators. Investigations usually indicate start, break and finish times. They are dated and signed. Investigations are recognized by arbitrators as the foundation for assessing and reviewing discipline.

[13] In this case Mr. Gough's memo, which triggered this dismissal, is undated and unsigned. He does not specify a date of the incident. The Notice of Investigation does not specify a date of the incident nor does the investigation, the notice of discipline or the response at Step 1 of the grievance procedure.

[14] CP submits that while Mr. Blackwood was performing the work on July 22, 2020, Assistant Superintendent Ken Gough was actively engaged in routine Efficiency Testing on the property to ensure all running trade employees and stakeholders are properly complying with operating rules and safety standards. The Company provided the Grievor's entire record as part of the evidence considered when assessing the discipline. Part of that record was the Grievor's entire testing record. It does not indicate any Testing by Mr. Gough on July 22, 2020.

[15] The evidence indicates that the Grievor was removed from service following the incident on July 22, 2020. He was given notice of investigation on July 23, 2020. However, the Grievor's Test record indicates that he was tested twice on July 23, 2020 when he was out of service.

[16] The first July 23 test, a failure is similar to that of Mr. Gough's allegations the previous day. It indicates that on 07/23/2020 at 10:27 a Test by Trainmaster Dylan McMurray indicated:

Mr Blackwood was observed improperly throwing the crossovers between F102 and F103, as his movement was still occupying the crossovers he restored the F102 switch...

[17] The second test, pass on 07/23/2020 at 10:31 by Trainmaster Dylan McMurray indicates:

Mr. Blackwood was observed using the proper procedure and body mechanics to line switch into the rips. Ensuring movement was a safe distance from the...

[18] Neither Mr. Gough's undated memo nor the investigation of July 26, 2020 indicate the involvement of Trainmaster Dylan McMurray in any testing. There is no indication of the Tests indicated in the report in any other evidence.

[19] The Investigation clearly indicates a disagreement between the Union representative and Mr. Gough's interpretation application of the requirements for the use of the switches on July 20th. The Union claims that the investigating officer agreed with the Union's interpretation but he was told to continue the investigation after an extensive delay. The investigating officer did not record any time for discussion of the rule, clarification or time the investigation ended in the space provided.

[20] The investigating officer did not advise the Grievor what he did wrong in the handling of the switches or that injury was possible. That information was reviewed at the arbitration hearing.

[21] CP says that Efficiency Test reports indicate the date and time that a test was conducted, by whom and the testing information. There is no indication how or why two tests reports were placed on the Grievor's record by Trainmaster McMurray on July 23, 2020 when the Grievor was out of service yet Trainmaster Gough's the day before was not. The Company says the Grievor's Test record was considered as part of assessing discipline. In my opinion, given the error, there is no indication that any Company officer could have properly reviewed the evidence and not found Trainmaster McMurray's entries alarming.

[22] There is no doubt that the Mr. Gough spoke to the Grievor about a rule violation. However, his undated and unsigned memo raises concerns for the credibility of the entire investigation, discipline and grievance process. In multiple discipline cases of the Grievor brought before me, Mr. Gough was an initially involved as a provider of information or conducted the investigation. The alarming entries in the Grievor's Testing file challenge the credibility of the investigation.

[23] Mr. Harter assessed discipline and conducted the review of the discipline in the cases for this Grievor. I have concern that his assessment and review was without sufficient evidence of reviewing the basic facts and circumstances of the incident or mitigating factors. The combined actions of Mr. Harter and Gough challenge the integrity of the processes. Mr. Harter Tested and passed the Grievor 3 times on June 6, 2020. One of those Tests was for switches. He also assessed discipline and reviewed his assessment in the Grievance process for all of the Grievor's cases before me.

[24] The Grievor's long and excellent record indicates 451 Efficiency Tests with 15 test failures. He has been tested by over 20 different officers, some complimenting the Grievor for his rules compliance. He failed an Efficiency Test in 2013 for Switches (Efficiency Test code CRT 26.3). Since that Test failure in 2013, he has passed 35 Efficiency Tests for Switches. He has had no failures recorded for Switches on his Test record except the one said to have occurred on July 23,

2020 when he was not working. He has not had a Test fail for Switches recorded by Mr. Gough even though he was said to be performing Testing on July 20, 2020.

[25] As I have noted in previous awards, I believe Efficiency Testing is a valuable part of ensuring safety. These parties should be partners in advocating for a 100% compliance with the rules. I do not believe that evidence brought before me represents targeting by CP Rail. However, in this case Mr. Gough and Mr. Harter have failed in the fair and unbiased administration of Efficiency Testing as well as grievance handling. The combined issues I have noted in the six grievances represent a failure of the necessary checks and balances for ensuring the fairness and integrity of the process. To hold otherwise, it seems to me, would allow for an increased element of mischief into the Testing process, from the point of view of a reasonable observer, as to undermine the integrity of the grievance and arbitration process itself.

[26] In this the last of my six awards involving this Grievor, I must restate my opinion that these parties should be partners in ensuring their mutual interests for attendance and safety in this, one of the most time and safety sensitive industries. I agree with the comments of Arbitrator Jones 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.

[27] I also agree with the comments of Arbitrator Clarke in CROA 4604:

Legislation requires CP to be vigilant when it comes to safety. CP managers conduct e-tests to verify employees' attention to safety matters. This verification helps protect not just CP employees, but the Canadian public as trains move across the country.

However, just because legislation mandates these checks, it does not follow that they could not be used to harass or otherwise unfairly target certain employees.

[28] In my opinion, ensuring safety is paramount to both parties' best interests as well as the public. Joint safety and attendance advocacy 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 interests in jeopardy. The Union is not likely to partner and participate in advocating for adherence to attendance policies or safety rules if it is not reasonably sure that its members will be dealt with fairly during investigations. It must also have some degree of faith in the integrity of the grievance process for resolving differences of opinion on fact relating to discipline assessed.

[29] As I noted in a previous award, this Grievor was not unfamiliar with the process. He and his Union had filed a number of grievances claiming he was being unfairly disciplined and targeted following his original attendance grievance. The Grievor knew or ought to have known that one of his previous decision of not calling his supervisor as previously instructed would meet with a management response. The Grievor was aware of his situation and there is no indication he consulted his Union officer with whom he had significant contact over the past eight months before booking off on either day in that case. His actions or inaction can be viewed as an aggravating factor.

[30] As I also stated, it is a long standing and recognized rule of labour relations that an employee who disputes the correctness of an employer's action, as in the earlier case must "obey now and grieve later." Whether it was deliberate or otherwise, there is no evidence that the Grievor

consulted with his Union regarding not calling his supervisor in that case prior to booking sick. He knew he would be questioned. He had been advised that his job was in jeopardy and chose not to call his Union officer first. In my opinion, his action did appear to attract the attention of Mr. Gough. It did not however warrant the undermining of the Testing process or the disregard for the requirement of a fair and impartial investigation.

[31] Based on all the evidence before me, I cannot find that the Company provided a fair and impartial investigation in this case. In my view, the frustration of the Union is understandable given the facts and involvement of Mr. Gough and Mr. Harter in this particular case. However, the particular conceptualization of targeting by the Company in general has not been found as a result of this case.

[32] In view of all of the foregoing, I find the Grievor's discipline void ab initio due to the failure to provide a fair investigation and the significant procedural errors set out above. I order CP to reinstate Mr. Blackwood in his employment, with compensation of all wages and benefits lost and without loss of seniority.

[33] I remain seized with respect to the application and interpretation of this award.

Dated this 10th, day of May, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges", is written over a light gray rectangular background.

Tom Hodges
Arbitrator