

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**TEAMSTERS CANADA RAIL CONFERENCE (TCRC)**  
**(the Union)**

**And**

**CANADIAN PACIFIC RAILWAY COMPANY (CP)**  
**(the Company)**

**AH: 783**

**DISPUTE:**

Appeal of the 10 demerits assessed to Conductor Wade Blackwood.

**JOINT STATEMENT OF ISSUE**

Following an investigation, on December 2, 2019 Conductor Blackwood was disciplined as shown in his discipline letter as follows,

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

*In Connection with your tour of duty while working 113-20 on Thursday November 21, 2019. Formal investigation was conducted on December 10th, 2019 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:  T&E Rulebook Section 4 Item 4.6 OCS Broadcast Requirements. In consideration of the decision stated above, you are hereby assessed ten (10) demerits. 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 contends as below.

The Union contends any discipline assessed in this matter is in violation of the Collective Agreement as well as excessive.

Nothing provided through the investigation clearly shows that Mr. Blackwood did not provide the appropriate radio broadcast. It is shown within the investigation that Mr. Blackwood had performed all radio broadcast as per rule with the 1 alleged exception. It is the Company's requirement to show without a doubt that Mr. Blackwood was in violation of the rule. This has not been established and any discipline assessed has been done in violation of Article 39.05.

As noted, the Company has not shown that the employee's responsibility was fairly assessed by the evidence, the evidence in fact shows that most likely Mr. Blackwood and his crew performed their duties per the rule.

The Union further looks to the memo provided by the Trainmaster. The Trainmaster says he could hear other broadcast but as shown within the investigation he obviously did not hear everything that was broadcasted.

The memo itself does not prove that the comments provided by Mr. Blackwood show any culpability. At the time of being questioned Mr. Blackwood was obviously second guessing himself.

If in fact (and the Union has clearly provided its' position) Mr. Blackwood missed calling one instance there was no need for a formal investigation. A simple discussion with the crew to gain some facts and provide education, feedback would have been the process to follow, that would have been the progressive approach to take, not disciplining the employee for a singular minor alleged incident.

The Union requests that the discipline assessed to Mr. Blackwood be removed and that he be made whole with interest. 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 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.

As per the Company's Step 1 response, the Grievor made an error in not calling out the OCS Broadcast to the interlocking Utopia. The Company maintains intent is not required to establish a rule violation nor does lack of intent negate the rule violation. Further, in the fair and impartial statement the Grievor acknowledged that he understood Rule Book for T&E Employees Section 4, Item 4.06 OCS Broadcast, but cannot confirm his broadcast to the interlocking at Utopia.

The Union alleges a violation of Article 39 of the Consolidated Collective Agreement. The Company cannot agree with the Union's allegation and maintains that discipline was assessed following a thorough assessment of all the evidence and materials establishing the Grievor's culpability.

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:

Signed

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Wayne Apsey  
General Chairperson CTY East  
TCRC

January 10, 2022

FOR THE COMPANY:

Signed

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Lauren McGinley  
Assistant Director Labour Relations  
CP Rail

**Hearing:** February 17, 2022 - By video conference

**FOR THE UNION:**

Ken Stuebing, 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.

[2] 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**

[3] The Company maintains that the Grievor, confirmed during an investigation that he was familiar with Rule Book for T&E Employees, CROR, GOI, Safety Rule Book for T&E Employees, Current Timetable, Summery Bulletins, and Best Operating Practices. It says that while he was working as the Conductor on train 113.20 on November 21, 2019 he failed to comply with the Rule Book for T&E Employees Section 4 Item 4.6 OCS BROADCAST REQUIREMENTS.

[4] 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.) (Tab 8), the B.C. Labour Relations Board; Railway case CROA 4050, Arbitrator Jones in SHP 595. The Union referred to Ad Hoc 595 & 695, CROA 4621.

[5] The discipline was based on the report of a Performance Test conducted by Trainmaster Gough who submitted a memo for evidence at the investigation. The Company maintains that Trainmaster Gough clearly stated the facts as he was actively testing employees for compliance of rules and safety. However, CP says Mr. Blackwood was unable to say for certain if he had performed the radio broadcast over the radio or if he simply voiced the communication in the cab of the locomotive. The Company maintains that heightened importance of broadcasts when operating in OCS territory, requires rules to be adhered to with 100% compliance.

[6] The Company submits the monitoring and testing performed by Trainmaster Gough was not surreptitious, rather in line with efficiency testing procedures. Quite frequently across the expansive CP network, Company officers are constantly watching, listening, and coaching crews to ensure rule compliance and to better assist in developing a culture of safety.

[7] The Union submits that nothing provided through the investigation clearly shows that Mr. Blackwood did not provide the appropriate radio broadcast. It maintains that the Grievor had performed all radio broadcasts. It says the Company did not meet the requirement to show, without a doubt, that Mr. Blackwood was in violation of the rule. Further, the Company has not shown that the Grievor's responsibility was fairly assessed by the evidence. The preponderance of evidence in fact shows that most likely Mr. Blackwood and his crew performed their duties in accordance with the rule.

[8] The Union submits the memo provided by the Trainmaster indicates he could hear other broadcasts but as shown within the investigation he obviously did not hear everything that was broadcasted. The Company maintained that the memo submitted in the investigation written by Trainmaster Gough clearly states the facts from his side as he was actively testing employees for compliance of rules and safety. It says his version of events should be preferred in that the Grievor was unable to say for certain if he had performed the radio broadcast over the radio or if he simply voiced the communication in the cab of the locomotive.

[9] I find the Grievor and Trainmaster answered in the positive to a distinctly different question.

[10] The Grievor provided:

Q17: Did you make a broadcast stating your designation, station being approached, and next restriction when approaching the interlocking at Utopia?

A17: I believe I did.

[11] Trainmaster Gough provided:

Q19: Question to Ken Gough. Is this memo correct and to the best of your recollection?

A19: That is correct.

[12] In the Company's response at Step 1 of the grievance process, Superintendent G. Harter emphasises that opinion by stating:

It was established within the investigation that Mr. Blackwood thought he did but could not confirm that in fact he did or not.

[13] I find the Company's repeated characterization of Trainmaster Gough's statement in the investigation being the preferred version overstated. A review of both provides that each were providing and answered based on their recollections.

[14] The Company and Union tell significantly differing versions of what can be drawn from the evidence of the Grievor and Trainmaster Gough. The task of choosing one version of the events over the other is not without its difficulties. Common sense is often used to determine the reliability, and to decide how to use different pieces of evidence in making a finding of fact. Reconciling competing statements in a disciplinary investigation can often consider the broader context of the incident and harmony with the preponderance of the probabilities.

[15] The Grievor's disciplinary Form 104 from CP states that at the conclusion of the investigation it was determined that the investigation record as a whole contains substantial evidence proving he violated the rules as alleged. However, I find that Trainmaster Gough's statement is the only evidence to suggest a rule violation. His statement is inconsistent with other evidence.

[16] Proper radio communications are recognized as essential to ensuring safety throughout the transportation industry. The Company referred me to Ad Hoc 595 regarding the importance of safety. I agree with the comments of arbitrator Jones that:

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

[17] However, the incident addressed in Ad Hoc 595 was that Grievor's proven failure to use a safety face shield with no mitigating factors. Arbitrator Jones noted:

I am not inclined to alter the 15 demerits imposed by the Company on the Grievor for this infraction of the safety rules. There is no doubt that the relevant rule required the face shield to be in place whenever any grinding took place. There is no doubt that the Grievor knew this rule he had been counselled on this very rule shortly before this incident, and had been taken through the safety manual earlier in the summer.

[18] The incident under investigation in this case is a radio transmission made by the Grievor. It is not disputed that he made the required transmission. However, the Company maintains that based on Trainmaster Gough's statement, the Grievor made an error in not calling out the OCS Broadcast to the interlocking Utopia. The Company maintains intent is not required to establish a rule violation nor does lack of intent negate the rule violation.

[19] While intent may not be required to find a violation, CP has the burden of proof for disciplinary matters. This involves demonstrating, on a balance of probabilities that its evidence is to be preferred. I find CP did not meet this burden.

[20] At the outset of the investigation, the Investigating Officer stated that investigations are conducted in an effort to gather the facts of any given situation or incident. However, after a review of the investigation, I find the investigating officer attempted to prove facts as Trainmaster Gough believed them to be, rather than attempting to determine the true facts.

[21] The undisputed evidence at the investigation was that radio transmission problems were reported to Trainmaster Gough. The Locomotive Engineer stated there was the need to repeat things a number of times when communicating with Trainmaster Gough.

[22] Trainmaster Gough's allegations of improper radio procedure is also inconsistent with other evidence. The evidence established that Road Foreman Doug Elen rode with the Grievor from Vaughan to Baxter observing the crew communicating in the cab throughout the trip. Assistant Superintendent Dave Purdon was at Baxter performing a pull-by and communicated with the Grievor. No incident reports or memos were provided from either manager regarding any concerns.

[23] Trainmaster Gough provided a follow up Performance Test for radio procedures shortly after the alleged failed test. That test was shown as a pass in the Performance Testing Report. In addition, the Grievor's Performance Testing report indicates twenty Performance Tests of the Grievor for radio procedure compliance between April 2016 and June of 2020. Two of the twenty including Trainmaster Gough's were shown as initial fail but positive on follow up. One of the positive tests complimented the radio procedures observed by the testing officer.

[24] The Grievor also received two positive Performance Tests from Superintendent G. Harter who reviewed this grievance at Step 2 of the process. The Grievor's file also indicated 42 Rides by other CP managers with the Grievor between 2013 and 2020. No exceptions were recorded by Company managers during the Rides.

[25] The Grievor is a long service employee with no record to indicate a disregard for radio communication rules. Given all of the evidence, I cannot find that the Company has met the burden of proof.

[26] In view of all of the foregoing, I order that the 10 demerits be removed from the Grievor's record.

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

Dated this 10<sup>th</sup>, day of May, 2022.



Tom Hodges  
Arbitrator