

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Railway Company

(CP)

Grievance re G. Fahlman dismissal

Arbitrator: Graham J. Clarke

Date: March 30, 2023

Appearances:

TCRC:

K. Stuebing:	Legal Counsel
G. Lawrenson:	General Chair
H. Makoski:	Senior Vice General Chair
C. Ruggles:	Vice General Chair
J. Keen:	Local Chair
J. Hnatiuk:	Vice General Chair CTY West
G. Fahlman:	Grievor

CP:

L. McGinley:	Assistant Director Labour Relations, CP Rail
T. Gain:	Legal Counsel Litigation & Labour, CP Rail
J. Drover:	Trainmaster, CP Rail
B. McKeown:	Assistant Superintendent, CP Rail
K. Odell:	Trainmaster, CP Rail

Arbitration held via videoconference on March 23, 2023.

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement (Appendix 2) revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. On November 11, 2021, CP dismissed locomotive engineer (LE) Fahlman for “failing to properly secure the standing portion of unattended equipment on the mainline west of the Wynyard Terminal”¹. The evidence showed that 6 handbrakes ought to have been applied to the movement, whereas only 1 had been used. CP argued that this major rule violation under its policy provided it with just cause for the incident whether standing alone or as a culminating incident.

3. The TCRC contested the fairness of CP’s investigation, especially due to the Investigating officer (IO) disallowing the union representative’s Homesafe question for two CP managers. The IO allowed the union representative to ask other questions. On the merits, the TCRC argued that while LE Fahlman was not blameless and accepted responsibility, the situation was not as serious as alleged. CP had taken no steps to apply more handbrakes to the train in question. Such a scenario did not justify termination.

4. The arbitrator concludes that CP must reinstate Mr. Fahlman, but without compensation. CP conducted a fair investigation but the IO’s decision not to allow a question about the Homesafe program prevented CP from explaining why it took no steps to apply more handbrakes. This weakened CP’s position about the seriousness of the matter.

CHRONOLOGY OF FACTS

5. **January 30, 1995:** CP hired Mr. Fahlman. He qualified as an LE in July 2008. Mr. Fahlman had 26 years service at the time of his dismissal.

6. **October 27, 2021:** Two CP managers advised Mr. Fahlman and his crewmate that they had failed an efficiency test (ET) for the way they had temporarily secured their train.

¹ TCRC Exhibits; Tab 1; Joint Statement of Issue (JSI)

CP provided Mr. Fahlman with a Notice to Appear² pursuant to article 39 of the collective agreement (CA). That Notice attached two similarly worded memos from CP managers, the salient parts of which include the following:

Trainmaster Odell's memo³:

I performed efficiency tests on the 298-27 crew on October 27th at approximately 14:15 in Wynyard with Assistant Superintendent Brad McKeown.

We observed the crew at the East end of the yard coming out of TW05 off the lead and line TW01 switch and reversed into TW01 and stopped at the station to trade off.

The conductor lined the switch correctly and communicated to the engineer as such. Mr. McKeown and I decided to go check the standing portion left on the ML west of Hwy 640 crossing. We inspected the standing portion and found 1 hand brake applied on 90 cars, 9,315 tons and 5,173 feet.

We discussed with the crew at the Wynyard station our findings. We asked the crew to validate which track the standing portion was on, whether mainline or passing track. Ms. Suik confirmed they were on the mainline. I then asked what the securement requirements are for cars left unattended on the mainline. Ms. Suik replied she had secured the cars based on cautionary rules as in "An efficient amount by testing" which still would have a minimum of 2 hand brakes. Mr. Fahlman was asked how many hand brakes were communicated to him as tested before cutting off the cars. He replied 2 hand brakes.

We told the crew that there was only 1 hand brake applied to the standing portion of their train on the mainline through our validation of securement.

We advised the crew that we would be entering this as an exception on both of their records as a failure for securing equipment properly that was left on the mainline.

Assistant Superintendent McKeown's memo⁴:

Trainmaster Kory Odell and myself observed ENGR Fahlman and CNDR Suik on train 298-27 at the East end of the yard coming out of TW05 off the lead and line TW01 switch and reversed (westward) into TW01 and stopped at the station to trade off.

CNDR Suik lined the switch correctly and communicated to the engineer. At this point Trainmaster Odell and myself proceeded eastward to go check the standing portion left on the ML west of Hwy 640 crossing. We inspected the

² TCRC Exhibits; Tab 3

³ TCRC Exhibits; Tab 3; Page 12/191

⁴ TCRC Exhibits; Tab 3; Page 16/191

standing portion and found 1 hand brake applied on 90 cars, 9,315 tons and 5,173 feet.

We discussed with the crew at the Wynyard station our findings. We asked the crew to validate which track the standing portion was on, whether mainline or passing track. Ms. Suik confirmed they were on the mainline. I then asked what the securement requirements are for cars left unattended on the mainline. Ms. Suik replied she had secured the cars based on cautionary rules as in "An efficient amount by testing" which still would have a minimum of 2 hand brakes. Mr. Fahlman was asked how many hand brakes were communicated to him as tested before cutting off the cars. He replied 2 hand brakes.

We told the crew that there was only 1 hand brake applied to the standing portion of their train on the mainline through our validation of securement.

We advised the crew that we would be entering this as an exception on both of their records as a failure for securing equipment properly that was left on the mainline.

7. **October 29, 2021:** CP took Mr. Fahlman's Statement⁵, the salient parts of which include⁶:

Q10 Do you have any rebuttal to offer with respect to the contents of these appendices?

A Both memorandums from Kory Odell and Brad McKeown, the employee number stated beside my name is not correct. In both memorandums, it stated that Mr Fahlman was asked How many handbrakes were communicated to him as tested before cutting off the cars. He replied "2 Handbrakes" What it should state is my response was "I thought the conductor said 2 hand brakes were applied and I replied 2 hand brakes and train in emergency secure"

...

Q15 According to Appendix B & C, Assistant Superintendent Brad McKeown & Trainmaster Kory Odell observed your train secured and unattended with only 1 hand brake on the Mainline at Wynyard. Is that correct?

A That is Correct as per the memorandums

Q16 Could you explain why your train was left with only the 1 hand brake on the standing portion of your train that was being left unattended?

⁵ TCRC Exhibits; Tab 4

⁶ The arbitrator reproduces the text as found in the original document.

A As stated, I thought the train had 2 hand brakes which is what I replied and not corrected

Q17 Was your train on Main track, Non-Main Track or Yard track when it was secured in Wynyard?

A Main Track

Q18 Do you understand Main Track through a terminal is not considered non-main or a yard track?

A I do

Q19 Do you understand that the 10 or more cars left in emergency and unattended is a provision that was only for non-main track that has been designated a yard in the time table?

A I do

...

Q26 In reference to the chart that you have been provided as Appendix E, how many hand brakes would have been required for your 9000-10000 ton train being left unattended on the mainline in Wynyard?

A 6

Q27 Why wasn't the required 6 hand brakes applied to the balance of your train that was being left behind on the mainline in Wynyard?

A I don't know

...

Questions directed to Trainmaster Kory Odell by Union Rep Spence through Investigating Officer⁷:

Q1 Are you aware of the "HomeSafe" program as developed by CP?

A Yes

Q2 Is part of "HomeSafe" to Identify, report, and remove hazards?

A Yes

Q3 According to your memorandum, you found one handbrake on 298-27 on Oct 27th at Wynyard Terminal. Is this correct?

A Correct

⁷ The TCRC later posed similar questions to Mr. McKeown (TCRC Exhibits; Page 28/191).

Q4 The memo seems to omit any corrective action taken as per "Homesafe". Is this correct?'

The investigating officer will not be asking this question as Mr Odell is not under investigation at this time and his actions after his observations are not relevant

Union objects to the omission of this question. They speak to the severity of the situation in the managers mind at the time. Had the situation been deemed as unsafe, the union is sure there would have been corrective action taken.

The union objects to the entire investigation as the Investigating officer is neither fair nor impartial. The union has asked question 4 be made aware to Mr Odell and Mr McKeown and the investigating officer has refused and the simple knowledge of the question whether asked or not could have an effect to further questions.

Company Note: The investigating officer is conducting a fair and impartial investigation and has the right to deem questions asked to any witness as relevant or irrelevant. Thus if the question is deemed irrelevant as he has with this question that has been asked It is to be recorded and not asked.

Q5 Did yourself and Mr. McKeown write the memorandums together?

A We were in the same room but did not write them together

Q6 The memorandums are worded nearly identical. Please explain how this is possible

A I can't as I have never read the other memo

...

Q34 Can you [Mr. Fahlman] explain why you didn't practice Homesafe when you knew as per rule your equipment required 6 handbrakes to comply with the rule?

A I thought we had 2 handbrakes, we tested effectiveness, train didn't move. I was under the impression that it was secure and it was a safe situation

8. **November 11, 2021:** CP dismissed Mr. Fahlman for the incident and wrote in its Form 104⁸:

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

In connection with working as the Locomotive Engineer on train 298-27 on October 27, 2021 and failing to properly secure the standing portion of

⁸ TCRC Exhibits; Tab 6

unattended equipment on the mainline west of the Wynyard Terminal. A violation of GOT Section 4 Item 2.3 Confirmation of Securement, Item 5.1 Securing Unattended Cars - Main Track, Siding or High Risk Location and Appendix A - Minimum Hand Brake Requirements.

...

Notwithstanding that the above mentioned incident warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal.

9. **November 12, 2021:** The TCRC grieved Mr. Fahlman's termination⁹.

DID CP FAIL TO CONDUCT A FAIR AND IMPARTIAL INVESTIGATION?

10. The TCRC alleged that CP failed to respect article 39.05 of the CA:

39.05 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

(Emphasis added)

11. The TCRC's allegation arose from the IO's refusal to allow a specific question to each manager regarding the Homesafe program, *supra*. The TCRC alleged this showed the IO had prejudged the matter. The TCRC also alleged that the two managers colluded given how similar their memoranda appeared.

12. CP argued that the parties had already negotiated wording in article 39.04(1) about an IO's supervisory role over questions being posed:

In respect of a witness from whom a statement will be taken, the employee under investigation will be notified of the time and place in order that that employee or accredited representative may be in attendance if they so desire.

⁹ TCRC Exhibits; Tabs 7 & 8

Should they attend, they will be permitted to ask questions of the witness and/or offer rebuttal at the conclusion of the witness' statement. **It should be noted that all questioning must be directed to the witness through the investigating Officer in order to ensure the orderly conduct of the statement. Only questions or cross-examination on subjects directly pertaining to the evidence or matter under investigation will be allowed. When, in the opinion of the investigating Officer, a question is wholly irrelevant, it may be declined. The question will be recorded in the statement, together with the action of the investigating Officer in declining to direct the question to the witness.** If rebuttal is offered or questions asked by the employee under investigation or accredited representative, such rebuttal and questions asked together with the answers given by the witness will be recorded in the statement. Should the employee elect not to question the witness, this will also be recorded in the witness' statement.

(Emphasis added)

13. Given the challenges of hearing one or more grievances in a single day, railway arbitrators impose significant penalties if an employer fails to conduct a fair and impartial hearing. Arbitrators have often found discipline to be void *ab initio* when an employer violates an article like article 39.05¹⁰.

14. However, arbitrators must also keep in mind that laypeople conduct the investigation rather than lawyers. The arbitrator has previously compared the negotiated investigation process in the railway sector with examination for discovery in civil litigation¹¹:

26. An investigation under the parties' expedited arbitration regime is intended to be more informal than the process which might take place before an administrative tribunal. It is neither a criminal investigation nor a process conducted by experienced legal counsel.

27. It is rather an opportunity for both parties to ensure this Office's record contains the material facts should a later hearing be necessary. As a process designed to eliminate to a large extent the need for this Office to hear oral evidence, it allows each party to ask questions and to have the employee answer those questions. The TCRC posed questions to Mr. Madubeko near the end of the interview to ensure the record contained other facts it considered essential.

¹⁰ For the arbitrator's most recent application of this principle, see AH823: [Conférence ferroviaire de teamsters Canada c VIA Rail Canada Inc., 2023 CanLII 18498](#)

¹¹ [CROA 4608](#)

28. While not identical to the questioning of a witness in a labour arbitration or in an examination for discovery, the common goal of an employee's interview is to have him or her answer proper questions about the matters in question. Objections can be made, including, for example, to contest "loaded questions" which assume facts not in evidence. At the extreme ends of the investigation spectrum, this Office has overturned unfair investigations (CROA&DR 4591) and has also commented on attempts to obstruct a proper investigation (CROA&DR 3157).

15. In an examination for discovery, a party can bring a motion before a judge to resolve objections made about questions. But the parties have negotiated nothing similar for their investigative regime. Instead, the regime assumes that the parties will cooperate to produce a proper Record for an arbitrator.

16. As the last decade of railway arbitrations demonstrates, the parties have had frequent difficulties with this crucial task. The more adversarial the parties' relationship, the greater the challenge to produce a proper Record. If jointly preparing a full Record for the arbitrator were easy, then everyone would adopt this style of expedited labour arbitration. For decades, only railroaders succeeded in obtaining the incredible expedition that this cooperative arbitration system can provide.

17. For the following reasons, the arbitrator dismisses the TCRC's request to declare the discipline in this case void *ab initio*.

18. First, the parties have turned their mind to the role of the IO and decisions about questions¹². The reasons for not allowing the disputed question have been set out as per article 39.04(1). Nonetheless, the consequences of the IO's refusal to allow the question will have a major impact on the arbitrator's consideration of the appropriate penalty in this case, *infra*.

19. Second, while the managers' memoranda in parts appear identical, they do not introduce disputed facts. The union representative had an opportunity to question the managers on the similarity of their memoranda. Mr. Fahlman did not contest to any great extent the facts which appeared in the managers' memoranda. His candour during his statement is one of the bases on which the TCRC has asked the arbitrator to intervene and change the discipline.

¹² See, for example, [CROA 1858](#).

20. The arbitrator reminds the parties that evidence is not a group project. An arbitrator wants to know what a witness personally recalls. Anything else is essentially unhelpful hearsay. In regular arbitration, the parties usually ask for an order excluding witnesses who are not testifying to avoid them discussing their evidence together.

21. For the above reasons, the arbitrator does not find the discipline void *ab initio* and will decide this case based on the merits.

DID CP DEMONSTRATE IT HAD JUST CAUSE TO IMPOSE DISCIPLINE?

22. CP met its burden to demonstrate that it had grounds to discipline Mr. Fahlman. The fact that CP learned of the incident during an ET does not preclude it from taking disciplinary action¹³.

23. Mr. Fahlman did not deny, after having had time to review documentation (QA26), that the train should have had 6 hand brakes applied when it was on the main track. The crew only applied one.

24. CP had grounds to impose discipline given that the crew had left a 9000+ tonne train on the main line with only one hand brake applied.

SHOULD THE ARBITRATOR INTERVENE AND MODIFY THE PENALTY?

25. The *Canada Labour Code*¹⁴ (*Code*) governs arbitrators' remedial authority for disciplinary matters:

60 (2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

¹³ AH811: [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 9152](#) at paragraphs 22-26.

¹⁴ [RSC 1985, c L-2](#)

26. At arbitration, the parties put forward their best arguments, with reference to relevant caselaw, to support their respective positions. The Code then requires the arbitrator to determine i) whether to intervene and, if so, ii) the just and reasonable penalty.

27. While the arbitrator rejected the TCRC's argument that CP failed to conduct a fair and impartial investigation, those observations remain relevant when considering the appropriate penalty.

28. CP did not demonstrate that the situation merited the dismissal of a long service employee like Mr. Fahlman.

29. First, and most fundamentally, if the situation was as dangerous as CP suggested, why was the train left in the condition in which the managers had found it? Would CP's Homesafe program not have mandated some action? When the IO disallowed the TCRC's Homesafe question, CP lost the opportunity to explain this situation.

30. Second, the arbitrator agrees with the TCRC that CROA 4384¹⁵ represents an appropriate CP/TCRC comparator case to consider when examining Mr. Fahlman's situation:

It is clear that discipline is warranted. Ensuring the effectiveness of the brakes is of crucial importance. The crew was responsible for testing the effectiveness of the brakes. Even though there was a communication error between the grievor and the conductor, the grievor knew that he should not have made the assumption that he did that when the conductor said to pull the pin. The responsibility rests with the entire crew to ensure this important check is undertaken.

The grievor is a long service employee. The grievor readily admitted and took responsibility for his actions. The Company acknowledges that a similar incident by an employee with a good discipline record would lead to a lengthy suspension rather than dismissal but argues this was a culminating incident.

When viewing the grievor's record as a whole, at the time of the incident, the grievor stood at fifteen active demerits. In his thirty years of service, the grievor had no discipline in the periods 1984-1991 and again from 1995-2008. The recent period of suspension relied upon by the Company was not the result of an operating Rules violation. The discharge of a thirty

¹⁵ [CROA 4384](#)

year employee in these circumstances was not warranted. A seven day suspension is substituted for the discharge.

(Emphasis added)

31. Mr. Fahlman similarly worked with a colleague who applied the handbrake, though this did not lessen his responsibility. Mr. Fahlman also demonstrated candour during the investigation.

32. However, unlike in CROA 4384, Mr. Fahlman, despite his long service, did not have an enviable disciplinary record¹⁶ at the time of the incident. In the immediate years prior to this dismissal, he had been dismissed in 2017, but later reinstated by an arbitrator¹⁷ without compensation. In 2020, Mr. Fahlman had been suspended twice for 30 and 15 days respectively.

33. On these case specific facts, the arbitrator has concluded that CP must reinstate Mr. Fahlman without loss of seniority, but without compensation for past wages or benefits. Mr. Fahlman would be wise to consider this second reinstatement, without compensation, as a final opportunity.

DISPOSITION

34. The arbitrator orders CP to reinstate Mr. Fahlman, without loss of seniority, but without compensation for past wages or benefits.

35. The arbitrator remains seized for any issues arising from this award.

SIGNED at Ottawa this 30th day of March 2023.



Graham J. Clarke
Arbitrator

¹⁶ CP Exhibits; Tab 4; Page 37/193;

¹⁷ [CROA 4540](#)