

IN THE MATTER OF AN ARBITRATION UNDER THE *CANADA LABOUR CODE*, R.S.C. 1985, c. L-2

**BETWEEN:**

**CANADIAN PACIFIC RAILWAY COMPANY**

**and**

**TEAMSTERS CANADA RAIL CONFERENCE  
((Maintenance of Way Employees Division))**

**Grievance of 20 Day Suspension – J. Lynch**

**Arbitrator:** Cheryl Yingst Bartel

**Date of Arbitration:** October 24, 2022 (Held via videoconference)

**Date of Decision:** November 9, 2022

The parties filed a Joint Statement of Issue which reads:

**DISPUTE:**

Suspension assessed to Mr. Jason Lynch (Union file 11.2106; Company file 22835).

**JOINT STATEMENT OF ISSUE:**

On May 4, 2021, the Grievor, Mr. Jason Lynch attended an investigation in connection with “cancellation of a GBO on main track and allegedly leaving track unprotected for safe train operation resulting in an alleged rule violation which occurred during your tour of duty on April 24, 2021 in Maple Creek subdivision”

On May 20, 2021, the Grievor was assessed a 20 day suspension for:

Cancelling a GBO (slow track protection) at approx. 1712 MST on main track, leaving track unprotected for safe train operation resulting in a rule violation on Maple Creek Sub. New GBO was issued at approx. 1910.

Summary of Rules Violated:

Rule Book for Engineering Employees

9.1 GBO FOR SPEED RESTRICTIONS Protecting When a condition requires a reduction in permissible track speed, the foreman must protect access to the track by movements until the GBO is confirmed by the RTC.

Requesting GBO

(a) Prior to requesting a GBO from the RTC, the foremen must:

(i) Ensure that flags can be placed at least 2 miles in advance of the defect and note those which cannot be placed as required. When not placed, or located at other than the prescribed location, such must be included in the GBO.

(ii) Complete all applicable portions of Form 3940.

(b) Contact the RTC and request a GBO as indicated on the completed form.

GBO Confirmation

(a) The RTC will read the applicable GBO information or send electronically

(a) If correct, the foremen must respond as per the following example: “GBO NoC179 correct, Foreman Pete Pepindowski”

(b) The RTC will confirm protection as per the following example: “Protection confirmed, RTC JAG”

Placing Signals

After confirmation has been received, the foremen must arrange to:

(a) place a yellow flag at least 2 miles, or at the location indicated in the GBO, in each direction from the defect, to the right of the track as seen from an approaching movement; and

(b) place a green flag in each direction, immediately beyond the defect, to the right of the track as seen from an approaching movement.

Exception: One green flag may be placed on either side of the track when the:

- restriction is at a single mile point; or
- GBO contains multiple abutting restrictions to mark each speed within.

The Union objected and a grievance was filed on June 2, 2021 and the Company responded on July 8, 2021

**The Union contends that:**

1. The grievor mistakenly omitted to cancel the GBO but did not take his flags down. Consequently, the section of track under consideration was never unprotected and no danger ever existed;
2. During his more than 20 years of prior service the grievor had never committed any kind of track occupancy violation;
3. The discipline assessed was excessive, unfair and unwarranted.

**The Union requests that:**

The Company be ordered to remove the suspension from the grievor's record and compensate him for all wages and other payments lost as a result.

**Company Position:**

1. The Company denies the Union's contentions and declines the Union's request.
2. Following a fair and impartial investigation it was determined that on April 24, 2021, the Grievor cancelled a General Bulletin Order (GBO) which provided instructions to trains and/or track unit to restrict their speed to 25 mph. As a result, his culpability was established for violating the Rule Book for Engineering Employees, Section 9.1 GBO for Speed Restrictions.
3. The Company maintains that this violation is a major rule violation given the seriousness of the infraction and the potential consequences of non-compliance.
4. Given the circumstances, the Company maintains that the discipline assessed was appropriate and in no way excessive nor unwarranted.

**Appearances:**

TCRC

David Brown:	Legal Counsel
Wade Phillips:	President, TCRC, MWED

CP

Francine Billings:	Assistant Director, Labour Relations
Poonam Sheemar:	Manager, Labour Relations

**AWARD OF THE ARBITRATOR**

1. This case concerns a 20 day suspension issued to the Grievor, Jason Lynch, an Extra Gang Foreman, for improperly cancelling a General Bulletin Order (GBO) which protected a section of track under repair. The Grievor had 24 years of service with the Company at the time of this incident. This was his first Track Occupancy Permit (TOP) violation.

## **The Facts**

2. The facts are not in dispute. On April 14, 2021, the Grievor was working as an Extra Gang Foreman on the Maple Creek Subdivision. He was required to request and issue several GBO's, regarding track restrictions, so surfacing work could be performed. He was also required to place coloured flags at prescribed locations on each side of the restriction, to notify oncoming traffic there is a restriction ahead. The flags do not provide any details of that restriction. The Grievor placed the flags as required and requested GBO M736 to restrict the speed on the track from mile 37.8 to mile 43. The speed was reduced from 55 mph to 25 mph.

3. At approximately 17:12, the Grievor spoke with Rail Traffic Control (RTC) and cancelled GBO M736. The flags were not removed. The GBO was cancelled in error, as the work on the track was not complete. Approximately two hours later, Train 118 encountered one of the flags placed by the Grievor, which they did not understand as there was no GBO in that area. The crew of Train 118 reduced its speed and RTC was contacted. RTC then contacted the Grievor. When contacted by RTC, the Grievor reviewed his records and realized he had cancelled GBO M736 in error. GBO M764 was issued shortly after, with a 25 mph restriction.

4. An Investigation was conducted. The Grievor confirmed he mistakenly cancelled GBO M736 and that the track was not safe for operation above 25 mph as it had not been surfaced. The Grievor did not offer any explanation for his improper cancellation of GBO M736, but expressed that he handled the situation to the best of his abilities. He also apologized for that mistake. He acknowledged the track was unsafe, and stated "my saving grace was that the flags were in place".

## **Parties' Positions**

5. The Company argued TOP violations are serious and significant and that CROA jurisprudence supports a significant suspension. It argued that by cancelling GBO M736, the Grievor left the track unprotected and unsafe. It noted the flags were impermanent, and did not provide protection to the track, but only served to remind traffic of an upcoming restriction. The Company noted that had Train 118 not followed the rules, a major derailment could have occurred, with catastrophic results. The Company also pointed out the Grievor's

work was carried out in a largely unsupervised environment, and that he had been disciplined on six separate occasions prior to this instance, which it submitted demonstrated a pattern of flagrance for the rules. It relied on the lengthy suspensions practically imposed by arbitrators in cases of reinstatement, where no compensation is given for the intervening period between the dismissal and the reinstatement.

6. The Union submits the track was not left unprotected due to the presence of the flags, as Train 118 saw the flags and reduced its speed. Even if that were not the case, the Union submits mitigating factors should have been given more prominence, as discipline is meant to rehabilitate and not to punish. It argued the mitigating factors are all in the Grievor's favour in this case: long-service, admittance of error, and cooperation. It urged the disciplinary record did not demonstrate a pattern of disregard for the rules, and this was the Grievor's first TOP violation. The Union submitted the Company's reliance on jurisprudence for significant suspensions through arbitrator's reinstatement decisions was unreasonable. It submitted a 20 day suspension was excessive and unreasonable and that an assessment of demerits in the range of 20 to 30 would have been appropriate, if the track was not found to have been protected by the flags.

7. I agree with the Company that the flags are a system of notification of an upcoming restriction and not an independent system of protection for the track. The flags exist to support a GBO, which provides details of that restriction. In this case, when GBO M736 was cancelled, the track was not safe for trains moving at track speed, as it was not properly surfaced. The track was left unprotected. Had Train 118 proceeded at track speed, a derailment could have occurred, with catastrophic consequences. The Grievor's conduct in cancelling GBO M736 is culpable and discipline was warranted.

#### **Was the Discipline Reasonable?**

8. The next issue is whether the discipline imposed by the Company was excessive, in all of the circumstances. While jurisprudence can be helpful, a discipline decision must be reviewed on its own circumstances, as discipline must be contextual, as well as proportional.

9. Upon consideration of the CROA jurisprudence, I accept that suspensions are a form of discipline available to the Company in this industry. I also accept suspensions are consistent with progressive discipline principles, and can range between a few days to multiple months, depending on the circumstances.

10. The Grievor did not have any explanation for improperly cancelling the GBO. He had no later awareness he had even done so, until contacted by RTC. I find he demonstrated significant inattention and lack of care for a key and important function of his safety-sensitive job. Lack of attention in cancelling a GBO has potential catastrophic consequences. I cannot agree the significance of the Grievor's error is minimized because a serious foreseeable event does not practically occur. While I accept the "saving grace" was that an accident did not occur, that does not act to the credit of the Grievor, who did not make a conscious decision to leave his flags in place and so protect the track. Rather, he failed to do his part to protect the track by cancelling the GBO.

11. I agree with the Union that the Grievor's disciplinary record was not significant considering his years of service. His record does not demonstrate a flagrant disregard of the rules. In assessing the reasonableness of discipline and mitigating factors, I have considered the length of service of the Grievor, his disciplinary record, the fact he was honest and candid about his mistake, that he showed genuine remorse and he had considered how he could avoid a similar mistake in the future. Recognizing those mitigating factors, however, I cannot agree an assessment of demerits is appropriate for this significant safety violation.

12. In considering the appropriateness of the discipline, I do not find CROA jurisprudence where arbitrators have substituted significant penalties on reinstatement such as **CROA 4415** and **CROA 4583** to be relevant or analogous. Those types of cases are distinguishable. This is not a case which requires an arbitrator to consider the appropriateness of a penalty for reinstatement after the Company has assessed discharge.

13. Safety is non-negotiable: **SHP 595**. A TOP violation which leaves a track unprotected is a very serious and significant safety violation in this industry, which can have catastrophic consequences, such as a derailment or a fatality. The Grievor works largely unsupervised and

his role requires diligence and attention. An important aspect of this Grievor's job as Extra Gang Foreman was to ensure GBO's were properly requested and were appropriately cancelled, so the track was protected. The Grievor failed to bring due care and attention to this important task. Proportional discipline acts both to rehabilitate and as a deterrent for future conduct. The lack of judgment in this case resulted in a serious safety infraction, which attracts significant discipline: **CROA 4636; CROA 4592**. Upon careful consideration of all appropriate factors, I find the significant suspension imposed by the Company to be within the "range of reason" for this serious safety violation, when due consideration is given to mitigating factors, and I decline to interfere with that penalty: *Sheet Metal Workers' International Association, Local 473 v. Bruce Power, LP 2009 CanLII 31586 (ON LRB)*.

14. The Grievance is dismissed.

15. **SIGNED, DATED** and **ISSUED** this 9<sup>th</sup> day of November, 2022 at Wheatland County, Alberta

A handwritten signature in blue ink, appearing to read "Cheryl Yingst Bartel". The signature is fluid and cursive, with the first name "Cheryl" being the most prominent.

Cheryl Yingst Bartel  
Arbitrator