IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE
RAIL CANADA TRAFFIC CONTROLLERS

(the "Union")

- and -

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

Grievance of B. Manuel (Termination)

Date/Place of Hearing: March 27, 2023, Calgary, Alberta (in-person)
Arbitrator: Cheryl Yingst Bartel

DISPUTE:

Appeal of the Dismissal of Rail Traffic Controller Blake Manuel of Calgary, AB.

JOINT STATEMENT OF ISSUE:

On December 31, 2021 Mr. Manuel was dismissed for the following reasons:

> "While working as the 0700 Alberta South RTC on December 12, 2021 you had violations of CROR Rule 103(g) and Rail Traffic Controller Manual 4.10 Defective Automatic Warning Devices. Based on your previous discipline history and terms of your Last Chance Agreement dated February 10. 2021, this incident also constitutes a culminating incident and violation of the terms of your Last Chance Agreement, warranting dismissal."

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION POSITION

The Union contends that the investigation was not conducted in a fair and impartial manner as a result of Mr. Manuel being subjected to repeated questions and questions which were unnecessary, rhetorical and demeaning.

Mr. Manuel did not have a "rule violation". Mr. Manuel simply received a secret test from the company, which the company determined Mr. Manuel did not fully pass. A failed efficiency test is not a rule violation or a breach of the Last Chance Agreement.

The Union maintains that Mr. Manuel's Last Chance Agreement should not have formed part of the investigation as it did not form part of the Notice to Appear. In the alternative, the Union submits that there was no violation of Mr. Manuel's Last Chance Agreement. The Union further maintains that Mr. Manuel's discipline was arbitrary and targeted.

For the reasons stated above, the Union demands that the discipline assessed against RTC Manuel removed and that he be immediately reinstated and made whole with no loss of seniority and benefits, and that he be made whole for all lost earnings, with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Company maintains that an alleged rule violation observed through the course of an efficiency test remains an alleged rule violation. The manner in which an alleged rule violation is observed does not change the fact that the rule was alleged to have been violated. This is recognized by the arbitrators cited by the Union. Arbitral jurisprudence has clearly held that the assessment of discipline for a rule violation identified through the efficiency testing procedure does not void the discipline assessed.

Contrary to the position advanced by the Union, the Company maintains the evidence was supplied to the Grievor and his union representative prior to the investigation and in accordance with the Collective Agreement. Specifically, the Grievor's last chance agreement was known to him, including all of its terms and conditions, provided as an item of evidence in his Notice of Investigation and relevant to the determination of discipline, if any, following a determination of culpability. It must also be noted that contrary to the position of the Union, the final determination of any other assessment of discipline would not modify the Last Chance Agreement which was signed and executed by the parties in February 2021.

Regarding the allegation that the dismissal was arbitrary and targeted discipline, nothing could be further from the truth. In one breath the Union is stating the Grievor had 6 weeks remaining on his last chance agreement and in the next stating the discipline was targeted. Frankly, there is no evidence which suggested the discipline was either arbitrary or targeted. In this respect, the Union must be held to the standard burden of proof in establishing these allegations, which the Company respectfully submits the Union has failed to do in the circumstances.

Moreover, the Company reserves the right to object should the Union subsequently attempt to expand upon this allegation with details or facts not submitted as part of this

process. The Company objected to the submission of this grievance based on the fact that the grievance does not provide sufficient information to determine the validity of the Union's allegations and the Company maintains this objection.

The Union has alleged the investigation was not fair and impartial. The Company has reviewed the statement and cannot agree the Grievor was subjected to badgering. The objections at Q&A 18 and 38 were not ignored, they were noted for the record and the Grievor was asked to answer the questions. Lastly Q&A 56 clarified the Grievor's training following his reinstatement, validating the Agreement had been complied with. Based on all of the foregoing, the Company clearly agrees a fair and impartial investigation is required; however, in contrast to the Union's position, maintains a fair and impartial investigation was taken on the date in question.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:

Jason Bailey
General Chairman
TCRC RCTC

FOR THE COMPANY:

Chris Clark
Manager Labour Relations
Canadian Pacific Railway

March 17, 2023

Appearing for the Company: Chris Clark, Manager, Labour Relations
Francine Billings, Asst. Director, Labour Relations
Rene Araya, Coordinator, Labour Relations

Marc Boucher, Senior Director, Operations Centre

Appearing for the Union: Robert Church, Counsel, CaleyWray
Jason Bailey, General Chairman
Vernoica Linkletter, Vice General Chairperson
Dan Bertram

AWARD OF THE ARBITRATOR

Nature of the Case

1. On December 31, 2021, the Grievor was terminated from his position as a Rail Traffic Controller (RTC). The Company alleged that while working as the 0700 Alberta South RTC on December 12, 2021, the Grievor failed to protect a railway crossing at mile 106.6 Taber subdivision, in violation of CROR Rule 103(g) and Rail Traffic Controller Manual 4.10 "Defective Automatic Warning Devices". At the time of his termination, the Grievor was employed under the terms of a Last Chance Agreement (LCA). Even if the LCA did not apply, the Company considered the incident was a culminating incident when the Grievor's discipline record is considered, which justified termination.

2. A fact which complicates this Grievance is the significance – if any – of the circumstances under which the Grievor was given the direction to protect the crossing. Unknown to the Grievor, the direction to protect that track was part of an efficiency test initiated by the Company (also referred to as a "proficiency" test), to "test" the Grievor's ability to protect a defective crossing. Whether the results of an efficiency test are appropriately viewed as attracting discipline leading to termination under the scope of this LCA is an issue raised by this Grievance.

3. The Union has also argued the Investigation was not "fair and impartial" as required by the terms of the LCA and that the Grievor was "targeted" with a test shortly before the one year period referred to in his LCA expired.

The Facts

4. When terminated, the Grievor had been employed with the Company for 16 years. He spent 15 years in the role of an RTC. The Grievor's discipline record shows he had 12 assessments of discipline in the six year period between the beginning of 2016 and

the end of 2021, not counting the failed E Test in December of 2021. Some of those incidents involve "repeat back" or "recording error" mistakes.

5. The incident that led to the Grievor's termination in January of 2021 was one such incorrect "repeat back" error. After the Grievor's termination for that error, the parties entered into an LCA, executed on February 10, 2021, which reinstated the Grievor to his position as an RTC, subject to specific terms. The LCA provided that the Grievor was to complete a screening interview with his local manager to review the Company's expectations: Article 1.a. He was also to receive specific training and re-qualification: Article 1.b. The Grievor received nine further days of training by the Company, as part of his reinstatement. The other relevant terms of the LCA are:

> …
>
> 1.c Mr. Manuel shall comply with all of the Company's rules, policies, procedures and work practices. If, following a fair and impartial investigation, the Company determines that Mr. Manuel is culpable of a rule violation item 3 below shall apply. In all other instances, the normal application of the Company's Hybrid discipline policy shall apply.
>
> 1.d. Mr. Manuel's discipline record shall reflect this reinstatement into Company service and the 30 demerits which resulted in Mr. Manuel's dismissal shall be deferred for a period of 1 year. If, during the period of deferral, Mr. Manuel is assessed further discipline, the deferred discipline may be triggered in addition to the discipline assessed. If Mr. Manuel remains discipline free for the period of deferral, the disciplinary incident will remain on the employee's file but will not be triggered by subsequent discipline.
>
> …
>
> 3. If, following a fair and impartial investigation, the Company determines that Mr. Manuel violated or failed to comply with any of the terms and conditions of this Agreement:
>
> a. It shall be considered just cause for the termination of the employment of Mr. Manuel;
>
> b. The Company, in its sole discretion, may elect to dismiss Mr. Manuel from Company service or impose a lesser disciplinary penalty
>
> …
>
> 8. This Agreement will remain on the employment record of Mr. Manuel and may be utilized in the event that he appears before an arbitrator regarding this Agreement or any other future proceeding.

6. At approximately 14:41 MST on December 12, 2021, (10 months after the execution of the LCA), the Grievor received an emergency call from the Engineering Service Reliability Desk (ESR) and was instructed to protect mile "One Oh Six Dot Six" (106.6) in the Taber subdivision. That request was an E Test. The Grievor repeated back to ESR initially that the mileage he was to protect was "106.06", which was the incorrect mileage. ESR corrected the Grievor's error and again told the Grievor the crossing to be protected was at "one oh six decimal six". At the end of the call, the Grievor again stated the mileage as 106.06 and ESR again corrected the Grievor and stated 106.6. The Grievor also clarified with ESR during the call that it was the 30th street crossing that was to be protected.

7. The correct mileage of 106.6 was therefore given specifically to the Grievor three times in the call, in two different ways. While the Grievor stated that he believed he was protecting the mileage given for the 30th street crossing, he also stated he was aware from a previous mileage incident that the 30th street crossing was located at mile 106.6.

8. The Grievor provided his initials to ESR, indicating he understood the instructions. The Grievor then correctly blocked the area between mile 105 and 107 Taber sub (which included both mile 106.6 and mile 106.06). However, he inputted the incorrect mileage of "106.06" at two points: into the Transfer Information Editor and into the Defective Automatic Warning Device Record, which showed to "manually protect crossing at mile 106.06".

9. The following further facts are relevant: the position of RTC is safety critical; the consequences could be catastrophic if a crossing that required protection was not appropriately protected by an RTC; there was no crossing to protect at mile 106.06; and the Grievor was unaware the request was part of an efficiency test and so acted as if the need to protect the crossing was part of his regular work requirements.

10. The Director who ordered the efficiency test checked the Grievor's work and discovered that the Grievor had not properly protected the crossing. The Grievor's explanation in the Investigative interview was that he misheard the mileage. The Company considered the failed efficiency test constituted violation of Rule 103(g) – which Rule is recognized as a "cardinal" rule in this industry – and which triggered the "just

cause" provision in the LCA. The Company terminated the Grievor. The Company also considered termination was justified as a culminating incident, when viewed together with the Grievor's poor discipline record.

Analysis and Decision

11. The work of the RTC was described by the Company as the "eyes and ears" of the railway. It is fast-paced, safety-critical work which requires individuals to be attentive to multiple issues at once. One of the core duties of the role of an RTC involves careful listening and acting on directions heard, to properly engage protections, such as protecting defective crossings.

12. The Grievor acknowledged during his interview that of all of the rules and policies of the Company, Rule 103(g) relating to the protection of crossings with roadways was of the highest importance, as it could lead to the most tragic of outcomes if violated. Rule 103(g) states:

> When providing manual protection of a crossing, a crew member or other qualified employee must be on the ground ahead of the movement in a position to stop vehicular and pedestrian traffic before entering the crossing…..The movement must not enter the crossing until a signal to enter the crossing has been received from the employee providing the manual protection….

13. The "manual protection" referred to results from the RTC's actions to protect the crossing, even though an RTC is obviously not physically present at the crossing.

Preliminary Issues

14. The Grievor had been subject to an efficiency test on this particular crossing on November 24, 2021. The Grievor also failed that test and received verbal coaching from the Company on that occasion. The Union has taken issue with the reference to this incident by the Company. It argued it is a violation of Item 14 of the Memorandum of Agreement Establishing the CROA&DR to refer to that incident as it was not included in the JSI.

15. Item 14 limits the jurisdiction of the arbitrator to "disputes or questions contained in the joint statement submitted by the parties…" It does not limit the partis reference to

what factual information can support those arguments. While I agree with the Union that the incident from November of 2021 cannot be put into dispute due to its absence from the JSI, the *fact* the test occurred is relevant to an issue that *was* properly put in dispute by Union in the JSI: whether the Grievor was "targeted" by the Company. The *fact* of a previous efficiency test is potentially relevant to that issue. No violation of Item 14 has therefore occurred.

16. The Union also argued that the Notice to Appear did not include a reference to the LCA, which was prejudicial to the Grievor's ability to participate in the interview. The LCA is a legal agreement that sits as an overarching document which governs certain specific terms and conditions of the Grievor's employment. Its application to his employment is implied, as would be the application of a collective agreement. The Grievor was aware of the terms of the LCA and had been working under the LCA for 10 months. He was provided a further copy of the LCA to review as part of the Investigative process. I can find no prejudice to the Grievor from a failure to refer to the LCA in the Notice to Appear.

17. In this case, the Grievor had no knowledge that the instruction was other than what it appeared to be: a defective crossing that needed protection.

<u>The Investigation</u>

18. The Union argued that the Grievor was not given a "fair and impartial" Investigation, as required by both Article 32.1(a) of the Collective Agreement, and the terms of Article 1(c) and Article 3 of the LCA. The Union offered **CROA 2934** in support of its arguments. That case states:

> …[A]s a general rule the process of questions and answers must be open-minded and conducted in such a manner as to reflect general impartiality and a withholding of judgment (at p. 3).

19. The Union pointed to leading questions which it urged pre-supposed the Grievor's guilt and intent to commit a breach, which it argued were improper: the question "why did you think it was OK to use a different mileage than what was given to you by the [ESR]?"; "What were you listening to?"; and "is it fair you made a mistake and did not listen…" were argued to demonstrate bias, impute intention and prejudge the Grievor.

The Investigative interview in this case can be distinguished from the facts in **CROA 4139, 2934** and **3322,** which were offered by the Union. Those cases involved conduct such as withholding a witness statement, accusing the Grievor of lying; a threat to stay until midnight to "get the facts" and a 14 day investigation with substantial time spent on irrelevant facts. **CROA 4621** is another example of an improper Investigation process. In that case, another employee's role was not investigated or placed into evidence, which ignored the requirements of the collective agreement. The arbitrator found that was an Investigation "in name only".

20. Reviewing the entire transcript of this Investigation, I am led to the conclusion the Investigation was fair and impartial. As the Grievor had been given the direction of the appropriate mileage multiple times, it was relevant and appropriate to probe why the Grievor was not able to hear the appropriate mileage, or why he did not act according to the correction he had been given, as well as to ask whether it was fair to suggest he made a mistake and did not appropriately listen. The questions do not demonstrate a closed mind, bias or pre-judgment and were relevant and reasonable in attempting to understand the Grievor's explanation.

<u>The Grievor's Actions</u>

21. Turning next to the Union's characterization of the actions of the Grievor, the Grievor was given multiple opportunities to understand the appropriate mileage from the call on December 12, 2021. He initially mis-heard the mileage, but when he repeated what he *thought* he heard back to ESR, he was corrected by the ESR desk and he was again told the proper mileage, using the words "one oh six decimal six" this time, to distinguish it from the incorrect mileage the Grievor had originally repeated back. He was given the correct mileage a third time at the end of the call, when he again said "106.06" and was again corrected by ESR to 106.6.

22. It is not clear what else the ESR desk could have done to make the mileage clear to the Grievor. For whatever reason, the Grievor was unable to translate the mileage he was told into protection of the appropriate crossing. I have difficulty accepting that the Grievor's actions were the result of a "mistake" in hearing ESR when that same "mistake" in hearing occurred three times in the space of a short call and was corrected each time.

Even if the repeat back was a "mistake", there comes a point at which an innocent "mistake" becomes a significant and serious error in judgment. That point was reached in this case.

The Impact of the Efficiency Test and the LCA

23. This raises the next question, which is whether the efficiency test constituted a "rule violation" under the LCA. According to the Union, the efficiency test was not a "rule violation" but rather a "secret test" which did not trigger discipline under the LCA, as there was no need for the track to be protected. It argued that efficiency tests are not meant to be a disciplinary tool, but rather a tool to provide feedback and correction to an employee as part of coaching and instruction on performing tasks.

24. The Company's document "Proficiency Test Codes and Descriptions for Train & Engine Employees" states, in part:

> 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 non-compliance 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 (at p. 6, emphasis added).

25. As noted in this excerpt, the possibility that a disciplinary response *could* result from a failed proficiency test is not foreclosed by the Company. While the value of education and mentoring is recognized, corrective action in the form of a disciplinary response is one possibility arising from a failed efficiency test, dependant on the "frequency, severity and the employee's work history".

26. Certain jurisprudence in this industry has also accepted that efficiency tests have the ability to be used as a disciplinary tool, however the circumstances of such use is not entirely clear from those cases. **CROA 4580** considered an efficiency test relating to the examination of locomotives which had been set over and were waiting for an incoming train. In that case, there were several deficiencies, the most significant being a failure to perform a handbrake effectiveness test. Like in this case, the grievor had already been

reinstated once. That case quoted the same excerpt from the "Proficiency Test Codes" document quoted in the previous paragraph and then stated:

> This policy, while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage (at p.1, emphasis added).

27. The same arbitrator considered this issue again in **CROA 4621.** After quoting the above section of the "Proficiency Test Codes" policy and the quotation from **CROA 4580**, reproduced above, the arbitrator cautioned that his findings in **CROA 4580** did not allow "formal discipline any time an efficiency test is failed" as the "exception should not replace the rule, and not every efficiency test failure should be considered a candidate of discipline" (at p. 5). The arbitrator did not provide any further comments in that decision on what the basis of those "exceptions" would be, although later in that decision when considering a different discipline response for the same Grievor, he stated that the fact that the discipline resulted from an efficiency test was a "factor I have taken into account in assessing the appropriateness of the penalty" (at p. 15).

28. The two pieces of guidance that arise from these decisions is that the failure of an efficiency test *can* result in discipline being imposed (although in what circumstances is not entirely clear) and that the fact the discipline arose from a test is one factor that an arbitrator can consider when determining the reasonableness of a disciplinary penalty.

29. Due to the limited jurisprudence, a "case-by-case" analysis is required to determine when that disciplinary result is reasonable.

30. Turning to the circumstances of this case, Article 1.c of the LCA dictates that if a fair and impartial investigation finds that the Grievor was guilty of a "rule violation", then item 3 would apply, which includes a determination by the Company – in its sole discretion - that it has "just cause" to terminate the Grievor's employment. Like with all efficiency tests, as far as the Grievor was aware, the direction he was given arose in the ordinary course of carrying out his duties.

31. While I acknowledge the able argument of the Union on this point, I find that this is a situation where a failed efficiency test for a Rule 103(g) event can attract a

disciplinary response as a "rule violation" as that term is used in this LCA. While an efficiency test has value as a coaching and training tool, the value of that use for this particular Grievor was limited by this point. I note that carefully listening and repeating directions is a core duty for an RTC. The Grievor was given nine days of extra training when reinstated. He was also given three opportunities to hear and respond to the correct mileage on December 12, 2021 and yet remained unable to record the proper mileage even with that clarification. He was also aware the 30th street crossing was at mileage 106.6. Lastly, he had been provided coaching on the importance of careful attention to detail. When these facts are combined with the Grievor's poor disciplinary record on this issue, I am drawn to the conclusion this was an appropriate case to consider the use of an efficiency test as a disciplinary tool.

32. As jurisprudence in this industry has established that efficiency tests *can* be viewed as disciplinary events in certain circumstances - and as I have determined that the circumstances of this case would qualify as one such circumstance - I must disagree with the Union that an efficiency test is not properly considered a "rule violation" under this LCA, which can lead to "just cause" for termination. The Grievor's efficiency test demonstrated that he was guilty or "culpable" of a Rule 103(g) issue, as required by the LCA.

33. The final issue is whether the Grievor was "targeted" by the Company. A concern with arbitrary and targeted discipline through the use of efficiency tests was noted as a potential issue in **CROA 4621**. The Union argued the Grievor was targeted in the use of this efficiency test.

34. Given the Grievor's poor discipline record and multiple disciplinary events for poor listening and repeat back issues (including leading to his initial termination), it was not unreasonable for the Company to test the Grievor's skills in the safety-critical task of protecting a defective crossing, which required listening for – and accurately repeating back -information. The evidence does not establish this was an attempt to "target" the Grievor, but rather was appropriate to ensure competency with an important and safety critical task. I accept that it was reasonable for the Company to test the Grievor on the same crossing in December of 2021 that he was previously tested on one month earlier,

in order to determine if the verbal coaching given as part of that earlier test had the desired effect of improving his performance to protect a defective crossing. If the intention of the Company were to target the Grievor, he could have been tested on a different crossing for this efficiency test, rather than on the same crossing where he had already once been tested. Testing the Grievor on a different crossing could have provided a greater opportunity for an error to occur if that was the intent. I further find that a desire to "target" the Grievor was inconsistent with the nine days of further training given to the Grievor as part of his reinstatement. I find the Company gave this Grievor every opportunity to succeed.

35. The final issue is the appropriateness of the penalty of discharge. Termination is the most significant response that can be taken by an employer and has the most significant impact on an employee. The LCA provided an opportunity to this Grievor to be reinstated in a situation where he or she would otherwise have been dismissed. As noted in *Canadian Union of Postal Workers v. CPC* (2007) 89 CLAS 332, "[a]cceptance of the bargaining terms of the last chance agreement and the consequences for their breach is the consideration the union and employee give to the employer in exchange for reinstatement" (as quoted in **CROA 4615** at para. 11). The fact that there is an LCA in place limits the consideration which an arbitrator may otherwise give to the fact that discipline arose from a failed efficiency test, when considering the issue of penalty. Arbitrators have historically provided considerable respect to the penalty bargained in an LCA, out of concern that if that respect is not provided, parties will be reluctant to use such agreements in the workplace, and the purpose of deferred discipline in this industry would be undermined: **CROA 3224.**

36. In this case, a rule violation triggers Article 3 of the LCA and provides the Company with "just cause" to terminate the Grievor. I do not consider that this is one of the limited situations where it would be just and equitable to interfere with the penalty imposed by the LCA and agreed to by the parties when the Grievor was reinstated. As noted by the Company, the Grievor in this case had multiple opportunities to address his shortcomings as an RTC. The error in judgment made in the call on December 12, 2021 was significant and concerning considering the Grievor was told three separate times, in two different ways, what crossing to protect, was aware of what the mileage was at the 30th crossing

due to an earlier issue, yet remained unable to properly place the required protection. The concerns with the Grievor's ability are heightened due to the safety critical nature of the Grievor's work and the considerable assistance provided to him by the extra training given on his reinstatement.

37. The Company was entitled to consider it had just cause to terminate the Grievor's employment under the terms of the LCA due to the rule violation of Rule 103(g) and I decline to interfere with the exercise of that discretion.

38. Even if it had been found that Rule 103(g) was not a "rule violation" under the LCA, I would have determined the incident of December 12, 2021 was a culminating incident which justified termination. While it would be recognized in that determination that this discipline arose from an efficiency test, it is a significant aggravating factor that the Grievor was given three opportunities during that test to ensure he heard the proper mileage. Combined with his admitted understanding that 30th street was at mileage 106.6, his poor work record and his considerable extra training, the decision to terminate the Grievor would have been a just and reasonable response under the culminating incident doctrine. The Grievor in this case has been unable to "demonstrate a pattern of reliability" necessary for continued employment, despite being given numerous opportunities: **CROA 3454** (at p.8) and **AD HOC 332**.

39. The Grievance is dismissed.

DATED AND ISSUED this 8th day of May, 2023

Cheryl Yingst Bartel
Arbitrator