

AH848

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

BETWEEN:

**International Brotherhood of Electrical Workers System Council No. 11
(IBEW)**

-and-

**Canadian National Railway Company
(CN)**

Dismissal of Shaun Jackson

Arbitrator: Graham J. Clarke
Date: October 13, 2023

Appearances:

IBEW:

R. Church: Legal Counsel
G. Badesha: General Chairman IBEW SC NO. 11
D. Blakeney: Regional Chairman – IBEW SC No 11 CN West
S. Jackson: Grievor

CN:

M. Salemi: Human Resources Business Partner
J. El Shamey: Sr. Manager, Labour Relations
G. Beeds: Manager, S&C Maintenance

Arbitration held on October 5, 2023.

Award

BACKGROUND

1. The parties contest the appropriate penalty where an employee's failure to conduct the proper signal test disabled a railway crossing and resulted in a train going 10mph hitting a van with three passengers.

2. The parties did not dispute that CN had grounds to discipline Mr. Jackson, an S&C Maintainer, for his failure to protect the railway crossing. Mr. Jackson, who had 3 years service in the IBEW bargaining unit, and a previous 6-year stint in a different CN bargaining unit, had no demerit points on his disciplinary record prior to this incident¹.

3. CN imposed 60 demerit points which resulted in Mr. Jackson's automatic dismissal. The IBEW argued that 25 demerit points constituted the appropriate discipline.

4. For the reasons which follow, the arbitrator concludes that, while Mr. Jackson committed a serious error, the evidence did not support CN's position that he had been reckless, negligent or showed an unwillingness to follow the rules.

5. The arbitrator orders that CN reinstate Mr. Jackson, without compensation. The 60 demerits will be reduced to 40 on his disciplinary record.

CHRONOLOGY

6. **June 30, 1998:** CN originally hired Mr. Jackson for a position in Engineering – Track Department. The Steelworkers represented this bargaining unit.

7. **August 10, 2004:** Mr. Jackson resigned from CN.

8. **September 9, 2019:** CN rehired Mr. Jackson for an S&C position in the IBEW's bargaining unit. CN's company records include both of Mr. Jackson's employment periods².

¹ CN Brief, Tab 3.

² CN Brief, Tab 2.

9. **February 23, 2022:** Mr. Jackson attained the safety-sensitive position of an S&C Maintainer³. He used a CN vehicle to perform his functions largely on a solitary basis with little supervision.

10. **August 3, 2022:** Mr. Jackson had the responsibility to conduct S&C General Instructions (GI) Test GI 304(c) (primary battery test) but instead conducted GI 331 (timer test). He had asked a fellow employee for assistance but had not mentioned the correct GI test number. The incorrect test Mr. Jackson performed disabled the railway crossing and he placed no protection to warn approaching vehicles. About 10 seconds before the accident, a black vehicle had crossed the crossing. A van followed and, with no warning lights or other protection at the crossing, was hit by a train going 10mph. The collision pushed the van down the tracks. The 3 individuals were not severely injured but were transported to hospital by ambulance⁴.

11. **August 8, 2022:** CN issued Mr. Jackson a Notice to Appear⁵.

12. **August 10, 2022:** CN conducted Mr. Jackson's statement which included the following extracts:

6. Q. Have you had sufficient time to review the evidence?

A. Yes

7. Q. Do you wish to dispute or refute any of the information submitted as evidence?

A. No

...

23. Q. Can you confirm your understanding that GI 304a is a primary battery test not involving the testing of an actual stick release timer?

A. I do not understand the clarity here. It does not reference a stick release timer. I went to c, got stuck in the wording, and went right to stick timer to which I requested help from a fellow maintainer. Having now reviewed it with the union just now I do understand that that is not actually what it is asking.

³ CN's Brief states Mr. Jackson was a Mechanic (Paragraph 19), yet his Statement (Tab 10; QA1) describes him as a Maintainer. The IBEW Brief at paragraph 6 describes Mr. Jackson as a Maintainer.

⁴ CN Brief, Paragraph 30.

⁵ CN Brief, Tab 9.

24. Q. Can you confirm the GI test that references testing of an actual stick release timer?

A. I can now, GI 331.

25. Q. Have you performed any of these tests before?

A. 304c no, the stick release no, it was my first one.

...

41. Q. So having a block down and a crossing not activated, it did not occur to you that you were manipulating the signal system?

A. I don't know how to answer that question. I don't know how to explain my mind here. Better wording would be that I did not understand that the block was down, the other GIs say that I need track protection but the GI that I thought I was doing did not say that. I think its better to say that I was aware that the block was down, but since the GI I thought I was doing did not say to get track protection of any sort, I did not understand how that would affect the block.

42.Q. Was this from referencing the GI or SCIS?

A. I was still thinking in my mind that I was doing GI 304, the confusion in my mind resulting in me not thinking the track was down and not needing track protection. Even after I had read GI 304 and talked to Karen about a "stick release test", I did not think I would drop a track. I never put it all together.

43.Q. Did you have any type of positive protection on the crossing at 12.75 while testing?

A. No

...

54.Q. Do you have anything further to add to this employee statement?

A. I would like to know how the family is doing. I have come to realize my involvement and the responsibility I need to take for what transpired. Moving forward I need to do better in understanding what tests and procedures I am doing. If any concerns or clarifications are needed, I will be calling my supervisor. If I am not satisfied with my knowledge of that conversation I will escalate it to Greg or another supervisor until I understand everything about what I am about to do. I will seek knowledge until 100% understood as we do have a lot of responsibility, peoples lives in our hands and anything except being perfect, I need to basically be better. I have always been on the other side of preventing accidents or potential incidents, some down here. I do hold myself very highly and expect what I doing is exactly what I need to be doing. I need to know how to be better, how to do better and how to prevent this from happening again. (sic)

13. **August 25, 2022:** CN terminated Mr. Jackson⁶ for these reasons after imposing 60 demerit points:

Failing to properly perform the General Instruction testing at the Granville crossing and approach, located mile point 12.75 on the Lulu Island spur (Yale Subdivision) resulting into vehicle damage and nearly fatally injuring three civilians and for the violation of rule 301(i) on August 3rd 2022. (sic)

PARTIES' POSITIONS

CN

14. In its Brief, CN summarized its arguments supporting the 60 demerit point penalty and resulting termination⁷:

37. The Company will demonstrate that:

- The grievor acted in a reckless and negligent manner when he failed to properly perform the correct General Instruction testing at the Granville crossing and approach, located mile point 12.75 on the Lulu Island spur (Yale Subdivision).
- By performing the incorrect test, (performing GI 331 rather than GI 304(c)), his actions disconnected the approaches to the crossing. This resulted in the North Approach to Granville Ave. being completely disconnected for approximately 15-minute duration of the stick release timer. During this time train CN5679 was approaching Southbound at mile 12.75. The crossing failed to ring, (due to the grievor's actions) and did not ring until train CN5679 occupied the crossing and struck a member of the public's vehicle at 10 mph. As well CN5679 narrowly missed a black vehicle, approximately 10 seconds before impact with the minivan.
- The degree of reckless negligence demonstrated by the grievor breached the bond of trust necessary to continue the employment relationship.
- Simply, the grievor cannot be trusted in order to perform his job safely, and to ensure the safety of the public and ensure that Company's legitimate business interests remain intact.

IBEW

15. The IBEW did not contest that CN had grounds to discipline Mr. Jackson, but argued that a mistake did not justify a 60 demerit point penalty:

⁶ CN Brief, Tab 11.

⁷ CN Brief; Paragraph 37

41. The issue before Arbitrator is whether there is just cause for the Grievor's accumulation of 60 demerits and resulting discharge based on the facts of this one incident, and whether or not the Arbitrator ought to interfere with the penalty in this case and order the reinstatement of the Grievor on such terms that the Arbitrator deems appropriate.

42. Taking into account all of the mitigating factors, the Union submits that the discharge of the Grievor is excessive, inappropriate, and should be mitigated to a penalty short of discharge.

43. The Union specifically denies that the Grievor's behavior was reckless, negligent, or that he demonstrated a blatant disregard for safety, and puts the Company to the strict proof thereof. While the Grievor did make a mistake, he explained the basis for that mistake to the Company, and pointed out in the investigation the parts of the various rules which were confusing or unclear.

44. Further, the Union denies that the Company's business interests or its reputation has been harmed in this case. There is no evidence of any such impact, and the onus is on the Company to demonstrate such harm. The Union again puts the Company to the strict proof thereof.

ANALYSIS AND DECISION

16. The parties do not dispute that CN had grounds to discipline Mr. Jackson. The context surrounding the events of August 3, 2022, however, remains essential when evaluating the appropriate discipline.

17. CN played a video showing the consequences of Mr. Jackson not protecting the railway crossing in the course of his duties⁸. That video shows large trees obscured drivers' view of any approaching trains⁹. The public thus relied completely on the railway crossing working properly.

18. A dark van went through the intersection safely just before the train entered the crossing. A light van which followed was not so lucky. The train hit it right in the middle and pushed it down the tracks and out of the video's frame. The incident was no doubt horrifying for the three passengers who had had no warning a train was coming. Fortunately, the train was going 10mph on this section of the track and the van seemingly stayed upright as it was pushed down the track.

⁸ See, in particular, video #3 of the 6 videos CN filed into evidence.

⁹ CN Brief, Paragraph 30 (picture).

19. This incident description shows the consequences of Mr. Jackson performing GI 331 rather than GI 304(c). Moreover, at his interview, he still did not appear fully versed in what he should have been doing on August 3, 2022. The IBEW did not persuade the arbitrator that CN's training, which was objectively extensive, somehow contributed to the incident.

20. CN's concerns are evident and wholly justified.

21. But that does not mean that Mr. Jackson merited 60 demerit points and the resulting automatic termination. For multiple reasons, the arbitrator has decided to intervene and substitute a significant penalty in place of the dismissal.

Was Mr. Jackson “reckless and negligent”?

22. CN, which had the burden of proof, did not satisfy the arbitrator that Mr. Jackson's conduct met the standard of being reckless and negligent. Mr. Jackson, who travelled in his position and was performing this test for the first time¹⁰, knew he was not familiar with the test and contacted a colleague for assistance. His crucial mistake, however, was not identifying the precise rule (331 vs. 304(c)) which seemingly led his colleague to give instructions for a different test.

23. While the IBEW argued that both Rules used similar short form descriptions (Rule 331: Stick Release Timer¹¹; Rule 304(c) “Prim Batt – Stick Timer”¹², the arbitrator agrees with CN that Mr. Jackson's Work Assignment¹³ clearly indicated he had to do Rule 304(c).

24. The serious mistake Mr. Jackson made did not amount to recklessness. He was not, for example, cutting corners in order to complete his work quicker¹⁴. Mr. Jackson did reach out for assistance before performing his work, though he should have contacted his supervisor. Neither was Mr. Jackson negligent unless one characterizes any serious mistake as negligence. He made a serious mistake which resulted in unacceptable consequences for the passengers in the van.

25. Fortunately, the accident was not more serious. While CN initially described the incident as “nearly fatally injuring three civilians” in its Form 780¹⁵, a description which

¹⁰ CN Brief, Mr. Jackson's Statement, QA25.

¹¹ IBEW Documents, Page 9/175.

¹² IBEW Documents, Page 6/175.

¹³ IBEW Documents, Page 6/175.

¹⁴ Compare, for example, [AH705](#) (French). See also AH639, *infra*.

¹⁵ CN Brief, Form 708, Tab 11.

suggests some significant injuries occurred, its Brief later noted¹⁶ that “The 3 individuals were not severely injured”¹⁷.

Case law

26. The arbitrator has noted previously the importance of the context surrounding any cases put forward in support of a particular penalty¹⁸. An unfortunate reality exists that accidents occur¹⁹. Accidents do not automatically result in an employee’s termination²⁰ but could lead to that result depending on the circumstances.

27. In [CROA 494](#), Arbitrator Weatherill described the factors which led him to conclude the grievors had committed “very serious negligence” which had led to a fatality. The facts before Arbitrator Weatherill, and which led to his dismissing the grievances, differed significantly from those in Mr. Jackson’s case.

28. In [AH617](#), CN had initially terminated an S&C Maintainer but then substituted a 145-day suspension. The parties described the conduct leading to discipline as “failing to properly deactivate and restore a crossing including a failure to perform the walk of life.” The grievor had committed a similar infraction the previous year.

29. Arbitrator Picher provided an expanded description of what had occurred:

The crossing apparently remained deactivated overnight. Mr. Maik was called back to that location the following day, November 8, 2011 where he reactivated the crossing because of the impending passage of train 418. There appears to be no dispute that he properly performed the reactivation and, as required, he notified the Rail Traffic Controller that the crossing was reactivated. As reflected in the grievor’s disciplinary investigation, he then formed the opinion that the crossing was permanently reactivated and returned to his truck. He relates that shortly thereafter he noticed that the lights of the crossing came on as a tamper machine was operating within the crossing. **Without consulting any supervisors he assumed that he should again deactivate the crossing. He relates that he then deactivated the crossing and sat in his truck for approximately twenty minutes until the tamping operation was finished. According to Mr. Maik he then checked to see if there were any broken**

¹⁶ CN Brief, Paragraph 30.

¹⁷ While CN indicated that the 3 passengers were taken to hospital in shock, the arbitrator could find no further details in the Record about any injuries they suffered.

¹⁸ [AH794](#) at Paragraphs 19-20.

¹⁹ See generally [CROA 4628](#); [CROA 4519](#) and [United Steel Workers, Local 1-2010 \(USW\) v Greenfirst Forest Products Inc., 2021 CanLII 125068](#).

²⁰ Other events, such as working while impaired, do have a presumption in favour of dismissal subject to any mitigating factors: [AH734 - Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 583](#).

bonds, and having discovered a severed bond he replaced it. Then, in his words: “I had thought the crossing was back in service, and then I left.” In fact the crossing remained deactivated. The grievor had not communicated with the OCS foreman to determine its status. In fact the grievor did not communicate with the Rail Traffic Controller, as required, when he deactivated the crossing on the afternoon of November 8. Nor did he, before leaving, conduct the mandatory Walk of Life test to ensure that the crossing was activated and functioning properly.

In the result, by his inadvertence, the grievor created what can fairly be characterized as a potentially lethal trap. Because the crossing was left deactivated, any vehicle approaching it would rely on the signal and would have no forewarning of the approach of an oncoming train. Fortunately, no such incident occurred. The following morning, at 07:53 on November 9, 2011, the crew of train A-4195108 notified Company officers that the crossing lights were not functioning at Mile 176.69. Following established protocols, the Rail Traffic Controller immediately protected the crossing and police authorities were notified. **It was then discovered that the crossing had in fact remained deactivated from the previous day by reason of the inadvertence of Mr. Maik.**

(Emphasis added)

30. AH617, which fortunately did not involve a collision between a train and a passenger vehicle, confirms that serious mistakes do not automatically provide just cause for dismissal.

31. Arbitrator Picher further explained why he dismissed the grievor’s challenge of CN’s 145-day suspension:

Unfortunately, in the kind of work Mr. Maik was called upon to perform, there is no room for distraction, inadvertence or forgetfulness, much less departure from the most essential checks and balances of safety, such as notifying the Rail Traffic Controller of any change and performing the Walk of Life. In my view a second infraction of this kind clearly justifies the Company in questioning the safety of retaining the grievor to perform the essentially unsupervised duties and responsibilities of an S&C Maintainer. Nor do I consider that the grievor was lacking in training or that the errors he committed on November 8, 2011 were in any way related to a failure on the part of the Company to train him. As the Company’s representative properly notes, his correct performance of the deactivation and reactivation of the same crossing obviously confirms his understanding of the safety requirements to be observed.

(Emphasis added)

32. In [AH639](#), CN had discharged an S&C Maintainer for allegedly falsifying tests. While CN did not prove the alleged falsification, Arbitrator Schmidt nonetheless imposed a significant penalty for the employee's carelessness when conducting testing. That case described the offending behaviour:

Having regard to the above interchange, and particularly the grievor's obvious evasive answer to question 10, I do not accept the grievor's denial that he used the raco tool as argued by the Company. Had the grievor not used the raco tool as he had reported and recorded by dispatch, he had every opportunity to correct the record at the time of the Company's investigation. Instead, he was evasive. **In the circumstances I find that the grievor freed the contacts by banging on the code transmitter with the raco tool. He then reinstalled it and continued to work. Though the grievor temporarily resolved the trouble call, his handling of it in no way constituted a proper repair. The grievor's handling of the call suggests a degree of carelessness in his approach to his work. The grievor was less than forthright with the Company during its investigation of this incident.**

(Emphasis added)

33. This reckless conduct and other facts led Arbitrator Schmidt to reinstate the grievor, without compensation, and to reduce the number of demerit points:

By his conduct in respect of all allegations, the grievor has demonstrated a tendency for unreliability in his position, which is self-directed and safety sensitive.

Having said that, I agree with the Union's submission that the Company took an opportunity based on its audit results, to issue multiple disciplinary penalties. There is no question in my mind that this is a case of, as the Union put it, "piling on." To have imposed one-hundred-twenty-five demerit points and outright discharged the grievor for related offenses based on its discovery of the grievor's negligent work habits was, in my view, an excessive response by the Company.

Progressive discipline is a fundamental tenet of the Brown System. It is meant to provide an opportunity to an employee to correct unacceptable conduct or behaviour. **The manner in which the Company responded to its findings as a result of the audit that it conducted deprived the grievor of any opportunity to correct his inattentiveness to the dictates of his job.**

In the result, I direct the grievor to be reinstated to employment forthwith without loss of seniority, but without compensation. The grievor's

discipline record should reflect the imposition of ten demerits for the first incident for which the Company assessed fifteen demerits against him and forty demerits for the combined GI infractions, with the word falsification to be replaced with “reckless recording of tests in circumstances of your failure to perform GI-305.”

(Emphasis added)

34. The facts simply do not support CN’s position at arbitration, and summarized for example at paragraph 99 of its Brief, that Mr. Jackson showed no willingness to comply with the rules and is a reckless and negligent employee:

99. The Company respectfully submits that the grievor is incapable and shows no willingness to comply with the rules and instructions governing his job as well as the related laws, which is evidenced through his reckless and negligent conduct. The Company further maintains that it would not be able to protect its interests, or the safety of the public, if it had kept the grievor in its employment. **It would be a hardship for the Company to be required to afford the grievor yet another chance to maintain his employment, when he has shown that he cannot be trusted in his position.**

(Evidence added)

35. Had CN been able to prove the allegations in paragraph 99 of its Brief then the result in this case would have been different. But CN did not meet that burden.

36. The facts show that Mr. Jackson was uncertain about the task he had to complete. He made a significant mistake in asking his colleague about the wrong test. Had he used the actual rule number, then the incident would probably never have happened. His asking for help militates against a finding that Mr. Jackson “shows no willingness to comply with the rules”. Moreover, unlike in Arbitrator Schmidt’s decision in AH639, the evidence does not demonstrate that Mr. Jackson is a reckless and negligent employee.

Mitigating Factors

37. The arbitrator also agrees with the IBEW that certain mitigating factors exist in this case.

38. First, Mr. Jackson had no previous discipline until the current serious incident occurred. Second, while his seeming lack of understanding even during his statement about the rules causes concern, he accepted responsibility for his actions and indicated

what he would do in the future. Third, since CN's records and its Brief²¹ referred to Mr. Jackson's 2 separate employment periods totalling 9 years, he is not the short service employee one might otherwise have initially assumed.

39. In short, the evidence in this case does not allow the arbitrator to conclude that Mr. Jackson's mistake, while deeply concerning especially given the consequences which resulted, irreparably broke the essential bond of trust.

Substitution of penalty

40. Mr. Jackson's mistake led to serious consequences for the 3 passengers in the van. One can imagine the terror they felt as they crossed a railway crossing which had no flashing warning lights only to have a train smash into them and push their vehicle down the track. That is clearly an aggravating factor in this case.

41. CN had cause to impose discipline. Any penalty must also include a measure of deterrence to reinforce for other S&C personnel the importance of ensuring they perform the clearly indicated rules on their work assignments. CN will reinstate Mr. Jackson forthwith, without compensation, but without loss of seniority, and will reduce the original 60 demerits to 40.

DISPOSITION

42. For the reasons set out above, the arbitrator orders CN to:

- i) reinstate Mr. Jackson in his employment, without loss of seniority, but without compensation; and
- ii) reduce the 60 demerit points to 40 on Mr. Jackson's disciplinary record.

43. The arbitrator remains seized.

SIGNED at Ottawa this 13th day of October 2023.



Graham J. Clarke
Arbitrator

²¹ CN Brief, Paragraph 63.