

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**TEAMSTERS CANADA RAIL CONFERENCE**

(the "Union")

- and -

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

(the "Company")

Heard *via* Zoom on June 14, 2023 at Calgary, Alberta

**DISPUTE:**

Appeal of the 10 demerits assessed to Conductor Darrell Kaczynski of Regina, SK on January 12, 2021

**JOINT STATEMENT OF ISSUE:**

Following a formal investigation, Mr. Kaczynski was issued 10 demerits on January 12, 2021, described as "In connection with working as the Yard Foreman on assignment KRJ 1 LS on December 19, 2020 and the use of profanity over the radio, while switching in Regina Yard. A violation of CROR, General Rule A, item (ix) and CROR Rule 122 - Content of Radio Communications."

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 under the requirements of the Collective Agreement. The Union argues:

- The subject matter of the investigation was broad and predetermined culpability.
- The investigation was not held in a timely manner.

- The allegations against Mr. Kaczynski were not brought forward in real time.
- The memo of ATM Lee Irving was written 4 days after the alleged offense.
- Questions 12 and 20 required Mr. Kaczynski to admit culpability.

For these reasons, the Union contends that the discipline ought to be removed in its entirety and Mr. Kaczynski be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above. The Union contends the discipline assessed is arbitrary, unjustified, unwarranted, and excessive in all the circumstances, including mitigating factors evident in this matter including the following:

- Mr. Kaczynski was not advised of the allegations against him until 10 days after the fact.
- Mr. Kaczynski's statement was made to bring awareness of the icy conditions to his co-worker.
- Mr. Kaczynski's statement was spur of the moment, made on a private digital yard channel.
- The alleged use of profanity was not directed at any person.
- Mr. Kaczynski apologized for offending anyone with his comment.

With respect to the Company's objections regarding:

- the alleged vagueness of the Union's request that the grievor be made whole, the Union's positions remain unchanged. The Union is prejudiced by these late objections regardless of the fact the matters have been previously decided; *res judicata*.

The Union requests that the discipline be removed in its entirety, and that Mr. Kaczynski is made whole for all associated loss 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 the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that the Union describes. The Company's position continues to be that the quantum of discipline assessed was just, appropriate and warranted in all the circumstances.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator be drawn to the same conclusion.



- [2] This matter was heard under the *ad hoc* process. It is the second in time of six discipline assessments which were issued against the Grievor between November 2020 and October of 2021; five of which have been grieved. All five grievances were heard over a two day *ad hoc* session held on June 14 and 15, 2023.
- [3] On December 19, 2020, the Grievor was working as a Conductor at Yard KR11 in Regina, along with a Yard Helper. The Assistant Trainmaster had the radio turned to the channel which the crew was using. He heard the Grievor say over the radio that "I don't need to go skating cause I'm skating through the f---ing yard". Four days after the incident, on December 23, 2020, the Assistant Trainmaster documented the incident with a short memo.
- [4] CROR General Rule A, item (ix) requires, in part, that every employee is to "conduct themselves in a courteous and orderly manner". CROR Rule 122 states that radio communications "must be brief and to the point and contain only essential instructions or information".
- [5] The Grievor was assessed 10 demerits for this violation, on January 12, 2021. The Union grieved that assessment.
- [6] For the reasons which follow, the Grievance is dismissed.

## **II – Facts**

- [7] The Grievor is a long-service employee, having been hired by the Company on July 15, 1988, with Mechanical Services. He transferred into the running trades in January 2005. At the time of this incident, he had approximately 32.5 years of service, with 15 of those years in the running trades.
- [8] A Notice to Appear was issued to the Grievor on December 29, 2020, 10 days after this incident. An Investigation was conducted after Christmas, on January 5, 2021. The Grievor stated he was not aware of the incident until receiving the Notice to Appear.
- [9] When asked during the Investigation if he had used profanity on the radio on December 19, 2020, the Grievor initially stated he did not recall. Later in the

interview, the Grievor stated he recalled saying “It’s so frickin slippery out I could have skated to work today”.

- [10] The Grievor stated his intention in making this communication was to advise his co-worker of the slippery situation. He stated it was his belief he did not use foul language in his communication and believed he had followed Rule 122.

### **III - Arguments**

- [11] The Company argued that radio communications are to be brief and “to the point”, containing only “essential instructions”, with all exchanges to take place in a professional manner. It argued the Grievor did not use the proper radio procedures when he communicated to his coworker over the radio, was not courteous in those communications, and was culpable for violating that rule. It argued some form of discipline was warranted. The Company noted that the Grievor had eight issuances of discipline for various work performance and rule violations between 2015 and 2020.

- [12] The Union noted that the Assistant Trainmaster was “monitoring” the radio but did not take any action; did not address any alleged concerns; nor did he offer any coaching, guidance or feedback to the crew regarding their use of the radio shortly after the incident. It argued the Notice to Appear prejudged the issue by referring to the “Rules Violation” and that the Investigation was unfair and impartial, as the Grievor was asked leading and presumptive questions.

### **IV – Analysis and Decision**

- [13] I accept that the radio communication at issue was not “brief, to the point” with only “essential” “instructions or information”, as was required. I do not accept that the word “f---ing” is a word that is appropriately used in radio communications, even where that communication is required - which it was not in this case. It constitutes profanity.

- [14] The Grievor’s comment need not be made “in anger” or “directed at someone” or made with “ill intent” to be culpable, as argued by the Union. It also need not be established the Grievor acted “unsafely”, as also argued.

- [15] I am further satisfied that while he initially denied the communication, the Grievor did in fact recall the incident and that he chose to change the wording he used, in an attempt to downplay the incident.
- [16] I do not find credible the Grievor's explanation that his comment was made to "warn" his colleague of the slippery conditions.
- [17] By having the radio turned to the channel the crew were working, the Assistant Trainmaster was not conducting any type of "proficiency" test. Being aware of what was going on in the Yard and having the radio appropriately tuned was a responsible action for him to take. Neither did a failure to coach or offer immediate feedback for the use of profanity foreclose the Company from a later disciplinary response. Article 39 does not limit the Company's ability consider an incident and later determine discipline was warranted.
- [18] The Investigation was fair and impartial. The Grievor was requested to appear for a "Rule Violation" because that was the allegation made against him. During the Investigation, he was asked about his use of "profanity" on the radio, which places the allegation made directly before him for his response, as is required.
- [19] While the Union relied on *Hiram Walker & Sons Ltd. (1974) 4 L.A.C. (2d) 291* for the "continuum of speech within an industrial enterprise" which is appropriate, I do not accept that the workplace world is static or that what was acceptable in 1974 in an industrial workplace remains acceptable regarding that continuum.
- [20] I find **CROA 3921** to be more recent, specific to this industry and therefore persuasive. In that case, an employee was assessed 20 demerits for conduct unbecoming for radio communications that used profanity, in violation of General Rule A. Arbitrator Picher stated:
- While there may be some latitude for unvarnished "shop talk" in the workplace, radio communications, which can obviously be overheard by others, demand a degree of decorum and professionalism which the grievor plainly failed to observe. Given the grievor's relatively extensive discipline record, I am not included to disturb the assessment of twenty demerits for that incident (at p. 3).
- [21] I agree with that reasoning and find the Grievor failed to observe the required "degree of decorum and professionalism". The Grievor failed to meet that standard

by using the radio to make an unnecessary observation and by using profanity to do so. He is culpable for violating CROR Rule A (item ix) and Rule 122 and discipline was warranted.

[22] I am satisfied that during the Investigation, the Grievor was dishonest as he did not admit he used profanity. This failure to be accountable is a factor which is an aggravating circumstance for discipline.

[23] In this case, the Grievor was only assessed 10 demerits, not the 20 demerits assessed to the Grievor in **CROA 3921** for similar comments. The Grievor has multiple incidents of discipline on his record, even if only the last five years are considered. However, three instances of discipline issued between November of 2020 and January of 2021 are under Grievance at this *ad hoc* session.

[24] In all of the circumstances, I am satisfied that the assessment of 10 demerits was a just and reasonable disciplinary response for this incident.

[25] The Grievance is dismissed.

I remain seized to address any issues with the implementation of this Award and to correct any errors or omissions to give it the intended effect.

October 20, 2023



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**CHERYLYINGST BARTEL  
ARBITRATOR**