AH858

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 15, 2023 at Calgary, Alberta

DISPUTE:

Appeal of the 30 day suspension assessed to Conductor Darrel Kaczynski of Regina, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Kaczynski was assessed a 30 day suspension on November 3, 2020, for the following reason(s):

"In connection with your tour of duty on October 24, 2020 working KR11 LS and specifically failing to protect the point during a shoving movement and the subsequent run through switch in Regina yard. A violation of Rule Book for Train & Engine Employees – Section 12.6 (a) & (b) Shoving Equipment: Section 9.1 (a) Non-Main Track Other Than Non-Signaled Siding in CTC: and Section 14.1 (a) Fouling Other Tracks."

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 as the investigation contains self-incriminating and out of scope questions, specifically questions 25 and 32. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Kaczynski be made whole.

Alternatively, the Union contends the discipline assessed is unjustified, unwarranted, and excessive in all the circumstances, including mitigating factors evident in this matter including:

- Mr. Kaczynski was forthcoming and honest.
- Mr. Kaczynski believed he was properly lined based on the information provided by his crewmate Mr. Gutwin.
- Mr. Kaczynski was unable to activate the west end switching Point Protection Zone.
- Mr. Kaczynski believed the lead was seen or known to be clear.
- Mr. Kaczynski provided his commitment going forward to always be on the point of his movement unless otherwise properly protected.

It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

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 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. A plain read of the investigation confirms the Grievor's culpability was established and that the questions objected to were not leading, unfair, partial nor asked the Grievor to assume culpability. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

Regarding the Union's allegation that the discipline was excessive, the Company cannot agree with this allegation. Moreover, the Union supplied insufficient information in support of this allegation. It is not sufficient for the Union to simply state its position without supplying rationale, details or frankly any support for the allegations. The Grievance handling procedure requires sufficient information to be included in the grievance to be able to properly identify the issue and basis for an allegation. The lack of pertinent information renders the Company unable to properly respond. The Company reserves the right to object should the Union attempt to supply any additional arguments in support of this unsubstantiated allegation.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole".

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

FOR THE UNION:	FOR THE COMPANY:
Dave Fulton General Chairman TCRC CTY West	Lauren McGinley Asst. Director Labour Relations CPKC

May 24, 2023

Appearances:

For the Company:

A. Cake	Manager, Labour Relations
D. Zurbuchen	Manager, Labour Relations

For the Union:

E. Carr	Counsel, CaleyWray
B. Wiszniak	Local Chairperson
D. Edward	Vice General Chairperson, CTY-West
D. Fulton	General Chairperson, CTY-East
J. Hnatiuk	Vice General Chairperson, CTY-West
W. Zimmer	Local Chairperson
D. Kaczynksi	Grievor

AWARD OF THE ARBITRATOR

I – Background

[1] I was appointed to arbitrate this Grievance under a "Letter Re: Grievance Reduction Initiative & Article 41 Final Settlement of Disputes Without Work Stoppage (Arbitration)", dated March 21, 2022. By that letter, the parties agreed to both *Ad Hoc* Arbitration - similar to what is followed by the CROA&DR - and an Informal Expedited Arbitration process.

[2] This matter was heard under the *ad hoc* process.

[3] 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 in October of 2020, he had 32 years of service, with 15.5 of those years in the running trades.

[4] On October 24. 2020 the Grievor was working as the Yard Foreman in the Regina Yard. He was working with Mr. Gutwin, as a Yard Helper.

[5] The Grievor was in control of the RCLS movement on Track F9, traveling eastward toward F29 with five cars and was riding on the tail end. A run through occurred of an improperly lined switch.

[6] There is no dispute the run through occurred. What is disputed is what was the appropriate level of discipline for that event.

[7] After Investigation, the Company considered the Grievor had violated the Rule Book for Train & Engine Employees, Section 12.6 (a) & (b) Shoving Equipment: Section 9.1 (a) Non-Main Track Other Than Non-Signaled Siding in CTC: and Section 14.1 (a) Fouling Other Tracks for failing to protect the point.

[8] As it considered this to be a "major" violation under its Hybrid Discipline & Accountability Guidelines (the "Guidelines"), the Company imposed a 30 day suspension.

[9] For the reasons which follow, the discipline assessed was unwarranted and unreasonable. A disciplinary suspension of 20 days is substituted as a just and reasonable disciplinary response.

II –Facts

[10] When coming on shift, neither the Grievor nor Mr. Gutwin were aware of whether the switches would be lined for their work. The Grievor and Mr. Gutwin proceeded toward track F9.

[11] Mr. Gutwin detrained and walked the equipment in track 29 to prepare it to be lifted. He walked by switch F29 without lining it for the movement and proceeded to lock cars in F29.

[12] The Grievor took his locomotive west to track H2, tied onto 5 cars, locked the airbrakes, walked the equipment and removed the handbrake.

[13] While the Grievor was taking these actions, Mr. Gutwin made a radio communication to him that the F9 switch had been restored and that the Grievor was “lined up”.

[14] The Grievor explained he “assumed” that the F29 switch was also lined up – in addition to F9 - as a result of this conversation, because he was aware Mr. Gutwin had walked right past F29.

[15] This was a faulty assumption based on proximity and not fact. F29 was not lined up.

[16] The Grievor climbed on the last car and initiated the motion. He indicated he could see all switches from the tail end, except F29, because of the lead curves. He stated that when he realized the F29 switch was not aligned, he applied the emergency brakes. The run through occurred.

[17] The Grievor reported the incident. The crew kept working and finished their shift.

III - Arguments

[18] The Company maintained its discipline was just and reasonable and the Investigation was fair and impartial. It noted the Union only objected to two questions, neither of which was improper. It noted the Grievor had a pattern of acting on his own assumptions instead of seeking knowledge; that his discipline record was poor; that the safety critical nature of his role was an important aggravating factor in making the assumption which he did; that he has not shown remorse or accountability as he continued to justify his behaviour that he thought the switch was lined. It argued the event was a “major” event under its Guidelines.

It noted that Mr. Gutwin was not asked by the Grievor if the F29 switch was aligned and gave a more detailed incident report. It urged the Grievor had sole responsibility for the incident. It argued a 30 day suspension was the appropriate disciplinary response.

[19] The Union does not argue a "run through" of a switch occurred, but maintained the discipline was too severe and caused significant financial hardship for the Grievor. It also argued the Investigation was not fair or impartial, and that the Company cannot now rely on any arguments of a "near miss" or "life threatening" event, as that argument was not raised in the Grievance process or the JSI. It argued that Mr. Gutwin was not interviewed for the incident, resulting in discriminatory discipline. It urged that this was a "non-major" event and not the "major" event the Company argued, so should not have attracted a 30 day suspension. The Union maintained the Grievor reasonably rode the point, since he thought the switches were lined.

[20] The Company corrected that no "near miss" occurred. It acknowledged there was no derailment and no identification of damages from this run-through.

IV – Analysis and Decision

[21] An arbitrator must consider all relevant factors in determining if discipline is just and reasonable: *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. No. 98.

[22] I am satisfied the Investigation met the requirements of **CROA 2073.** The Investigation must provide to the Grievor an opportunity to know the accusations and identity of his accusers, as well as the evidence; and to be given a chance to provide rebuttal evidence in his own defence. The Grievor was not denied that opportunity when the transcript of the Investigation is viewed in its entirety.

[23] The Company relied on **CROA 4087**, which involved an assessment of 40 demerits for a run through switch, leading to discharge for accumulation. The Grievor in that case had a worse disciplinary record than the Grievor, having been discharged twice in four years of service (converted to lengthy suspensions). In that case, the arbitrator noted these issues with recividism and that even 30 demerits would have resulted in discharge, given the Grievor's record. He declined to interfere with the penalty. Those facts are also distinguishable.

[24] **CROA 4477** involved a short service employee of only 18 months; the Grievor has 33 years of service. That case is also distinguishable.

[25] The Company also relied on **CROA 4411B.** That case involved an assessment of 15 demerits and not a suspension. In that case, the Grievor claimed the switch was aligned.

[26] I can't agree with the Union that in that case it was found to be aggravating that the Grievor denied the run through even happened or took no corrective action. The short decision does not provide that much detail into the facts which were found. In that case, it was determined on a balance of probabilities that the Grievor ran through the switch. That is as far as that case goes.

[27] It is also difficult to compare cases of demerits with cases of suspensions. 15 demerits is half way to discharge under the Brown System, which makes it a significant penalty. A 30 day suspension is an even greater penalty, however, as it includes a serious financial impact.

[28] I am satisfied the Grievor took two actions in this case that led to this run-through. I am further satisfied that both actions resulted from incorrect assumptions he made, without confirming his information.

[29] First, the Grievor made an improper assumption from Mr. Gutwin's information that F29 was "lined up". This was an inappropriate assumption for the Grievor to make, since Mr. Gutwin had specifically mentioned the "F9" switch in his conversation and not the F29 switch.

[30] The Grievor should have confirmed that "all" switches were lined, and not just assumed - because Mr. Gutwin had walked by F29 - that he therefore had also aligned F29.

[31] Second, he rode on the tail end where he could not confirm for himself the state of the switches, until it was too late.

[32] I agree with the Company that the Grievor cannot rely on this poorly thought out assumption that "all" switches were lined - when Mr. Gutwin specifically referred to the F9 switch – and then build on that assumption to suggest it was appropriate for the Grievor to therefore ride the point.

[33] Both aspects were the Grievor's responsibility and not that of Mr. Gutwin. I do not find there was discriminatory discipline. As the Forman and the Conductor, Mr. Gutwin was held to a higher standard.

[34] He failed to protect the point.

[35] The Grievor's actions in failing to ensure the switches were properly lined and in inappropriately riding the point without that knowledge is culpable and significant misconduct.

[36] I disagree the Grievor tried to deflect blame. An individual is entitled to explain their reasoning for taking a particular action, even when that reasoning does not ultimately excuse the misconduct occurred or demonstrates carelessness. Insight and awareness into why that action was ultimately wrong is what is important in assessing accountability.

[37] Regarding the appropriate discipline, the Grievor is a long-serving employee, which is a mitigating factor. The Grievor did indicate in the Investigation that he would take steps to ensure switches are properly lined in the future.

[38] The Grievor's discipline record for his work performance prior to October 24, 2020 was poor. It included multiple suspensions (5 days for proficiency test failures in February of 2016; 5 day suspension in March of 2016; 14 day suspension in October of 2016; 20 Day suspension in August of 2017). The Grievor did see some improvement in 2018-2020, with only 10 demerits assessed for work performance issues in 2018 and none between that time and this 30 day suspension. While this record is poor, it does not demonstrate a level of recidivism as in the jurisprudence relied on by the Company.

[39] That said, this is not the first time making assumptions has led this Grievor into making mistakes. There is a pattern of this type of behaviour, which is aggravating, although not to the degree demonstrated in **CROA 4087**.

[40] When considering all of the factors – including the fact the Grievor's record had improved since 2018 - I agree with the Union that an assessment of a 30 day suspension for this misconduct was severe and unwarranted. I am inclined to exercise my discretion to reduce the disciplinary penalty in this case to a 20 day suspension.

[41] The Grievance is allowed, in part. The 30 day suspension is vacated and a 20 day suspension is substituted.

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

_____

CHERYL YINGST BARTEL
ARBITRATOR