

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**TEAMSTERS CANADA RAIL CONFERENCE**

(the "Union")

- and -

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

(the "Company")

**JOINT STATEMENT OF ISSUE**

**DISPUTE:**

Appeal of the 30 Demerits and subsequent dismissal of Conductor Darrell Kaczynski of Regina, SK.

**JOINT STATEMENT OF ISSUE:**

Following an investigation Mr. Kaczynski was assessed 30 Demerits on October 22, 2021, for the following, "In connection with your tour of duty on Yard Assignment KR12 on September 25, 2021, while working as the Conductor, in Regina yard and failing to use proper radio positive identification communication while switching cars. A violation of CP Rule Book for Train & Engine Employees, Section 4.4 Positive Identification and Section 12.4 Switching by Radio."

Mr. Kaczynski was subsequently dismissed for "an accumulation of demerits under the Hybrid Discipline and Accountability Guidelines."

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:

- Question 18 was self-incriminating.
- Question 19 was outside the scope of the investigation.
- Question 17 was speculative.

For these reasons, the Union contends that the discipline is null and void and 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 discriminatory, arbitrary, unwarranted, and excessive in all the circumstances, including mitigating factors evident in this matter including the following:

- Manager Trainee Cole Coroy confirmed the crew only used names on the radio when the movement was stopped, crew safety was never at risk, and the crew maintained a clear understanding of what was occurring and the tasks to be completed.
- The Crew maintained a clear understanding through job briefings to ensure safe operations.
- Train ID was always used prior to movement being initiated.

It is the Union's position the Company specifically targeted Mr. Kaczynski, and his dismissal is a result of these discriminatory actions.

The Union submits the Company has engaged in the unreasonable application of the Efficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union submits that Mr. Kaczynski was wrongfully held from service in connection with this matter, contrary to Article 39.06 of the Collective Agreement.

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 be reinstated without loss of seniority and benefits and be 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 and his subsequent dismissal 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.

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".

FOR THE UNION:



For

---

Dave Fulton  
General Chairman  
TCRC CTY West

### Appearances:

#### For the Company:

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

FOR THE COMPANY:



For

---

Lauren McGinley  
Asst. Director, Labour Relations  
CPKC Railway

#### For the Union:

K. Steubing, Caleywray, Counsel  
B. Wiszniak, Local Chairperson  
D. Fulton, General Chairperson, CTY-East  
W. Zimmer, Local Chairperson  
D. Kaczynski, Grievor

## **AWARD OF THE ARBITRATOR**

### **I – Background and Finding**

- [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, he was working as a Conductor.
- [4] At the time of this incident in September of 2021, the Grievor had 33 years of service, with 16.5 of those years in the running trades.
- [5] This is one of five grievances heard at the same time, for misconduct which occurred in the space of one year. The other grievances have been decided as **AH 856** (10 demerits upheld as reasonable; incident in December of 2020); **AH 857** (20 demerits upheld as reasonable; incident in January of 2021); **AH 858** (30 day suspension vacated and 20 day suspension substituted; incident in October of 2020). **AH 859** was for an incident which took place on the same day as the incident at issue in this grievance.
- [6] In **AH 859**, the assessment of 30 demerits was upheld as an appropriate and warranted disciplinary response for the Grievor leaving loaded propane cars without handbrakes and for not providing an accurate recap of his work to the Trainmaster.
- [7] In the year of these events, the Grievor had 30 demerits from **AH 856** and **AH 857** when combined together; 30 demerits from the incident grieved in **AH 859** and a deferred 30 demerits issued just two weeks previously, that was triggered by the misconduct of **AH 859**. That discipline was substituted for dismissal, acknowledged by the Grievor and unable to be grieved.
- [8] Therefore, after **AH 859** was upheld, the Grievor had 90 demerits, which was well over the 60 that triggers dismissal under the Brown System. Dismissal was upheld

in **AH 859** and would be the result, *even if* the demerits issued by this decision are vacated.

- [9] This decision does not therefore impact the result that the dismissal of the Grievor is upheld. The appropriateness of the discipline will, however, be assessed, in case I am found to be incorrect in any of the previous assessments.
- [10] For the reasons which follow, the Grievance is allowed.
- [11] I am satisfied that the Company has not established this was an appropriate circumstance for the imposition of discipline for this efficiency test failure. The evidence is that the Grievor was coached by the Superintendent and the Assistant Superintendent. I am satisfied that a coaching conversation – to remind the Grievor of the requirements when using the radio – was a sufficient response in the circumstances of this case.

### **Facts**

- [12] It is accepted that the work of a Conductor is to ensure the safe operation of the train and that this role is considered as ‘safety critical’ in this industry. It is also accepted that proper radio communication is part of ensuring that safety.
- [13] The Rule Book for Train and Engine Employees – Section 4, Item 4.4 Positive Identification requires both parties to a radio communication to “positively establish the identity of the other person”. Employees are to be identified by their “occupation and name...” There is also provision for the identification of engines, trains and transfers and movements.
- [14] Section b of Item 4.4 states: “When initiating the communication with a person, you must start the communication with the initials of the company for which the person works”. Section c states that the person initiating the communication must end with “OVER”. Each part to a communication is also to end their final transmission with the spoken word “OUT”. There is an example in the Rule Book of proper communication: “*CP Foreman Pete Pepindosky, this is 5834 West, OVER*”.
- [15] On September 25, 2021, the Grievor was working as a Conductor in the Regina Yard. The Company alleged the Grievor on that shift did not comply with the requirements for proper radio communication, which failure was witnessed by Superintendent Smith and Assistant Trainmaster Raj.

[16] Superintendent Smith wrote a Memorandum regarding what he heard. The Company noted the Grievor did not contest the validity of that Memorandum.

[17] Superintendent Smith stated:

On Saturday September 25, 2021 I was in Regina Efficiency testing with Regina ATM Gowtham Raj. We were at the east end of the Yard listening to the 0800 Regina yard crew work. I witnessed radio communication that was not per the rule. Specifically, the foreman on the job [the Grievor] stated “Brady stopping”; “opening the knuckle” and “going ahead Brady”. We stopped the movement when they pulled from the track and reviewed the rule with them about distance, direction and designation. ..

[18] The Assistant Trainmaster indicated that they heard “Foreman Darrell Kaczynski not using proper radio communication. He indicated that they stopped the crew and talked about failure to comply with proper radio procedures. The Company noted the Grievor did not deny these rules and was well aware of these requirements.

[19] For his part, the Grievor stated that he had identified himself on his initial interaction that day so did not consider he was required to identify himself with each interaction. The Union noted that the Grievor had also explained that names were being used as between himself and Yard Helper Gutwin, as the radio calls were “not in connection with the actual movement of their RCLS locomotive consist” and that the Grievor was complying with RCLS Rule 1.10, which provides that:

Verbal communication between crew members relating to the nature of RCLS operation and a thorough understanding of all movements and intentions must be maintained at all times.

[20] It was argued that the Grievor did not understand that he had to use engine number or assignment ID when performing job briefings vs. controlling movements.

### **Analysis and Decision**

[21] I accept that RCLS Rule 1.10 does not over-ride or replace the requirement of Section 4, Item 4.4 “Positive Identification”. I am satisfied that with *every* interaction, proper radio procedure requires appropriate identification.

[22] Whether the movement was stopped or not, I am satisfied the crew were to comply with Section 4 of the Rule Book for Train & Engine Employees regarding radio communication.

- [23] However, I am not satisfied the Company has established just cause for the discipline.
- [24] It was acknowledged by the Company that the Company Officers were conducting an “Efficiency Test” by listening to the radio communication.
- [25] The Company must conduct efficiency tests. There is disagreement between the parties on whether disciplinary responses should follow.
- [26] The *Canada Efficiency Test Codes and Descriptions for Train & Engine Employees* - which is reproduced in the Company’s document “Proficiency Test Codes and Descriptions for Train & Engine Employees” - states:

An efficiency 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 rule compliance and to isolate areas of non-compliance for immediate corrective action. Efficiency 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.*<sup>1</sup>

- [27] There has been very little guidance given to the parties in this industry on if – and when – discipline can – or should - result from efficiency tests.
- [28] I am prepared to accept that discipline is not foreclosed just because the issue was discovered through an “efficiency test”.
- [29] The purpose of an efficiency test must be kept in mind – it is to “isolate areas of non-compliance for immediate corrective action”.
- [30] Education and mentoring are accepted to be appropriate responses, *as well as discipline*, in an appropriate case. The requirement noted above recognizes that discipline may be the “corrective action required”.
- [31] I am prepared to accept that whether or not a disciplinary response is appropriate for failure of an efficiency test should depend on the “frequency, severity and the employee’s work history”.

---

<sup>1</sup> Emphasis added.

- [32] For example, if an individual has been subject to multiple efficiency tests and keeps making the same error, that may suggest that education and mentoring is not having the desired result and that a disciplinary response is appropriate.
- [33] Or, if there are significant safety issues that result from a failed efficiency test, that may make that failure more “severe” and so justify a disciplinary response to bring home the importance of that rule.
- [34] It must also be emphasized, however, that efficiency tests are “planned procedures” under this definition.
- [35] A Company official who happens to see a breach of a rule, or misconduct, as they are looking at the yard, or going about their day, is not thereby conducting an “efficiency test”. The witnessing of that misconduct is not the result of a “planned procedure to evaluate compliance with rules”. Any discipline that results from *that* misconduct, would not be an “efficiency test” failure, and so would not be subject to the standard where the “frequency, severity, and the employee’s work history” are the relevant factors to consider.
- [36] In this case, while the Grievor did not have a good work history, there was no evidence that he had frequent issues relating to radio communication, which were not successfully addressed through education or mentoring.
- [37] There was also no evidence of the severity of the issue - for example that multiple crews were in the yard and were confused and that safety issues therefore resulted.
- [38] In fact, an email from a management trainee states that the “safety of the crew was not in jeopardy”.
- [39] The Company argued that a previous incident – which occurred two weeks before the incident addressed in this Grievance – was a significant part of the disciplinary history of the Grievor and that this incident was “culminating” and warranted a more severe disciplinary response.
- [40] It argued the Grievor was aware at that point that any incident could “put him over the edge” for dismissal, under the Brown System.
- [41] The concept of a “culminating incident” at law recognizes that an incident – standing alone – may not warrant a certain level of discipline, but that misconduct can



represent a “culminating act”, which, when combined with the prior disciplinary record, justifies a more significant disciplinary response.<sup>2</sup>

[42] For that concept to apply, however, a further incident of “misconduct” must occur.

[43] I do not find that “misconduct” worthy of discipline occurred in this case.

[44] I am satisfied that this is not an appropriate case for discipline for failure of an efficiency test, so that “misconduct” warranting a disciplinary response, did not occur.

[45] The Grievor was coached about the need for proper radio communication. That was a sufficient response to the conduct which was witnessed.

[46] In view of this finding, it is not necessary to address any alleged issues with the Investigation process.

I retain jurisdiction to address any issues with the implement of this Award or to correct any errors or omissions to give it the intended effect.

October 20, 2023

A handwritten signature in blue ink, appearing to read "Cheryl Yingst Bartel".

**CHERYL YINGST BARTEL  
ARBITRATOR**

---

<sup>2</sup> Labour Arbitration in Canada, Mitchnick and Etherington; 3d edition; p. 252