

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the Union”)

- and -

CANADIAN PACIFIC RAILWAY COMPANY

(the “Company”)

DISPUTE:

Appeal of the 45-day suspension assessed to Conductor Dino D’Ulisse of Calgary, AB.

JOINT STATEMENT OF ISSUE:

Following a fair and impartial investigation Mr. D’Ulisse was issued a 45-day suspension, which was described as “Your tour of duty on September 22, 2019 while working as the Yard Foreman on Assignment AO21-22 and the incident surrounding the bypassed couplers resulting in a one car derailment; a violation of T&E Safety Rule Book T-6 and T&E Rule Book Sections 2.2 and 12.5.”

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

UNION POSITION

The Union contends the Company has failed to meet the burden of proof or establish culpability with respect to T&E Rule Book Section 2.2 and T&E Safety Rule Book T-6 and T-12. The Union further contends the penalty is unjustified, unwarranted, and excessive including Mr. D’Ulisse’s honesty and intent to stop the movement.

The Union requests that the discipline be removed in its entirety, and that Mr. D’Ulisse 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 was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent

factors.

Whether the Grievor intended on the violation or not, it does not lessen the Grievor's culpability and should not be considered as mitigating. There is no evidence, nor was any requested by the Union or the Grievor, which supports the Union's contention that there was an issue with brakes on the locomotive. Moreover, after the couplers had bypassed, the Grievor continued to operate his movement resulting in damage to the track and one car to derail.

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 and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

FOR THE COMPANY:



for Dave Fulton
General Chairman
TCRC CTY West



Chris Clark
Manager Labour Relations
Canadian Pacific Railway

September 26, 2022

Hearing: October 19, 2022

APPEARANCES

FOR THE UNION:

Michael Church, Counsel, Caley Wray
Dave Fulton, GC CTY West
Doug Edward, VGC CTY West
Ryan Finsson, VGC CTY West
Trent Haug - Local Chairman - Calgary
Dino D'Ulisse - Grievor

FOR THE COMPANY:

Chris Clark, Manager Labour Relations
Elliot Allen, Labour Relations Officer
Lauren McGinley, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

1. This is an Ad Hoc Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

2. The Grievor first entered Company service on May 4, 1992 as an engineering employee and subsequently resigned in February 1997. He returned to CP Rail on October 9, 2007 where he worked out of the Calgary Terminal as a Conductor until his dismissal on August 17, 2020.

3. The facts leading up to the incident are not in question. On September 22, 2019, the Grievor began work at 1530 as the Yard Foreman on Remote Control Locomotive Service (RCLS) assignment A021-22 with RCLS Conductor Paul Cole. The Grievor was an experienced RCL operator having completed his RCLS training and qualification in October 2015. The September shift in question was his 154th tour of duty of the year, all of which were in (RCL) service. The term "remotely controlled locomotives" refers to a locomotive which, through use of a radio transmitter and receiver system, can be operated by a person not physically located at the controls within the confines of the locomotive cab. RCL operators can work from the ground, controlling the movements via a hand-operated transmitter or "control box".

4. While working at Ogden Park, the Grievor and his crewmate Conductor Cole were switching a track of cars in order to build their train. Conductor Cole was in control of the RCL and attempted to kick a car into a track. However, the car stalled, remaining foul of the lead. The Grievor took control of the RCL and he attempted to make a joint on the car that was foul in order to shove it into the clear. The movement failed to stop short of making the joint resulting in the bypassed couplers.

COMPANY POSITION

5. The Company submits that the result of the failure to stop the movement prior to the joint on the non-tangent track, were bypassed couplers. This meant that the railcars had not only made contact with each other but were basically fused together. Seeing that the attempt to couple the cars had failed, the Grievor then attempted to uncouple them by pulling the cars apart. This did not work. With the cars still intact, couplers bypassed, the Grievor attempted to shove the car into the track through the curve while the cars were still intact, couplers bypassed and not properly secure.

6. CP argues that the force applied from the shoving move in conjunction with bypassed couplers forced the rail to roll and caused the railcar to derail. The incident resulted in damage to not only the railcars but also to the track. The rail roll resulted in damage to approximately 80 feet of track. When the Grievor realized a car had derailed and the damage the track, he reported the incident to the on-duty Trainmaster.

7. The Company maintains that the Grievor was conversant with all applicable Canadian Railway Operating Rules (CROR), Special Instructions and General Operating Instructions (GOI) and, more importantly, all Company Policies. The Grievor regularly completes his rules recertification courses as required.

8. CP says, stopping prior to attempting to make the joint, is not only necessary to ensure the drawbars are properly lined up for a successful coupling, but is also a procedure prescribed by rule. The investigation confirmed that the Grievor understood the proper procedures but for reasons only he knows, chose not follow them.

9. The Company maintains that incident was completely avoidable. Rather than take the safest course of action, the Grievor cut corners, was negligent, choosing to ignore simple rules. The Company maintains that the Grievor knew and understood the work location and ought to have been more vigilant when handling his train. The Grievor acknowledged in his investigation that he did not stop his movement in time prior to coupling the cars. The Company submits that the investigation confirmed the Grievor failed to abide by the following rules as outlined in the Rule Book for T&E Employees:

Rule T- 6 Coupling / Uncoupling:

1. Before coupling cars:
 - If riding equipment prior to coupling, detrain (if riding a locomotive, you are exempt from detraining); and
 - **Ensure couplers are aligned** and that at least one knuckle is open.

Rule 12.5 Coupling to Equipment:

(b) equipment on other than tangent track, a stop must be made not less than 6 nor greater than 12 feet from the coupling and extreme caution must then be used, ensuring couplers are properly aligned prior to coupling being made.

Section 2 – 2.2 While on Duty:

2. 2 WHILE ON DUTY

(x) communicate as quickly as possible to the proper authority any condition which may affect the safe operation of a movement and be alert to the company's interest and join forces to protect it;

10. The Company submits that a review of the Grievor's record and the guidelines demonstrates that as a result of the incident being his second Major Rule Infraction in less than a 12-month period the consequential next step was up to and including a 45-day suspension and or dismissal. It says the Grievor ought to have known after the issuance of his 20-day suspension for his role in the May 2019 main track authority incident that any subsequent incident could result in another significant suspension or even his termination. In lieu of dismissal however, the Company maintains it leniently opted to issue a 45-day suspension in an effort to change the Grievor's behaviour.

UNION POSITION

11. The Union argues that considering this incident as a major violation is an exaggeration. It says that it is clear the Grievor had full intentions of braking and attempted to brake, but the brake did not work as he expected. Once the bypass occurred and would not release, he made his

best effort to be productive and rectify the situation given the circumstances. Unfortunately, the unintentional derailment resulted despite his best efforts.

12. The Union argues that bypassed couplers are a common occurrence, which can be made worse by the type of coupler. The problem was the RCL brakes were not functioning properly and did not stop the movement as it should have. The Union submits that the Company has failed to establish that Mr. D'Ulisse violated either T&E Rule T-6 or T&E Rule 12.5. It says the Grievor consistently and repeatedly stated that he attempted to apply the brakes to check on alignment. The Grievor noted that upon attempting to brake, the locomotive did not stop as expected. He made numerous unchallenged statements to this effect, including in his initial Incident Report, in which he stated: "I tried to stop with enough time before making joint but wasn't successful."

13. The Union argues that, Mr. D'Ulisse's uncontested evidence is that he made every attempt to follow the rules, but was unable to brake because the brakes were not working as expected. The Company has not presented any evidence to the contrary. Given the Grievor's contentions, it would have been in the Company's interest to have supplied the locomotive download. The Company bore the responsibility to refute Mr. D'Ulisse's evidence. Otherwise, Mr. D'Ulisse's evidence ought to be accepted. The Union maintains that the Locomotive download which could have demonstrated the problem was not provided at the investigation.

14. The Union argues that the Grievor did not receive a fair and impartial investigation. The Union relies on CROA Case No. 1677, 3999, 3671, 4341, and 4466.

15. In support of its decision, the Company relies on *William Scott & Co. v. C.F.A.W., Local P-162* (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B); *Steel Equipment Co. Ltd.* (1964) 14 L.A.C.; *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009 CanLII 31586 (ON LRB); SHP 595; CROA 4539, and 4457.

ANALYSIS AND DECISION

16. Article 39 – investigation & Discipline provides:

39.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.

1. The notification shall be provided not less than two days prior to the scheduled time for the investigation unless arrangements for a shorter notification time have been made between the Company Officer and the employee being investigated or the accredited representative of the Union.
2. The notification shall include advice to the employee of their right to request witnesses on their own behalf. If the Company is agreeable and the witness is a Company employee, the witness will be at the Company's expense. If the Company is agreeable and the witness is not a Company employee, it will be at the Union's expense. The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility. Upon request, the Company shall confirm to the employee whether or not technical evidence, such as Q-Tron tapes, will be used at an

investigation in order that they might arrange for a qualified accredited representative. The employee and their representative will be allowed time to study this evidence as well as any other evidence to be introduced at the commencement of the investigation. Should any new facts come to light during the course of the investigation, this will be investigated and, if necessary, further memoranda would be placed into evidence during the course of the investigation.

17. The Union argues that regarding this as a major incident is an exaggeration. Bypassed couplers are a common occurrence and that the RCL brakes were the problem. It says the Grievor and his Union Representative requested all evidence but were not provided with the engine download which could have resolved the dispute.

18. I find that a claim of engine braking problems is a serious claim and should be addressed. The Company claims no concerns were raised by the Grievor or Union regarding engine brake failure at the time or after the incident. The Grievor and his representative were asked during the investigation if they had any evidence or witnesses:

Q 11- Do you have any appendices, evidence or witnesses that you would like to bring forward that pertains to this investigation?

A 11 - No

19. During the investigation, the Grievor was asked what happened and stated:

Q - 17: In regards to our answer in the previous question, in your own words please explain what incident took place on -September 22nd 2019?

A -17: I was working with Paul Cole at Ogden Park. We were switching some tracks and kicking cars to build our drag. Paul was in control of the movement and kicked a car towards OP9. The car didn't make it as far as I had hoped and was sitting partly on the lead and partly in OP9. I then asked Paul to head into OP4 and grab 4 cars. Paul tied on to the cars and proceeded westward over the OPJ-5 lead switch. Paul pitched to me then I started the movement eastward towards OP9 planning to stop short of the joint to make sure the drawbars were lined up. As I brought the movement eastward I noticed we weren't slowing down as I used the speed selector to slow down the movement. When I was approximately 3 cars away I placed the RCLS speed selector to stop. I was attempting to stop to make sure the couplers aligned. **I think this was the first move I had that night operating the locomotive with cars attached and did not know how it reacted when braking. Emphasis Added**

Q 33- Referencing your answer to question 30, did you attempt to communicate to the manager on duty when you could not separate the couplers by stretching.

A 33-No

Q 34 - Looking back at this incident, would you do anything differently & if so, please explain?

A34: Yes, Looking back at the incident I will take the proper steps before an incident occurs.

20. I find no evidence that the engine download was requested at the investigation to support any braking issue. Conductor Cole, the Grievor's co-worker, had also been in control of the locomotive during the shift but did not claim any braking issues. Nor was he called as a witness to support the Union's contentions regarding braking issues. Conductor Cole accepted responsibility for his role as Conductor and was assessed discipline. Neither the Grievor or Conductor requested that the engine be inspected for brake deficiencies. The Union did not provide any evidence that braking issues were raised regarding the engine brakes by any other crews or at Safety meetings. The first suggestion by the Union that the engine brakes were not working properly was at Step 2 of the grievance process.

21. The only braking related issue claimed by the Grievor was that he did not know how it reacted when braking. He did not claim they were the fault of the incident. I find the Grievor is an experienced RCLS operator yet did not immediately reduce the speed of the movement to coupling speed when he took it over from the Conductor. He said it was his first move of the shift yet made no attempt to determine how the brakes would react immediately upon assuming control. The Grievor did not accept responsibility for the incident. He had also recently received another suspension.

22. I find the comments of Arbitrator Hornung in CROA 4539 on point in upholding the dismissal where he stated:

While it was clear that the Grievor was experienced, his lack of attention and lapse of judgment - factors which he controlled - caused the incident which should reasonably have been avoided. In the circumstances, and in the absence of a satisfactory explanation negating his responsibility, his lack of care is culpable and warrants discipline.

23. Further in CROA 4539 Arbitrator also addressed the issue of evidence to be provided at an investigation which is also applicable in this case stating:

I accept the principle in CROA 3221 that a failure to conduct a fair and impartial investigation results in any ensuing discipline being declared null and void. However, the Grievor's investigation was neither unfair or impartial [sic] as the Union suggests. The Company is required to investigate the incident and to make the Grievor aware of the evidence on which it relies; and, to provide him with any documents with respect to the same.

24. In view of all of the facts and circumstances of this case and keeping with the principle of progressive discipline, I find that the discipline assessed was within the reasonable range.

25. The grievance is dismissed.

Dated this 23rd, day of December, 2022.



Tom Hodges

Arbitrator