

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE
(the Union”)

- and -

CANADIAN PACIFIC RAILWAY COMPANY
(the “Company”)

DISPUTE:

Appeal of the 60-day suspension assessed to Conductor Dino D’Ulisse of Calgary, AB.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. D’Ulisse was assessed a 60-day suspension which was described as “A formal investigation was held in connection with "Your tour of duty on assignment AO21-16 on December 16, 2019, and your subsequent derailment at T14 EVRAZ."

The investigation confirmed that you were positioned without a control box between equipment and your trainee, and that you were in violation of the following rules:

- Rule Book for Train & Engine Employees Section 12.6 (a),(i)
- Rule Book for Train & Engine Employees Section 2.2 (a)
- Rule Book for Train & Engine Employees General Rule (b)
- Rule Book for Train & Engine Employees General Rule (xii)

Additionally, upon return from suspension, you will be required to participate in any additional rules requalification or training, which the Company may require.”

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 as evidenced by Mr. Voytchek’s memo being refuted and assessing guilt prior to the statement and Q&A 17 and 20 of the supplemental investigation.

The Union contends the Company has failed to meet the burden of proof or establish culpability for a violation of Rule Book for Train & Engine Employees Section 12.6 (a), (i), Section 2.2 (a), General Rule (b), or General Rule (xii). In the alternative, the Union contends the discipline assessed is unjustified, unwarranted, and excessive including significant mitigating factors listed in the Union’s grievances as;

Thorough job briefings performed

Familiarity with the customer facility and resulting instructions provided to RCLS Trainee

Compliance with T&E Rule 12.6, with the track being seen as clear

Made every attempt to stop the movement with means available.

Lack of RCLS Coach training provided to Mr. D'Ulisse, and no instructions provided regarding the required vicinity to trainees

The Union requests that the discipline be removed in its entirety, and that Mr. D'Ulisse is made whole for all lost wages and benefits plus 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.

The Union submits the discipline assessed be excessive, yet, again advances no rationale as to how or why. 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 Dave Fulton
General Chairman
TCRC CTY West
September 26, 2022

FOR THE COMPANY:



Chris Clark
Manager Labour Relations
Canadian Pacific Railway

Hearing: October 19, 2022 via videoconference

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. On December 16, 2019, the Grievor was ordered as the Remote Control Locomotive Service (RCLS) Foreman on assignment A021-16 with Yard Helper Shivang Purohi. Also forming part of the crew was Conductor trainee Josh Engelhardt and trainee, Josh Bellemore. The Grievor was assigned as coach to RCLS trainee Bellemore, while Yard Helper Purohi was responsible for Conductor trainee Engelhardt.

3. On that day, one of the tasks for the crew of the A021-16 was to service the customer facility EVRAZ. EVRAZ is a supplier to the North American energy market specializing in oil and gas products. While servicing the customer, the crew shoved a car over the end of track stop block resulting in the derailment of the car. The derailment prevented the assignment from completing the spot at EVRAZ and prevented other customer service requirements from being fulfilled as well as damage to the track, stop blocks and the derailed rail car.

4. As a result of the incident, the crew of the A021-16 was subject to post incident drug & alcohol testing. All crew members passed those tests.

COMPANY POSITION

5. The Company maintains that the investigation which followed established errors of the Grievor:

- i. He did not properly monitor the speed selection of his trainee;
- ii. He acknowledged that the territory they were working on was challenging for RCLS movements, therefore extra care was required;
- iii. He and his trainee determined it was unnecessary to ride the point to the end of the track because of it being short in length;
- iv. He acknowledged that he and the trainee were culpable for shoving too far and too fast;
- v. He acknowledged he should have had his own “control box” providing for final control of the movements;
- vi. He could have placed the train in emergency quickly and avoided the incident all together; and
- vii. He acknowledged the trainee was not at arm’s length as he should be as per CP’s approved coaching techniques.

6. The Company also took a statement from RLCS trainee Bellemore. CP maintains that his statement confirmed the following:

- i. Trainee Bellemore had never been to that particular customer facility (EVRAZ) either as a conductor or as a RCLS trainee;
- ii. Trainee Bellemore and the Grievor conducted a job briefing on the work to be performed.
- iii. The Grievor explained that the track fit 12 cars and they had 10 cars to spot;
- iv. Neither he, nor the Grievor were on the point of the shoving move;
- v. The Grievor did not remain close enough to the Trainee to take appropriate action if necessary.
- vi. The Grievor was actually across from his trainee on the opposite side of the movement and on the other side of the track.
- vii. He misunderstood the number of cars that fit into the customer's track.

7. The Company submits that the Grievor had an extensive background in all applicable Canadian Railway Operating Rules (CROR), Special Instructions and General Operating Instructions (GOI) and more importantly all Company Policies. It says the Grievor was also a qualified coach and trainer of new hires and RCLS trainees. The Grievor completed specific coaching clinic programs in 2007 and 2009. As a coach, the Grievor was paid a coaching premium to ensure inexperienced employees get appropriate help during the on-the-job-training (OJT) experience.

8. CP maintains that a Coach is expected to provide active guidance, ensuring the trainee is performing the tasks as required. CP submits that an effective coach is not only expected to maintain a positive attitude and atmosphere as well as clarify performance expectations, but they must model safe and efficient work practices. On the job training must include best practice techniques, special local instructions or customer specific requirements, if any, as well as an explanation of the different operating characteristics such as track grades and lengths, track ID's and/or any other applicable special instructions.

9. The Company relies on CROA cases 4636; 4592; 4455; 3606; and 4674 in support of its decision to dismiss the Grievor.

UNION POSITION

10. The Union contends that the investigation was not conducted in a fair and impartial manner as evidenced by Mr. Voytchek's memo being refuted and assessing guilt prior to the statement and during the supplemental investigation. Assistant Superintendent Keith Voyteck issued a memo to file regarding the events of December 16, 2019. Mr. Voyteck's memo essentially blames Mr. D'Ulisse for the incident, despite the fact that a Notice of Investigation had not yet been issued:

At approximately 21:45-16 while spotting the customer "Evrax: T14" the assignment A021-16 shoved a single car, two wheels over the stop blocks at the end of track, resulting in a single car derailment. The crew was not in a position on the point while shoving the movement into the track to spot but rather, Mr. D'ulisse and Beltpack trainee Mr. Bellemore situated themselves at the fouling point of track T14 while shoving ten (10) loaded cars into the

customer track. The reasoning provided for this move was that the track holds 10 cars so they could just shove until the cars were at the fouling point and then they would know the cars were on spot. Mr. D'ulisse, having a trainee with him whom had never been to the customer facility before should have, and needs to, provide the coaching to show Mr. Bellemore the entire facility and the right way to do things. Not take shortcuts. Through discussion with the crew it was delivered and understood that they need to ensure that, especially with a new trainee at a new facility, that they never take shortcuts and that they do the right thing. In this case it would have been to be in a position with the cars to physically see the end of track and spot the customer correctly and safely. Not to be at the fouling point of a track, shoving to spot from 10 car lengths away.

11. The Union, in its submissions maintains that the crew was switching at EVRAZ and shoving 10 cars to spot in track T-1401 in a very well-lit area. The track holds 12 cars, and was seen and known to be clear. It says there was no requirement under the circumstances to ride the point.

12. The Union maintains that Mr. Purohit and Mr. Bellmore were on the locomotive end of the movement protecting the crossing, while Mr. D'Ulisse and Mr. Engelhardt were at the fouling point of track. Mr. Bellemore was controlling the shove movement and was in possession of the OCU RCLS control box. Due to the abnormal amount of crew members, Mr. D'Ulisse did not have possession of an OCU RCLS control box. Mr. D'Ulisse instructed Mr. Bellemore to shove the movement into the track at coupling speed with a light brake set and the movement commenced westward. Mr. Bellemore did not set the brake as instructed. Mr. D'Ulisse noted the speed and radioed the crew to put the movement into emergency six times prior to reaching the end of track before Mr. Purohit finally took action, and with no response from Mr. Bellemore. One set of wheels went over the stop blocks and derailed on the leading car.

13. The Union submits that the locomotive download later revealed that Mr. Bellmore was still in speed selector 4 until only nine seconds before the emergency brake was applied by Mr. Purohit. At this time, Mr. Bellmore throttled down to coupling speed, but did not have the automatic brake applied. In fact, there was no automatic brake applied until Mr. Purohit places the movement into emergency. The download shows that Mr. D'Ulisse's instructions were not followed.

14. The Union submits that the 60-day suspension of Mr. D'Ulisse is unjustified, excessive, and unwarranted. It requests that the grievance be allowed in full, the discipline be removed in its entirety, and that Mr. D'Ulisse be made whole for all losses with interest. In the alternative, and without prejudice, the Union submits that the penalty ought to be replaced with a written warning, and Mr. D'Ulisse be made whole for all losses with interest.

15. The Union relies on CROA Case No. 2934; 3952; 4466, 1677; 4710, 690, 3581, 3581; 4387; and AH710.

ANALYSIS AND DECISION

16. The Union argues that the Grievor did not receive a fair and impartial investigation as a result of a memo submitted for Assistant Superintendent Keith Voytechek regarding the events

of December 16, 2019 and his discussions with the crew immediately following the incident. The Union claims that his incident memo was biased. The Grievor and the other crew members had also submitted incident reports immediately following the incident.

17. Mr. Voytechek did not conduct the investigations. The investigation was conducted by Road Foreman Grant Duncan. The investigating officer gave the Grievor the opportunity to rebut Mr. Voytechek's memo.

18. In setting out the facts the Union maintained that the crew was switching at Evraz and shoving 10 cars to spot in track T-1401 in a very well-lit area. The track holds 12 cars, and was seen and known to be clear. I find in this case that crew members knowledge and understanding of track capacity is an essential fact. The Grievor had stated in his incident report that he informed the crew that the track held 11 cars. In his initial statement he indicated that the length of track T1401 is approximately 11-12 car lengths. When questioned regarding the understanding of crew members he stated:

Q18: When you said that 12 cars fit in T1401, in fact only 10 cars fit from the fouling point to the end of track, is this correct?

A: No incorrect, I have spotted 11 cars previously.

Q19: During your job briefing do you recall instructing trainee Bellemore that 12 cars fit into T1401 when in fact only 10 or 11 cars fit?

A: I told him there was room for 12. There was room for 11 but you can spot 12 but you have to leave 1 foul of the next track. That's where the miscommunication likely happened.

19. The Union submitted as fact that the track held 12 cars. However, the evidence established that what was told to the crew was far from clear. The Grievor clearly stated that the track held 12 with 1 car left foul. The Grievor also stated that it was a miscommunication. I find that one car left foul is a track full with one car left foul. Stating there is room for 12 is an error. The move he communicated was done while he was on the opposite side of the track from the crew controlling the movement, also a clear error given his miscommunication.

20. The Grievor had told RCLS Trainee Josh Bellemore, in control of the locomotive, that the track fit 12 cars and they had a hold of 10 cars. There was still plenty of room to spot 10 cars in a track that holds 12 cars. He also stated incorrectly that it was not Josh Bellemore's first time at the customer facility either. To his understanding the Trainee had been there previously but not on an RCLS assignment.

21. During Trainee Josh Belmore's statement, his Union representative refuted the Grievor's assertions regarding the capacity of the track. Trainee Belmore refuted the Grievor's statements regarding his experience at the customer's facility providing:

Q-8 Do you wish to comment on or refute any evidence contained in these documents?

A Yes, in Dino's statement where he said that I had been to and spotted Evraz in the past. I had never been there before either as a conductor or RCLS operator.

Q-26 Do you now realize after reviewing the download that in fact you did not have a light brake applied with 4-5 cars left to the end of track?

Union objection: Unfair question, as per his answer he did put a brake in as he thought he had more room to the end of track as he was informed by Dino.

Company Officer: Duly noted

A-26 I was under the impression that 12 cars fit from the fouling point to the end of track as I was told by Dino. In fact, only 10 cars fit from the fouling point to the end of track. The reason I put the brake in when I did was that I thought I had 4-5 cars left to the end of track as instructed. 12 cars of room is actually from the crossing which if spotted there you are 2 cars foul of T1401.

Q27 Have you ever spotted this facility by yourself as an RCLS operator in the past?

A-27 No, not as a CP employee ever. I had never seen this customer before.

22. The Union points me to the findings of Arbitrator Picher in CROA 2934 regarding the obligation of an investigating officer for ensuring a fair and impartial investigation stating:

Secondly, it is difficult to view the comments made by the investigating officer, who by his own account on at least one occasion accused the grievor of lying, and threatened to continue the investigation until midnight if necessary, to get the facts, as complying with the standards of a fair and impartial investigation. Obviously, an investigating officer may well have an opinion about the answers provided by an employee, and should be given some latitude to probe unclear answers. However, as a general rule the process of questions and answers must be open-minded and conducted in such a manner as to reflect general impartiality and a withholding of judgement. Unfortunately, that did not occur in the case at hand. The Arbitrator accepts the evidence of Mr. Lorman that Mr. Edgar's accusations and threat caused him considerable discomfort and uncertainty.

23. In this case, the Grievor was not refused the right to call witnesses as in CROA 2934. I do not find that that Grievor was intimidated by the investigating officer. He was given every opportunity to know the evidence against him, his accusers and to rebut evidence while giving his side of the story.

24. The Grievor acknowledged miscommunication with Trainees. He also was not clear of the understanding or experience of the Trainee in control of the movement. He was not in the position to take control or have immediate contact with Trainee Josh Belmore to effect control. The result was a derailment and the third serious incident in a short period of time. He refused to take full accountability for his actions and was assessed a significant suspension.

25. In view of all of the foregoing facts and circumstances of this case, I find that the discipline assessed was within the reasonable range. It is also in keeping with progressive discipline.

26. The grievance is dismissed.

Dated this 23rd, day of December, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges". The signature is written in a cursive style with a large initial "T" and "H".

Tom Hodges
Arbitrator