CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4619

Heard in Edmonton, March 14, 2018

Concerning

CANADIAN PACIFIC

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Therens of Moose Jaw, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Mr. Therens was dismissed which was described as "For breaching the bond of trust necessary for continued employment with the Company by failing to ensure that your power would clear the power in a connecting track resulting in a side collision on December 25, 2016 in the Regina Yard. A violation of Rule Book for T&E Employees Section 2 items - 2.1, 2.2 & 2.3, Section 4 - Item 4 – Item 4.2, Section 12 - Item 12.6 (d) and T&E Safety Rule Book-T23, while employed as an Conductor in Moose Jaw, Saskatchewan." The Company did not respond to all of the Union's grievances.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to many of the allegations outlined above. The Union further contends that Mr. Therens' dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union contends that Mr. Therens was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union requests that Mr. Therens be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Fulton	**(SGD.)**
General Chairman	

There appeared on behalf of the Company:

S. Oliver	– Labour Relations Officer, Calgary
D. Pezzaniti	– Manager Labour Relations, Calgary
W. McMillan	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
W. Zimmer	– Local Chairman, Moose Jaw
R. Donegan	– General Chairman, CN, Saskatoon
S. Therens	– Grievor, Regina

AWARD OF THE ARBITRATOR

This incident occurred on a snowy Christmas Day in 2016 in CP's rail yard in Regina. A locomotive fouls the track when it is left so close to a switch that equipment travelling through the switch will sideswipe or collide with it. Such an event happened that day. The grievor was working as a Conductor along with Locomotive Engineer Jeff Birkett. There was no injury or damage to the track and the damage to the locomotive was cosmetic.

The Form 104 allegations are summarized as follows:

Type	Rule/Section	Subsection(s)	Description
T&E Rule Book	Section 2 – General	2.1	Reporting for Duty
T&E Rule Book	Section 2 – General	2.2	While on Duty
T&E Rule Book	Section 2 – General	2.3	Crew Members
T&E Rule Book	Section 4 – Communication	4.2	Communication Requirements
T&E Rule Book	Section 12 – Switch	12.6	Shoving Equipment
Safety Rule Book	Train and Engine	T-23	Restricted/Close Clearence

Boiled down they all basically involve failing to properly check that the movement the grievor was authorizing could occur without sideswiping nearby locomotives that were fouling the switch.

The Union asks that I view these allegations in the same manner as I did similar multiple charges in **CROA 4492**:

> The Union urges that, in respect to both the sleeping allegations and the speeding allegations, the Company has "thrown the book" at the grievor using every possible rule violation that might be claimed over the alleged conduct. I accept the proposition that an arbitrator should look at the individual allegations as a whole and not treat each possible rule violation as a separate failure.

Having reviewed the listed sections, and all the evidence and submissions, I cannot find any indication as to why s. 2.1 is included. Section 2.2 and 2.3 are only relevant in a vague and very general way, and nothing of substance is put forward to justify discipline for their breach. Sections 4.2, 12.6 together with T-23 fully cover the alleged facts and the Section 2 provisions add nothing of substance beyond that.

Rule T-23 provides:

> T-23 Restricted/Close Clearances
>
> 1. Review the applicable operating bulletins/notices, timetables (special instructions) and job aids for close/restricted clearances during job briefings and follow-up job briefings.
>
> 2. When riding on equipment, detrain before reaching a restricted/close clearance.
>
> 3. Extreme caution must be used if switching movements are required within a restricted/close clearance area. These movements should be no more than a car length in distance and the crew member must place himself in a position that allows the maximum margin of safety.
>
> 4. If unable to identify the clearance point when leaving equipment in a track, stand outside the rail of the adjacent track and extend the arm towards the equipment. When you are unable to touch the equipment, leave the equipment at least an additional 50 feet into the track to ensure equipment is beyond the clearance point.

The grievor was asked if he was familiar with this Rule, which he was. The Union argues that this Rule is directed at specific restricted/close clearance areas as expressly identified in Company bulletin, notices or timetables. Nothing from the Company establishes such an identification for this area, and I therefore take no account of this allegation. This is a good example of an issue that could have been dealt with prior to the CROA submission.

The grounds also include the phrase “for breaching the bond of trust necessary for continued employment”. This phrase, which has no magical powers, is customarily reserved for cases where, by reasons of deceit or dishonesty, the employee cannot be trusted any more in some moral sense. Adding this phrase to what are otherwise just rule violations adds nothing of substance to the allegations.

The grievor’s service at the time of dismissal was two years and eight months. During that time he received some serious discipline.

> March 30, 2015
>
> 30 Day (15 to Serve) Susp. (April 20 to May 4, 2015) – For failing to ensure your movement was properly coupled prior to shoving causing a sideswipe in the Moose Jaw yard on March 30, 2015. A violation of CROR 113(e), General Rule (iii), (vi) and (viii), CROR General Notice, GOI Section 4 Item 6.0 D, and Canadian Pacific Safety Policy.
>
> June 24, 2015
>
> (Resolve) Unpaid Suspension – For failing to confirm your movement was properly lined for the route to be used resulting in a run through switch while working train EXKALIUM on June 24, 2015 at Kalium. A violation of CROR 104(b), CROR 114 (b), CROR General Rule C(i),

> CROR General Rule A(i), (iii) and (vi), CROR General Notice and CPs Corporate Safety Policy.

The June incident initially resulted in a termination which was set aside by agreement, on a compassionate basis, on October 1, 2015, without compensation; in effect a 95 day suspension.

Holding Out of Service

The Union argues that the grievor was wrongfully withheld from service contrary to Article 70.05 of the collective agreement.

> An employee is not to be held off unnecessarily in connection with an investigation unless the nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual or to expedite the investigation, where this is necessary to ensure the availability of all relevant witnesses to an incident to participate in all the statements during an investigation which could have a bearing on their responsibility. Layover time will be used as far as practicable.

This type of sideswipe incident is not, the Union says, such that "of itself" places doubt on the continued employment of the grievor. It refers to Arbitrator Clarke's decision in **CROA 4591** that included the following in substituting a 7 day suspension for a dismissal:

> The parties did not dispute that any sideswipe is a serious incident. But the arbitrator can find no support in the case law the parties filed that a first offence like that of Mr. Wojcik merits termination of employment.

The Employer replies that, having previously been dismissed and then reinstated for a not dissimilar offence the grievor "ought to have understood that any safety violation … would be heavily scrutinized and place doubt on his continued employment."

The circumstances may well not justify termination of themselves, but a sideswipe is serious, and the grievor's short service plus his record is sufficient to indicate that his employment was indeed in jeopardy.

The Cause of the Incident

The crew had to pick up unit UP5502 from the shops. The Locomotive Engineer went to get the unit while the grievor began clearing snow from the switches they would need for the movement. The Locomotive Engineer walked past the fouled units on track RF23 but did not notice that they were foul of track RF22, on which his unit would soon be passing.

While he was clearing the switch, Mr. Therens says he looked several times at the locomotive on track RF23, but from each vantage point, and admittedly without walking up to the switch, the locomotive appeared to him to be clear of the fouling point. After Mr. Therens had finished clearing the switch he lined it and then radioed instructions to the Locomotive Engineer to reverse three car lengths; about 180 feet. Mr. Therens boarded the train, on the Locomotive Engineer's side (the south side), and was about to give the Locomotive Engineer the car lengths' movement needed to spot the locomotive properly. Before he could do so he heard and felt the contact being made with the fouled locomotive on the other side. The Locomotive Engineer stopped immediately. The grievor then went to the north side, saw the contact, checked for derailings or fuel leaks, then went straight to the office to report the incident.

The locomotive with which the equipment the grievor was guiding was in fact foul of the switch his equipment was crossing. The Company provided schematic drawings of the rail location, all in front of the engine shed. The Union demonstrated with an aerial photograph that the schematics distort the curvatures of the tracks in question, and I have taken that into account. This supports the grievor's explanation that, from the side of equipment where he was situated, he had a blind spot in terms of seeing the proximity of fouled locomotives.

The grievor was asked at Question 12 in the investigation:

> Q12 You indicate that you looked down RF23 at the units and they appeared to be clear, did you verify that by walking up and ensuring that they were clear?

He replied:

> A No I didn't, but I just judged the units to be clear and as per rule 14C equipment not to be left foul. And the amount of time that I have worked in Regina yard, we never left any units foul on the shop track. I used my judgment when looking down the track at them.

The Union introduced Company Bulletin CPSB-020-16 into evidence. Dated May 26, 2016, it reads in part:

> Subject: Fouling Other Tracks – Changes to T&E and Engineering Rule Books, and new CP SSI
>
> <u>Summary of changes:</u>
>
> Per CROR114(c), equipment must not be left foul of a connecting track unless the switch is left lined for the track upon which such equipment is standing. Effective immediately, equipment must not be left foul of a connecting track regardless of the position of the switch.

> When leaving equipment, the end portion of such equipment must not be left between the fouling point of a connecting track and the switch points. Should it be necessary to leave equipment which will not clear the fouling point, it must be left occupying the switch points or beyond.

Specific rule changes and explanatory diagrams are also included. These changes support the grievor's assertion that equipment should not be, and customarily are not, left fouling the tracks. However, it does not imply that those running close to equipment are relieved of the obligation to check for appropriate clearance.

It is conceded that the grievor played no role in positioning the locomotive that was fouling the switch. They were left foul by another crew on December 24th. Statements from that crew show they were aware that they were leaving the equipment foul and did so because they believed that track RF22 was out of service. They each received a 30 day suspension, but these are subject to outstanding grievances.

The grievor's reliance on the proposition that others should not leave equipment foul of a switch does not assist his case. An important reason for having an employee at the front of the movement is to protect that movement in case someone else has violated a rule. In the situation here the grievor relied on his assessment, from a distance, that the locomotives were not fouling the track. He should have exercised greater caution and walked up to the switch to check it more precisely before he gave the instruction to proceed three car lengths. That he encountered a blind spot only adds to the need for that extra caution. It was not simply a poor judgment, but a failure to follow steps appropriately required to protect against harm in the event of any such poor judgment.

Penalty

The Union argues that the penalty imposed on the grievor is overly harsh compared with similar reported cases and in comparison to the Locomotive Engineer who received no discipline, or the crew who left their equipment foul of the switch who received 30 day suspensions. I am not persuaded that this is a case of discriminatory discipline between those involved. I have considered the cases cited as precedent for sideswipes or analogous Rule 115 incidents, including **CROA 4251, 2990, 3237, 3845, 4455, 4512, 4552** and **4524**. The Union argues that **CROA 4591** is closely analogous, and this is so in terms of the incident, but not in terms of the grievor's prior record.

The grievor is about 45 years old with three daughters still at home. He has worked in several places beyond Moose Jaw. Since his dismissal, Mr. Therens has been employed full-time at Classic Farms.

His record, set out above, is poor, although it does not include any cardinal rule violations, and it does not include past discipline for the same offence. The grievor is, however, a short term employee with a poor record. I am not persuaded in the circumstances that the penalty of termination was inappropriate or unjust in a way to justify the exercise of the arbitrator's remedial jurisdiction under the *Canada Labour Code*.

This matter proceeded to arbitration on the basis of an *ex parte* statement. I see nothing in the facts as argued that should have prevented a joint statement, and I urge

the parties to work towards achieving that in future. I note here as well that the Company's Step 1 reply was essentially just a denial. The Company made no reply to the Step II grievance. Failing to reply, or to work collaboratively towards a joint statement, does nothing to focus the issues to be arbitrated and leaves unnecessary differences to be dealt with in the expedited CROA hearing context. I urge the parties, in this case particularly the Employer, to make greater efforts in this respect in future cases.

For the reasons above the grievance is dismissed.

April 11, 2018

ANDREW C.L. SIMS, Q.C.
ARBITRATOR