CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4636

Heard in Calgary, May 8, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer G. Trollard from Lethbridge, Alberta.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Engineer Trollard was issued a letter from the Company informing him that he was dismissed from Company service for the following reasons; Please be advised that you have been dismissed from Company Service for failing to observe Track A/ Lead switch was lined against your movement on November 8, 2016, causing your movement to run through Track A / Lead switch resulting in the derailment of 4 cars; a violation of Rule Book for Train and Engine Employees at Lethbridge Alberta.

The Union contends that the incident as investigated does not establish culpable behavior that would justify the ultimate penalty of dismissal. Further, the Union cannot agree that the Company met the burden of proof necessary to impose the ultimate penalty of dismissal. As a result, the Union contends the discipline is unjustified, unwarranted and extreme.

The Union contends that the Company has not considered any of the mitigating circumstances surrounding the incident. Engineer Trollard did check for switches lined against him and noticed none as he continued his movement on the lead. It wasn't until the movement was reversed that it was discovered the A switch at Kipp had been run through.

The Union further contends that Engineer Trollard did not intentionally violate any rules and took full responsibility for the incident without attempting to shift the blame.

The Union also contends arbitral jurisprudence has demonstrated that advancing straight to dismissal without discipline assessments from the Company, even in cases such as this, is unjust and over reactive. As an example, in CROA 4294 Arbitrator Schmidt found that progressive discipline had not been applied as is the case in our instant matter. The Union also contends that the Company has violated Engineer Trollard's rights under the *Canada Labour Code*.

The Union contends the Company has failed to establish any culpable behaviour on Engineer Trollard's part that would justify discipline. Even should he be found partially culpable, there is no justification for discipline and outright dismissal.

The Union requests that Engineer Trollard's dismissal be removed from his record and that he be reinstated to his former position without loss of seniority or benefits, and made whole for all wages lost, with interest, in relation to the time withheld from Company service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) G. Edwards **(SGD.)**
General Chairman

There appeared on behalf of the Company:

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
G. Edwards	– General Chairman, Calgary
C. Ruggles	– Local Chairman, Lethbridge
G. Trollard	– Grievor, Lethbridge

AWARD OF THE ARBITRATOR

The grievor, Gerrard Trollard (46), began his service with the Company on January 17th, 2005. He is separated from his spouse and has a seven year old son.

On November 8, 2016 the Grievor was working as a locomotive engineer at the 1600 yard assignment in Lethbridge Alberta. While operating his unit and proceeding east with approximately sixty cars in tow, he ran over track A/Lead Switch which was not lined for the intended route. When he discovered his mistake, the Grievor reversed the movement and derailed four cars.

Following an investigation he was dismissed from the company (Company Exhibit; Tab 1):

> "… failing to observe Track A/ Lead switch was lined against your movement … causing your movement to run through Track A / Lead

> switch resulting in the derailment of four cars; violation of Rule Book for Train and Engine Employees at Lethbridge Alberta".

A summary of the rule violations of the *Rule Book for Train and Engine Employees* followed, comprising of violations of *Sections 2.2, 4.2, 6.5, 14.1 and 14.2*.

The facts were not disputed. The Grievor allowed, in his investigative interview (Union Exhibit; Tab 4), that: he was familiar with the Lethbridge yard; he was in the controlling locomotive facing eastward; he was the only crew member in a position to see the intended route to be used; and, that it simply did not register that the switch in front of his movement was lined against him. He also allowed that he did not confirm with his Foreman or helper whether the switch was lined and locked. He acknowledged that he was:

> "… solely culpable for this incident. I did believe that my intended route was lined for me as I was proceeding eastward towards the switch…".

The Employer argues that the Grievor's culpability is exacerbated by the fact that he failed to communicate with his crew to confirm that the track switch was lined and locked prior to entering his intended route. *Section 6.5* of the *Rule Book* requires that crew members, who control the engine, know the identification of a fixed signal before passing it - including a switch not properly lined.

The Union asserts that the Grievor's inattention, and his failure to notice that the switches were not lined, did not represent negligence on his part and therefore called into question the discipline imposed.

I am satisfied that his errors and mistakes, flowing from his inattention and carelessness, were properly disciplinable (**CROA 4592**).

The issue is whether, in light of all the circumstances, the discipline imposed was a reasonable response which ought not to be disturbed by this Board.

The Union, relying on *Section 23.04 of the Collective Agreement*, argues that the investigation of the Grievor was not carried out in a fair and impartial manner and therefore the discipline imposed should voided. It suggests that the Company's failure to interview Conductor Sheppard or Brakeman Fisher - who were on the Grievor's crew that day – manifested a breach of Article 23.04.

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 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. In this case the Company did just that. As it is compelled to do, pursuant to *Article 23.01(3),* the Company provided the Grievor with the appropriate notification and *"…all available evidence, including a list of any witnesses … whose evidence may have a bearing on the employee's* ***responsibility****".*

Here, the Grievor admitted to his culpable behaviour and took full responsibility for it. It is therefore difficult to understand how interviewing Conductor Shepard and Brakeman Fischer might have assisted the Company in determining the Grievor's, already admitted to, "*responsibility".*

Furthermore, at the point the interview took place, the Company had investigated and disclosed all of the evidence it intended to rely on. Neither the Grievor nor the Union, prior to or during the course of the hearing, raised any objection or any issue with regard to the Conductor or Brakeman. This Office has repeatedly dealt with the appropriateness of the kind of argument raised here and has made it clear **(CROA 3610; 2036; 2492; and 2911)** that the Union's failure to put the Company on notice, or otherwise object in a timely manner, results in the waiver of its right to do so at the hearing. Finally, had the Grievor genuinely wished to rely upon the statements of witnesses which might assist his case, he had the right to do so, or otherwise offer rebuttal evidence as set out in *Article 23.01(3) and 23.03*. This right was made clearly apparent to him in the investigation notice provided to him (Company Exhibit; Tab 4.A).

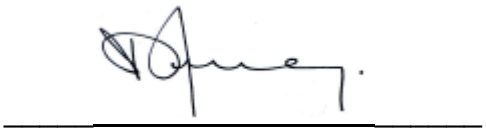
The only issue here is whether or not, in the circumstances, dismissal is appropriate. The events leading to the dismissal in this case occurred on November 8, 2016. At the time the Grievor had been with the Company for just under 12 years. The portions of his record that are appropriately before me (Company Exhibit; Tab 3**)** reflect that he has been disciplined on nine occasions. Of these nine occasions, five relate to "moving" infractions. In addition to his dismissal for the conduct disclosed in this

grievance, in 2011 he was assessed 25 demerits, for failure to be attentive resulting in his movement passing over and damaging a derail. In 2014 he received a suspension for failure to be attentive resulting in skidded wheels. And, in April 2015 he received a suspension for failure to be attentive resulting in a switch run through.

It is apparent that the process of progressive discipline has not worked for the Grievor and that the Company justifiably concluded that its trust in the employment relationship with him had waned. While I considered his candour and immediate acceptance of responsibility; and, while I sympathize with his circumstances, I am unable to conclude that this is a case where mitigation of penalty is appropriate.

The grievance is dismissed.

June 4, 2018



RICHARD I. HORNUNG, Q.C.
ARBITRATOR