CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4686

Heard in Calgary, May 16, 2019

Concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor P. Levy.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Levy was dismissed from Company Service on September 8, 2017 for the following:

> "Dear Phil. Formal investigation was issued to you in connection with the occurrence outlined below: "With your tour of duty on August 9, 2017 working as Conductor on Train 119-08. Specifically, the passing train inspection of 40B-07 approaching the North siding switch at Buckskin."

Formal investigation was conducted on August 17, 2017 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following;

> T-0 Job Briefings in the T&E Safety Rule Book, CP Rule Book for T&E Employees Section 11.7 and T&E Safety Rule Book Section 2 General 2.3. This letter will advise and confirm that you have been dismissed from company service."

On January 12, 2018, the Company unilaterally reinstated Mr. Levy and provided a reinstatement letter with expectations contained within the letter.

Union's Position:

The Union's position is that the assessment of dismissal in this case was unjust, unreasonable, excessive, abusive, and in violation of the Collective Agreement, and the CLC. The Company failed to hold a fair and impartial investigation, and dismissed Mr. Levy with non-existent rules and clearly with their dismissal of Mr. Levy they have abused their Management Rights.

Mr. Levy never disputes not being on the opposite side of the track but Mr. Levy and his crew members within their statements provide the mitigating factors of the "why". The Union within its grievances have clearly shown the unfair scrutiny that was in the end the wrongful dismissal of Mr. Levy when no other employee received discipline.

There was never reason to dismiss Mr. Levy, it was done as the Company couldn't get their way when attempting to force the General Chairman into signing an agreement that was in violation of Mr. Levy's rights to fair representation.

The Union ask the Arbitrator to look at this new attack by the Company to now take away the rights of the employees and the Union, this cannot continue.

There was never any injury, damage or otherwise any specific prejudice to the Company that would elevate this matter to circumstances requiring this type of discriminatory discipline. Mr. Levy took the safe course of action at the time and was wrongfully dismissed for it.

The Union requests that the dismissal be removed from Mr. Levy's file, that the "last chance agreement" that was never agreed to be removed from Mr. Levy's file, that Mr. Levy be compensated all lost wages with interest, loss of benefits, no loss of seniority or pension and the re-calculation of his AV and EDO's for the period of time he was wrongfully dismissed.

The Union further request punitive damages in the amount of $15,000.00 be paid to Mr. Levy as this was no more than a calculated abuse of Managements Rights and a further abuse of Mr. Levy's rights. This type of Company behavior must stop. The Union seeks further damages as it is clear the Company will continue this abuse of Management Rights if corrective actions are not taken.

In the alternative, the Union requests that the discipline be mitigated as the Arbitrator sees fit.

Company's Position:

The Company maintains culpability was established through a fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and discipline record. While the Company considered that it had just cause to terminate the Grievor, the choice to reinstate him was one of leniency.

The Union confirmed the Grievor's culpable act of not being in position to fulfill CRO Rule 110; however, then suggests mitigating factors which should somehow relieve him of his responsibility to follow the rules. The Company cannot agree.

The Union further suggests the Company has treated the Grievor in a discriminatory manner. When considering the appropriate disciplinary assessment, each employee must be considered individually and on his/her own merits. This includes consideration of past discipline. The Union states:

> "There was never reason to dismiss Mr. Levy, it was done as the Company couldn't get their way when attempting to force the General Chairman into signing an agreement that was in violation of Mr. Levy's rights to fair representation."

This contention, along with the Union's assertions that the Company has violated the CLC are unsubstantiated. If the Union believes this to be the case, they ought to have provided clear and cogent evidence to demonstrate such on the balance of probabilities rather than just unsupported conjecture.

With respect to the Union's claim for punitive damages, the Union provides no rationale. As the Union is aware, punitive damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in nature and such that by any reasonable standard it is deserving of full condemnation and punishment as established in the notable Honda v. Keays Supreme Court of Canada decision. As the Union failed to even allege such action on behalf of the Company, its request for punitive damages is without merit.

Based on the foregoing, the Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) S. Oliver**
General Chairperson	Manager, Labour Relations

There appeared on behalf of the Company:

S. Oliver	– Manager Labour Relations, Calgary
J. Bairaktaris	– Director Labour Relations, Calgary
D. E. Guerin	– Senior Director Labour Relations, Calgary
W. McMillan	– Manager Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smiths Falls
D. Edward	– Senior Vice General Chairperson, Calgary

AWARD OF THE ARBITRATOR

On August 9, 2017 the grievor was the conductor on train 119–08 and was working with locomotive engineer Elliott and locomotive engineer trainee Dodd. At the time, the noted "CP Canada 150 train", train 40B-07, was traveling across the country in an easterly direction from Port Moody British Columbia to Ottawa in order to commemorate Canada's 150th anniversary. Senior CP management staff were amongst the passengers.

At approximately 07:20, train 40B-07 arrived at Buckskin where the crew stopped for approximately one hour. During that time, the crew took part in a job briefing to ensure

that a train inspection of 40B-07 occurred at Buckskin. The grievor indicated that he would perform the inspection on the east side of 40B-07. As the grievor indicated at his investigation:

> Q18: Did you and your crew perform a job briefing with respect to ensuring a train inspection was going to be performed on train for 40B upon it arrival at Buckskin?
>
> A: Yes we did
>
> Q19: Please explain what the job briefing consisted of?
>
> A: We pulled in, gave the track release, we heard the 150 called Bala. I advised Ed that I would do the pull by on my side (east side) and then walk up and get the switch so we could depart.
>
> Q20: Referencing Appendix E you indicate "we heard the 1401 call the mile board for Bala", is this correct?
>
> A: Yes
>
> Q21: Was everyone on your crew aware the 1401 South, 40B called the mile board to Bala?
>
> A: Yes, we talked about it.
>
> ….
>
> The grievor further confirmed in his interview that the approximate run time between the north switch at Bala and the north switch at Buckskin was 15 minutes.

Around 08:20, the grievor's train engine shut down due to a fuel conservation measure known as "Smart Start". The grievor and his crew had been waiting for train 40B-07 to call the approach but there was no such announcement over the radio. It was later determined that once the engine began to start up again, the engine radio had turned off

and had switched channels. The grievor was unaware that this had occurred. As the grievor explained at his interview:

> Q30: Why did you not hear the 150 train call the mile board at Buckskin?
>
> A: Although I did not know it at the time, our locomotive had shut down due to the EASS system and the radio channel apparently switched off of channel 95/95. I believe that the radio must have shut down at the time that 150 called the mile board to Buckskin so I did not hear it.
>
> Q31: Did you have your portable radio on channel 95/95 while waiting for the 150 train to arrive at Buckskin?
>
> A: No, I do not have my portable on when I am on the engine due to squelch noise if we use it.

The grievor was also asked at his interview why he did not position himself on the east side of the mainline to ensure that he complied with CROR 110. The grievor responded that he had intended to comply with rule CROR 110 but that he did not hear train 40B-07 call the mile board at Buckskin and; further, that he was unable to cross the tracks safely once he observed the approaching train.

On September 7, 2017 the grievor and the Union were presented with a “Offer of Continued Employment–Last Chance Agreement”. On September 12, 2018 the Union informed the Company that it disagreed with the contents of the Last Chance Agreement and suggested amendments. Those amendments were not accepted by the Company.

On September 15, 2017 the grievor was dismissed from his employment for the following violations: T-O Job Briefings in the T & E Safety Rule Book, CP Rule Book for

T& E Employees Section 11.7 (inspecting passing movements-also found at CROR Rule 110) and T&E Safety Rule 2 General 2.3.

The grievor was reinstated on January 12, 2018 by the Company.

The Company takes the position that it is entitled to expect employees to perform their duties in a safe and efficient manner as well as abide by the rules and regulations. Given that Train and Engine ("T &E") employees are part of a largely unsupervised craft, the Company submits that it needs to trust those employees to perform their duties in the manner prescribed by the rules during their working hours.

The Company maintains that a passing inspection is a fundamental responsibility of T & E employees. The Company notes that these inspections are performed to identify dangerous conditions which, if left unchecked, put the safety of train crews and the public at risk. The Company also notes that it brought the grievor back from dismissal in January 2018. The grievor's four-month suspension was within the reasonable range of responses, as supported by numerous CROA decisions (See **CROA 3924, 3711, 3712**). It is a proper disposition given that the grievor did not fulfill his important duty to perform a pull-by inspection of train 40B-07 on the far side of the track.

The Union submits at the outset that the grievor was not provided with a fair and impartial investigation pursuant to article 70 of the collective agreement. The Union notes in that regard that Mr. Godin interviewed the train crew shortly after the incident when

they were booked off for rest in the Mactier bunkhouse. The Union claims the questioning of the three crew members in the bunkhouse while on rest by Mr. Godin resulted in incident reports being completed by the crew while under duress. The Union further requested, in an email dated August 15, 2017, that Mr. Godin be made available as a witness during the investigation. The Company replied: *"Brad will be made available in person or via phone*." The Company's failure to have Mr. Godin available as a witness during the investigation prejudiced the grievor given the Union was unable to question Mr. Godin.

The Union claims that the grievor used his best judgment by not crossing in front of the oncoming train 40B-07. The grievor made it clear during the investigation that he was familiar with the requirements of a passing train inspection. He was unaware that train 40B-07 was actually near their Buckskin location because the channel had been changed on the radio when the engine shutdown. Once the crew actually saw the train, all three on board immediately detrained to do the inspection on the west side.

Overall, the Union submits that the grievor exercised proper judgment in deciding to remain on the west side of the train with the other members of his crew. The Union further adds that the grievor would have put himself in a dangerous situation had he decided to cross the tracks. As a result of discharging the grievor under such circumstances, the Union asserts that the Company has violated section 147 of the *Canada Labour Code* by insisting the grievor perform unsafe work. In the alternative, even

if the grievor was in violation of article11.7, his actions were motivated by an overriding concern for his own personal safety.

The Union also takes the position that the Last Chance Agreement proposed to the grievor was inappropriate under the circumstances. The Union further submits that the grievor's outright dismissal was discriminatory compared to the rest of his crew who received no discipline at all. The Union, finally, argues that the Company's actions in this case were abusive, discriminatory and done in bad faith and requests damages in the amount of $15,000.

I agree with the Company that the grievor should have taken a further step with respect to getting himself in a position to detrain and inspect the east side of the train.

The grievor indicated that he had been working the territory "regularly since 2014" (Q 10) and provided a direct answer of "15 minutes" when asked about the run time between the switch at Bala and the switch at Buckskin. Being familiar with the run time, the grievor should have taken steps to detrain and put himself into position to inspect the passing train on the east side of the tracks, even in the absence of a call from train 40B-07 to the mile board.

The fact that the grievor's portable radio was turned off due to squelch noise was another reason to be vigilant about following through with the inspection given the absence of a call from train 40B-07 to the mile board at Buckskin. The grievor himself

admitted at the conclusion of his investigation that *"Given what occurred, I wish I had gone out sooner…"* (Q45). But this lack of judgment and initiative on the part of the grievor did not warrant outright termination. A short suspension would have been an appropriate disposition bearing in mind in particular the grievor's eightteen years of service and the fact that he had no active demerits on his record.

Of more concern here is the preliminary objection of the Union in reference to the absence of Mr. Godin at the investigative meeting. Requests for the attendance of certain witnesses by the Union typically occur, as provided in the rules, because those individuals are actual witnesses to the events that are the subject matter of the discipline. In this case, however, the Union specifically requested the attendance of Trainmaster Godin given his role in obtaining witness statements from the three crew members shortly after the incident while they were on their rest periods in the Mactier bunkhouse. These three handwritten statements were part of the investigation process and important in the Union's view to that process. For this reason, they requested the attendance of Mr. Godin. The Company indicated, as noted, that Trainmaster Godin would be available (*"Brad will be made available in person or via phone*"). But the Company did not fulfill its earlier advice to the Union at the investigation on August 17, 2017 to have Mr. Godin available. His absence was commented on by Mr. Banton:

> Q44: Do you have any rebuttals or wish to refute or comment on any of the documents that have been provided to you in this investigation?
>
> A: I will let the record speak for itself.
>
> **Break at 1613**
> **Resumed at 1430**

> **Objection from Mr. Banton:**
> Union objects to this investigation, we had submitted a request that Mr. Godin be made available for questioning. We were told through email that Mr. Godin would be available by phone, the company now refuses to make Mr. Godin available. We believe that this is a violation of the collective agreement and for that reason we feel that the investigation is neither fair or impartial.
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> **Response from the investigating officer:**
> Mr. Godin was not located at the north siding switch at buckskin at the time that CP 1401 S., 40 B arrived and as such he has no bearing on the subject matter of this investigation.

Arbitrator Sims commented recently in **CROA 4558** on the importance of fairness and due process in CROA proceedings:

> The CROA system is a longstanding, unique, and consensual modification of that "normal system". By a combination of collective agreement terms (specific to each bargaining relationship) and adherence to the rules and procedures of the Canadian Office of Railway Arbitration, the parties allocate part of the "due process responsibilities" to the workplace and other parts to the CROA panels. The CROA panels that carry responsibility for the resulting decisions can only ensure that overall due process is met by requiring the parties to adhere strictly to their part of the due process bargain. This is not just a matter of contract law, but of the administrative law CROA&DR 4558 – 29 – rules that ensure that the basic elements of fairness such as those described above, are met in individual cases.

I agree that the importance of procedural fairness cannot be understated in CROA proceedings. As Arbitrator Picher noted in **CROA 3221**:

> For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing discipline being declared null and void (CROA 628, 1163, 1575, 1858, 2077, 2280, 2609 and 2901). While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of

> disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized. (See, generally, Picher, M.G. "The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails" Labour Arbitration Yearbook 1991 pp 37-54 (Toronto 1991).)

The grievor and his Union representative attended the investigation fully expecting Trainmaster Godin to be available for questioning. After indicating he would be there in an earlier email, and without any earlier notice to the Union indicating otherwise, the Company refused to produce him either in person or by telephone on the basis that he was not a witness at the Buckskin switch on the day of the incident. That may well have been a legitimate response by the Company earlier for contesting his attendance. But it was a breach of procedure and due process to promise his attendance at the grievor's investigation and then revoke it without notice on the date he was expected to appear and answer the Union's questions. The Company offered no reason for his absence other than their view that he "had no bearing on the subject matter of this investigation". I simply cannot accept that reason as a proper excuse when the Company had assured the Union in writing that Mr. Godin would be present at the investigation either in person or by phone for questioning by the Union officers.

The promise to make a witness available and then withdrawing that undertaking at the investigative hearing in my view undermines the integrity of the investigative process envisioned by this Office and amounts to a breach of the due process requirement for a "fair and impartial investigation" under article 70 of the collective agreement. As a result,

the discipline imposed on the grievor on September 15, 2018 when his employment was terminated is declared to be *void ab initio.*

The grievor is entitled to compensation, without loss of seniority, for the period from the date of his termination on September 15, 2017, to the date of his reinstatement on January 12, 2018, less any mitigated earnings. This is not a case, however where the conduct is so egregious that it is appropriate to impose punitive damages, as requested by the Union

I shall remain seized should any issues arise regarding the implementation of this award.

May 29, 2019

JOHN M. MOREAU, Q.C.

ARBITRATOR