

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4728-ABCD

Heard in Calgary, February 11, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

- A. Appeal of the 5 day suspension to Conductor F. Meeser of Revelstoke, BC.
- B. Appeal of the 20 day suspension.
- C. Appeal of the 30 day suspension.
- D. Appeal of Dismissal.

JOINT STATEMENT OF ISSUE:

A. 5 Day Suspension

Following a formal investigation, Mr. Meeser was issued a 5 day suspension (deferred) described as “missed calls for train 869-250 called for 0236 and 861-253 called for 0550, September 10, 2017 at Revelstoke, BC. A violation of the Canadian Pacific Attendance Management System.”

Union Position:

The Company did not respond to the Union’s step two grievance.

The Union submits the Company has improperly applied the process of deferral in the instant matter, which fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09.

The Union contends the Company has failed to establish culpability regarding the discipline as outlined above. The Union further contends the discipline assessed to Mr. Meeser is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. Additionally, the Union asserts the discipline assessed is contrary to the arbitral principles of progressive discipline.

Accordingly, the Union requests the discipline be removed in its entirety, and that Mr. Meeser 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 in its entirety.

The Company has reviewed the Union's grievance, the statement and investigation in its entirety and cannot agree with the Union's contentions. The Company maintains the Grievor's assessment of 5 days deferred suspension was appropriate, following the fair and impartial investigation into the matters surrounding the Grievor's missed calls on September 10, 2017.

B. 20 Day Suspension

Following an investigation Mr. Meeser was issued a 20 day suspension described as "for failing to control your movement accordingly after encountering a fixed signal yellow flag at mile 41.2 on the Mountain subdivision while operating train 199-02 on January 4th, 2018. A violation of the Rulebook for T&E 2.2 while on duty (a) & c (v), T&E Rulebook 6.5 Fixed signal recognition and compliance (c), T&E Rulebook 3.8 Slow Track Protection by GBO-No GBO (a), (b), & (c)."

Union Position

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. In the alternative, the Union contends that Mr. Meeser's 20 day suspension 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 is contrary to the arbitral principles of progressive discipline.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Meeser 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 in its entirety.

The Company has reviewed the Union's grievance, the statement and investigation in its entirety and cannot agree with the Union's contentions. The Company maintains the Grievor's assessment of 20 day suspension was just an appropriate, following the fair and impartial investigation into the matter.

Accordingly, the Company maintains there was just cause to assess discipline and the quantum of discipline assessed was just, considering all the circumstances. The Company maintains the discipline assessed should not be disturbed.

C. 30 Day Suspension

Following an investigation Mr. Meeser was issued a 30 day suspension described as "For failing to communicate the action of entraining and detrainning equipment to your locomotive engineer on January 24th, 2018 on train 8610-030. A violation of the Train and Engine Safety Rule Book T-11 Entraining and Detraining Equipment.

Union Position

The Union contends that Mr. Meeser's 30 day suspension 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 submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Meeser 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 in its entirety.

The Company has reviewed the Union's grievance, the statement and investigation in its entirety and cannot agree with the Union's contentions. The Company maintains the Grievor's assessment of 30 day suspension was just and appropriate, following the fair and impartial investigation into the matter.

Accordingly, the Company maintains there was no cause to assess discipline and the quantum of discipline assessed was just, considering all the circumstances. The Company maintains the discipline assessed should not be disturbed.

D. Dismissal

Following an investigation, Mr. Meeser was dismissed which was described as "Following your tour of duty on January 29, 2018, specifically the events surrounding crossing in front of Train 199-26 while moving on the North Track at Revelstoke, BC a violation of the following rules and safe operating practices. T&E 2.2 (a)(c) v, vi, vii, x, T&E 2.3 (b), T&E Safety Rule Book T-0 and T&E Safety Rule Book T-20. Notwithstanding that the above mentioned incident warranted dismissal in and of itself, based on your previous discipline history; the incident also constitutes a culminating incident which warrants dismissal."

Union Position

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Meeser be made whole.

The Union submits that the Company has not demonstrated that it had reasonable and probable grounds to engage in the extraordinary step of subjecting Mr. Meeser to video surveillance, or that there was not a less invasive method available. The Union contends that the Company's conduct in this regard has breached Mr. Meeser's rights under the Collective Agreement and PIPEDA. The Union also contends that the inappropriate use of video surveillance renders the evidence inadmissible and the discipline null and void.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. The Union further contends the Company has failed to establish the abovementioned incident warranted dismissal, or that it constitutes a culminating incident worthy of discharge. In the alternative the Union submits Mr. Meeser's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test Policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

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

The Union requests that Mr. Meeser be reinstated without loss 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.

Company Position

The Company disagrees and denies the Union's request in its entirety.

The Company has reviewed the Union's grievance, the investigation and statement in its entirety and cannot agree with the Union's contentions. The Company maintains the Grievor's dismissal was just and appropriate, following the fair and impartial investigation into the matter.

The Company maintains the Union's contention of the surveillance video of the crew has no merit and is contrary to the Arbitrator Picher's decision in CROA 3877 rendered March 15, 2010.

Accordingly, the Company maintains there was cause to assess discipline and the quantum of discipline assessed was just, considering all the circumstances. Further, and notwithstanding that the incident in question warranted dismissal in and of itself, based on the Grievor's disciplinary history, the incident in question also constitutes a culminating incident which warrants his dismissal.

The Company maintains the discipline assessed should not be disturbed

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson

FOR THE COMPANY:

(SGD.) D. Zurbuchen

Manager, Labour Relations

There appeared on behalf of the Company:

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|-------------|--------------------------------------|
| W. McMillan | – Manager, Labour Relations, Calgary |
| D. McGrath | – Manager, Labour Relations, Calgary |

And on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairperson, Calgary |
| D. Edward | – Senior Vice Chairperson, Medicine Hat |
| J. Kiengersky | – Local Chairperson, Revelstoke |
| F. Meeser | – Grievor, Revelstoke |

AWARD OF THE ARBITRATOR

1. Because of time constraints, the parties have requested a summary award in all the above noted matters on a "*bottom line basis*".

2. Accordingly, I have provided my summary determination in each of the matters as noted below on the understanding - agreed to by the parties - that this award will be effective the date of its issue. However, should either of the parties request, in writing, extended reasons on one of the matters, I will provide the same on the understanding that for, appeal purposes, the time will not run until after the date I have issued the extended reasons requested by such party.

4728 A – 5 Day Deferred Suspension (Missed Calls)

3. The Grievor was assessed a 5-day deferred suspension for two missed called on September 10, 2017. The evening prior to the missed calls, the Grievor noted that the manpower situation in Revelstoke was depleted and in an attempt “*to take advantage of it*”, he did not book personal rest and made himself available for a call the subsequent day.

4. He denied having received any call despite the repeated attempts from the Company’s automated system and two personal calls from an attendant. He attributed the same to the fact that there was an outage of service on his cell phone in his area - which he subsequently confirmed with his cell phone company. He was required to change the network settings on his phone to resolve it.

5. There was no evidence to dispute the Grievor’s explanation.

6. This is consistent with the fact that he purposely made himself available to be booked for service on September 10. I accept that, had he received the call, he would have been available as he intended.

7. While I fully appreciate the Company's concern that timely response to calls is necessary for the purpose of the seamless operation of its service, in the circumstances here, the Grievor's failure to do so was not culpable.

8. In the circumstances, I find that a 5-day deferred suspension, being his first discipline since he began working for the Company, is too severe.

9. I allow the grievance in part and direct that the 5-day deferred suspension be set aside and replaced with a letter of reprimand.

4728 B – 20-Day Suspension (Yellow Flag)

10. On January 4, 2018, the Grievor was subject to Dynamic Efficiency Testing for CROR44 (Unknown Yellow Flag) at mile 41.2 on the Mountain Subdivision while operating train 199-02.

11. The Grievor's train passed by the yellow flag at 23:00. The road Foreman observed the train pass by the flag and after waiting for the entire train length for a response (speed reduction and/or radio call), contacted the crew over the radio asking if they saw the yellow flag.

12. The crew responded that they had seen the flag (and the Grievor explained that they were in the process of slowing) but did not reduce their speed to the required 10 mph to comply with the rules, thereby resulting in their train passing by and missing the signal in its entirety.

13. The rule book for Train & Engine Employees Item 3.8 Slow Track Protection by GBO requires that where there is no GBO, the obligation of the crew is to:

- a. reduce to 10 MPH;
- b. immediately communicate with the RTC; and
- c. be governed by instructions received.

14. The Union argued that the consequences were lessened because the breach occurred during an Efficiency Testing Process. Nevertheless, it is imperative for the safety of the crew, and all concerned, that the rules be followed. The purpose of efficiency testing is precisely to achieve that result.

15. In this case the breach of the rule was purposive in that the crew acknowledged seeing the flag but did not take the necessary action.

16. The Company assessed a discipline of a 20-day suspension. I find that same to be too severe. While taking into consideration that the purpose of the testing process is

instructive rather than punitive, it is nevertheless significant here that the crew purposely delayed taking the necessary action even though they saw the flag.

17. I conclude that the Grievor and his crew's conduct was culpable and warranted discipline. The 20-day suspension shall be set aside and replaced with a 5-day suspension. The Grievor will be made whole.

4728 C – 30 Day Suspension (Entraining and Detraining)

18. On January 24, 2018, the Grievor and Locomotive Engineering were called in straight away service from Golden to Revelstoke on the Mountain Subdivision.

19. While the crew was moving the locomotive to the train, the Grievor was observed during an Efficiency Test, entraining and detraining on the locomotive without broadcasting over the radio his intent to do so.

20. After a fair and impartial investigation, the Company assessed discipline of a 30-day suspension.

21. The Grievor works in a safety sensitive position. Entraining and detraining is fraught with risk and requires strict rules to be observed. The fact that the Grievor's breach of the rules was observed as of an Efficiency Testing Process, does not preclude the Company applying a disciplinary approach.

22. His conduct was culpable and deserving of discipline. However, in the circumstances, a 30-day suspension is too severe.

23. I allow the grievance in part and direct that the 30-day suspension be set aside and replaced with a 10 day suspension.

24. The Grievor shall be made whole.

4728 D - Dismissal

25. On January 29, 2018, at approximately 08:50, Assistant Superintendent Gingras received a call about a Revelstoke employee crossing in front of CP train 199-26. The incident was initially observed by a yard camera.

26. After reviewing the video, the Assistant Superintendent confirmed with the Grievor that it was him. The Grievor allowed that he had crossed in front of the train in order to perform a pull-by inspection on train 199-26.

27. The facts are not in dispute. The Grievor noticed that there was no one on the far side of train 199-26 conducting a pull-by inspection. In an attempt to “help out” and to carry out what is an accepted protocol, he decided to conduct the same. To do so he crossed the track in front of the moving train.

28. He did not notify the conductor of train 199-26 that he was going to assist with the pull-by inspection.

29. While he considered it safe to do so at the time, he subsequently allowed, in his discussion with the Superintendent, that he: *“didn’t realize that it was that close until he was across and then he knew he should not have done so”*.

30. After what I conclude was a fair and impartial investigation the Company, taking into consideration his previous disciplines (items A to C above), dismissed the Grievor.

31. In my view dismissal is not warranted.

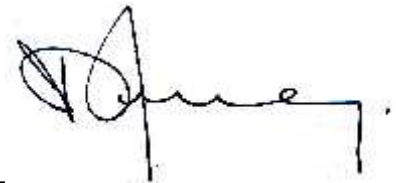
32. That said, having viewed the video, I was struck by how close the Grievor crossed in front of the moving train. I realize that the train was just beginning to move and was only traveling 1-2 MPH and that the distortion of the video camera angle must be taken into consideration. However, by any standard, what he did was dangerous and an egregious breach of an obvious rule. I am concerned that the Grievor, while he may be well intentioned, has shown an almost cavalier regard for safety rules. This is his third violation of a safety rule (two of which relate to his personal safety).

33. Accordingly, I am of the view that a severe discipline is warranted in order to bring home to the Grievor the necessity for him both to pay attention to and follow the established safety rules in this safety sensitive industry.

34. The grievance is allowed in part. The dismissal shall be set aside and the Grievor re-instated. In its place the Grievor shall be suspended for 45 days.

35. In this case – and in all of the above where it applies - the Grievor shall be made whole. Further, as necessary, I shall retain jurisdiction with respect to the application, implementation and interpretation of these awards.

February 18, 2020

A handwritten signature in black ink, appearing to read 'R. Hornung', written over a horizontal line.

**RICHARD I. HORNUNG, Q.C.
ARBITRATOR**