

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4741

Heard in Montreal, June 10, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION**

DISPUTE:

Suspension and restriction assessed to Mr. W. Brehl.

JOINT STATEMENT OF ISSUE:

On April 18, 2019, the grievor, Mr. William Brehl, was issued an Employee Notification Letter that advised him that he was being assessed with a one year restriction from operating on or off track equipment and company vehicles and a 30 day suspension, effective April 22, 2019 until May 31, 2019, "for property damage in Cranbrook Yard on March 21, 2019 caused by the loader that you were operating." The Union objected and a grievance was filed.

The Union contends that:

1) The guy wire that the grievor made contact with was unmarked and the pole that held the guy wire, unlike other areas and locations in the Cranbrook Yard, was not protected by cones or barricades. A lone light pole standing in the open in the running trades' parking lot at Fort Steele is protected by barricades. The grievor did not see the guy wire and, in the circumstances, could not reasonably have been expected to do so. The grievor was therefore unjustly disciplined.

2) The (otherwise unjust) 30-day suspension issued to the grievor violated the Company's own Hybrid Discipline Policy which, in the circumstances, provided for no more than the assessment of 30 demerits. The (otherwise unjust) one year restriction was improper because, when added to the suspension, it constituted a form of inappropriate double jeopardy.

3) The discipline assessed was excessive, unwarranted, and well beyond industry standards.

The Union requests that; the entirety of the discipline assessed to the grievor be stricken from his record, that his restriction be lifted immediately, and that he be made whole for all wages (including overtime) and benefits lost as a result of this matter.

Company Position:

The discipline assessed the grievor was appropriate under the circumstances and denies the Union's contentions and declines the Union's request. The discipline rendered was

fully justified in light of the grievor's responsibility for the incident, especially at a work location and surroundings he was fully aware of. Lastly, the administrative restriction from operating on or off track equipment that was imposed on the grievor was made in the interests of safety, both to the grievor, his fellow employees and the public.

The grievor has had numerous similar incidents in the past relating to accidents and collisions involving moving equipment. This demonstrates a pattern of carelessness that is not compatible with any position required to drive vehicles or equipment. As such, the restriction was fully justified.

Removing this restriction would amount to undue hardship on the Company and placement of the grievor and others at risk.

FOR THE UNION:

(SGD.) G. Doherty

President

FOR THE COMPANY:

(SGD.) D. Guerin

Senior Director, Labour Relations

There appeared on behalf of the Company:

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| F. Billings | – Manager Labour Relations, Prince George |
| S. Oliver | – Senior Manager Labour Relations, Toronto |

And on behalf of the Union:

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|---------------|--------------------------------|
| D. Brown | – Counsel, Ottawa |
| G. Doherty | – President, Ottawa |
| H. Helfenbein | – Vice President, Medicine Hat |

AWARD OF THE ARBITRATOR

1. Following an investigation the Grievor was assessed a one year restriction (Company Tab 1) from operating on or off track equipment, and a 30-day suspension from Company service for property damage which occurred in Cranbrook Yard on March 21, 2019.

2. The Union grieved the suspension and restriction on the basis that:

- The 30-day suspension violates the Company's own hybrid discipline policy;
- The 1-year restriction was improper in that it amounted to a form of inappropriate double jeopardy; and
- The discipline assessed was excessive and unwarranted.

3. An investigation revealed that the Grievor was operating his loader in the Yard in Cranbrook, BC. While making a reverse movement, the loader made contact with a guy wire attached to a power pole causing the power pole to snap and fall but missing the loader.

4. By his own admission, the Grievor stated:

*Once I dumped my bucket, I checked my mirrors and began a reverse movement west. **I had clear sight of the pole and knew I would miss it, and calculated I could shift to forward within a few feet and head east. Suddenly, I heard a loud crack and the top half of the pole fell in front of my loader.** I stopped immediately. Not seeing any wires touching my machine, I drove it eastward to clear and got out. Signal Maintainer Don McDonald was present and I asked him to keep people clear because I was going to report this. I went to (Supervisor) Derrick Roy's office to get him.*

(Emphasis added)

5. That admission itself indicates that the Grievor was willfully negligent in operating the loader. His purposive movement of the vehicle, after he had wrongly or carelessly calculated that he could shift forward, was negligent.

6. The Grievor's choice to move forward with the loader - considering that it was in clear sight of him - so as to strike the guy wire and knock down the telephone pole shows a lack of attention and judgment which, given his experience, he ought to have avoided. His lack of care constitutes culpable negligence and warrants discipline.

7. The Grievor's record reflects the following:

- November 30, 2018: 20-day suspension for a motor vehicle accident and a loader he was earlier operating (discipline was later reduced to 20 demerits).

- May 29, 2018:5-day suspension for causing property damage when he made a reverse movement with a loader and backed into the Cranbrook roadhouse turntable.
- March 1, 2016:5-day deferred suspension for failing to ensure the safety devices for the machine he was operating were in position and secured resulting in the work head contacting a road crossing.
- September 22, 1992 - January 19, 1983: The Grievor had four further incidents wherein he was responsible for damage caused by vehicles on three occasions and one for damage caused by his failure to protect the movement.

8. In light of the Grievor's abysmal record, the Company imposed both a 30-day suspension, and, as noted, a one year restriction from operating on or off track equipment.

9. The Union argues, initially, that the 30-day suspension breaches the Company's hybrid discipline policy. However, a review of the same (at page 4) reflects that suspensions up to 45 calendar days may be warranted where rule violations cause a serious collision or extensive damage to property which was "*reasonably foreseeable*". In the circumstances here, the Grievor's admission that he knew where the pole was - and nevertheless proceeded in a fashion which caused the collision - reflects my earlier conclusion that his conduct was willful negligence for which the "serious collision" consequences were reasonably foreseeable. Accordingly, the 30-day suspension stands.

10. The Union further argues that the 1-year restriction constitutes a breach of the prohibition against double jeopardy in that the Grievor is penalized twice for the same offence. I cannot agree.

11. While an employee cannot be disciplined twice for the same workplace “offense”, such is not the case here. In addition to the suspension imposed on the Grievor, the Company, pursuant to *Part II, Section 125(1)(y)* of the *Canada Labour Code*, has an obligation to protect the health and safety of his fellow employees as well as that of the Grievor himself. In this case, given the Grievor’s abysmal record with respect to vehicular accidents, the imposition of the further restrictions placed on the Grievor were reasonable in the circumstances, in order to ensure that his activities did “*not endanger the health and safety*” of other employees.

12. The Grievance is dismissed.

June 30, 2020

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

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