CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4770

Heard via Video Conferencing in Montreal and Calgary, March 9, 2021

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 30 demerits, and subsequent discharge for accumulation of demerits to Locomotive Engineer J. Flack of Kamloops, B.C. for a violation of Form 8960 Section A1.1, C1.9, G1.2, G2.4, G2.8, G3.9 and G3.11.

JOINT STATEMENT OF ISSUE:

On June 29, 2019 the Grievor (Mr. Flack) initiated an Engineer Initiated Emergency (EIE) while operating on a Clear to Stop Signal on train Q10851-29. The Company conducted an investigation and determined Mr. Flack was in violation of Form 8960 Section A1.1, C1.9, G1.2, G2.4, G2.8, G3.9, and G3.11. The Company subsequently assessed 30 demerits which placed the Mr. Flack at 65 active demerits and subject to discharge for accumulation in excess of 60 demerits.

The Union's position is that the assessment of 30 demerits and subsequent discharge is excessive and unwarranted and that the Company violated Article 86 of the collective agreement and as a result the grievor did not receive at fair and impartial investigation.

The Union requests that the Company reconsider its position and immediately return Mr. Flack to service without loss of seniority, make him whole for all lost wages and benefits and that the discharge be substituted with an educational component to address his abilities; or alternatively that Mr. Flack be returned to service and demoted from Locomotive Engineer for a period of time acceptable to the parties.

The company disagrees with the Union's position.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. King (for) **KC James**	**(SGD.) C. Bailey** (for) **D. Klein**
General Chairperson	Senior VP Human Resources

There appeared on behalf of the Company:

F. Daignault	– Senior Manager Labour Relations, Montreal
V. Paquet	– Manager Labour Relations, Toronto
S. Blackmore	– Senior Manager Labour Relations, Edmonton
S. Grewal	– Senior Manager Engine Service, Edmonton
J. Butz	– Engine Service Officer, Melville

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
K.C. James	– General Chairperson, Edmonton
M. King	– Senior Vice General Chairperson, Edmonton
R. Russett	– Vice General Chairperson, Edmonton
R. Koffski	– Vice General Chairperson, Kamloops
J. Flack	– Grievor, Kamloops

AWARD OF THE ARBITRATOR

The grievor entered into the service of the Company as a Conductor in August 2007. He qualified as a Locomotive Engineer but was restricted from his position in September 2016 for 18 months as a disciplinary measure. He then returned to his position as a Locomotive Engineer after completing additional training trips, which included distributed power and winter training.

On June 29, 2019 the grievor was operating his train Q10851-29 from North Bend on the Thompson subdivision to Kamloops in a straightaway service. The Conductor on this assignment was Stuart Prince. The crew took control at approximately Mile 121.5 and then proceeded eastward on the Thompson subdivision. The train traveled approximately 2 miles prior to arriving at the approach signal located at MP118.6 where they received a clear-to-stop signal. The clear-to-stop signal indicated that the grievor would be required to bring his train to a stop at the next signal located 1.2 miles away at MP 117.4. The grievor was traveling at 30.1 mph.

The grievor’s plan, after arriving at the clear-to-stop signal, was to reduce the throttle-anticipating that the terrain would assist him in slowing the train. When the train

didn’t slow down as quickly as he thought it would using the throttle manipulation, and with the stop signal at mile 117.4 now visible, the grievor began to apply the brakes. The brakes, according to the grievor, did not respond as he expected. He then put his train into emergency. It came to a stop prior to reaching the stop signal at mile117.4.

The Union, for its part, alleges to begin with that the Company has breached articles 86.1 and 86.2 of the Collective Agreement by failing to provide proper notice and produce relevant evidence prior to the investigation. Specifically, the Union argues that the Notice to Appear does not include any indication as to which CROR or Form 8960 rules or policies the grievor was alleged to have breached. As such, neither the grievor nor the Union were able to adequately prepare for the investigative meeting. The Union further submits that the Notice to Appear is also misleading due to the fact that it was accompanied by a request for the grievor’s cell phone records. The Union also notes that the email of July 3, 2019 from ESO Gosse, where he lists the rules that may have been broken during the incident, should have been forwarded to the Union 48 hours in advance of the investigation held on July 6, 2019.

With respect, the Arbitrator disagrees with the Union that the grievor was not afforded a fair and impartial investigation. A reading of the transcript of the investigation indicates that neither the Union nor the grievor objected or made any reference to any aspect of the investigation as being unfair or impartial. In particular, there is no mention either prior to or at the outset of the questioning that the Notice to Appear was vague or confusing. Indeed, the first paragraph of the Notice to Appear in my view captures the essence of the subject matter of the investigation. It states:

> You are required to attend an investigation to provide a Formal Employee Statement in connection with circumstances and events surrounding an alleged Engineer Initiated Emergency (EIE) while operating on a Clear to Stop Signal during assignment Q10851 – 29 which commenced on June 29, 2019.

The Notice to Appear is clearly unlike the inadequate notice found in Arbitrator Sims' decision **Ad Hoc 521** cited by the Union**.** The Notice to Appear in that case contained no substantive particulars but rather simply stated *"...failing to meet your obligations as an employee on the following dates…".*

The reference to the cell phone records, albeit somewhat confusing on its face, does not detract from the main object of the investigation which was to obtain details of the grievor's emergency brake handling at the clear-to-stop signal. The Arbitrator does not find the Union's argument persuasive that the Company should have produced the alleged list of violations prepared by ESO Gosse. These references again were not essential to the substance of the investigation. More to the point, the grievor did not hesitate to provide his answers that he understood that CROR 439 was a Cardinal Rule that required the movement to stop at least 300 feet in front of the stop signal. The grievor also acknowledged that he understood the requirements of Systems Notices No. 904 and No. 912. For all these reasons, the Union's preliminary objection regarding the alleged breach of articles 86.1 and 86.2 is dismissed.

Turning to the merits, the Company maintains that there was nothing unexpected that occurred in the grievor's tour of duty. The grievor was aware upon seeing the clear-to-stop signal at mile 118.6 that he had to be ready to stop his train 1.2 miles away. In the

Company's view, the grievor had adequate time to adjust his train speed to gently bring his train to a stop at signal 117.4. The grievor, in that regard, should have slowed down his train much earlier with incremental reductions of air through dynamic braking rather than having to initiate an emergency braking application only upon first seeing the clear-to-stop signal. Overall, the Company alleges that the grievor should have been traveling at a speed which allowed him enough time to slow down and stop the train 300 feet before the stop signal, in accordance with CROR rule 439, and without the need to rely on the emergency brake.

The Union alleges that the plan the grievor had in mind as part of his forward planning was reasonable in the circumstances. He chose to use throttle manipulation and the terrain's incline before applying brakes to bring the train to a stop. Unfortunately, his plan did not succeed any he was forced to place the train into emergency. By doing so he was able to avoid a breach of CROR 439 by stopping in advance of signal 117.4. The Union also pointed out that there was no delay or damage to any equipment as a result of the grievor's actions.

The Union further submits that the appropriate disciplinary action in these circumstances would be to provide additional coaching or training to the grievor in order to ensure future rules compliance. The Company would only be justified in assessing more serious discipline if the grievor had a substantial disciplinary record. In that regard, the Union submits that the grievor's record is not so serious as to demonstrate that he is incapable of improvement, notwithstanding his history of train handling problems. The Union also underlines that, in addition to the absence of a breach of a CROR rule, there

was no train separation or other property damage. The Union also notes that a penalty of 20 demerits would not have resulted in the grievor's job loss.

The Arbitrator notes that the grievor stated at his investigation that his most recent experience on the Thompson subdivision approaching the clear-to-stop signal taught him *"…that as good as throttle manipulation can be it doesn't always work properly".* Unfortunately for the grievor, his train handling ability has resulted in four rule Form 8960 violations as well as a cardinal rule violation since 2015. They include: 10 demerits for his first Form 8960 when the grievor, similar to the current incident, had to put his train into emergency after passing a clear-to-stop signal; a 2.5month suspension in 2015 for passing a stop signal in the Clearwater subdivision in violation of cardinal rule CROR 439; a demotion for 18 months after receiving a second Form 8960 violation for the same offence of passing a clear-to-stop signal resulting in the Conductor initiating the emergency braking procedures. The grievor, as noted, was provided with additional train handling and air brake reviews before resuming his duties as a locomotive engineer. More recently, in a decision upheld by this Arbitrator (**CROA 4769**), the grievor received 15 demerits for failing to comply with the train handling policy on the Ashcroft subdivision resulting in an unintentional emergency brake application as his train began to roll backwards.

The grievor has not, in particular over the last four years, been able to demonstrate the kind of focus and attention to detail required of a Locomotive Engineer. The Company has tried in earnest to send the message by way of its disciplinary responses to the various incidents, including relieving the grievor of his Locomotive Engineer duties for 18

months in 2016. The evidence is that the grievor was then retrained on air-brake applications and was monitored on some 6 occasions before returning to work as a Locomotive Engineer. The grievor regrettably did not learn his lesson as further incidents of train handling errors occurred due to his lack of forward planning, as set out in Section G of the *Locomotive Engineer Operating Manual*.

The grievor, although employed by the Company for 11 years, beginning as a Conductor, has only worked as a Locomotive Engineer since 2014. He unfortunately has never mastered the skill sets required of a Locomotive Engineer. Of more concern is the fact that the grievor, despite the Company's retraining efforts, has repeated the same kind of operational mistakes and been unable to make the necessary adjustments to safely operate his movement.

The assessment of 30 demerits, coupled with the 15 demerits from his March 23, 2019 incident, unfortunately puts the grievor in a position where he exceeds 60 demerits by 5 demerit points. I would be persuaded to reduce the current discipline and permit the grievor to be reinstated as a Locomotive Engineer if I was confident that he had truly learned his lesson about the need for proper forward planning as part of his train handling skills. I regrettably do not have that level of confidence in the grievor's ability to safely operate a locomotive. The grievor's record for repeated train handling mistakes of a similar kind as the current circumstances leads me to conclude that the grievor can no longer be trusted to dutifully perform his duties as a Locomotive Engineer.

I also do not find it appropriate in this case, as the Union has requested in the alternative, to reduce the demerits and allow the grievor to continue working as a Conductor. That was the result in **CROA 4480-C** where Arbitrator Flynn demoted a Locomotive Engineer to a Conductor with an unenviable disciplinary record who did not *"…seize opportunities to change his behaviour"*. The compelling factor in that case, however, was the grievor's long service which is not a mitigating factor which would tip the scales in favour of reinstating the grievor into a Conductor's position in this instance.

For all the above reasons the grievance fails and the resulting termination is upheld.

March 22, 2021

JOHN M. MOREAU
ARBITRATOR