

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASES NO. 4808 –and– 4809**

Heard via Video Conference and in Ottawa, Ontario, April 12, 2022

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

**4808:** The Union advanced an appeal on behalf of Locomotive Engineer W. Delmage of Moose Jaw, SK, regarding his assessment of a 45-day suspension.

**4809:** The Union advanced an appeal on behalf of Locomotive Engineer W. Delmage from Moose Jaw, SK regarding his dismissal from Company Service.

**JOINT STATEMENT OF ISSUE:**

**4808:** Following an investigation, Engineer Delmage was assessed with a 45-day suspension via form 104 described as:

Please be advised that your discipline record has been assessed with a 45 Day suspension from Company service without pay (effective 1643 December 22, 2018 to 1642 February 5, 2019) which includes the time served when held out of service for the following reason(s):

For failure to operate your movement in accordance with of the GOI Sec I - Locomotive and Train Operation/Train Handling which resulted in a 4car derailment in Moose Jaw Yard on December 21, 2018 while working as the Engineer on 498-19. A violation of GOI section I; General Instruction Item 32.0, Item 35 - Use of Throttle, Item 39 - Restriction when Moving Backward. Item 40 - Equipment Handling and Item 42.5 - Back-up Movements.

**UNION'S POSITION:**

The Union continues to take the position that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. The Union contends that

concept has not been adhered to through the Company's aggressive approach to its workforce. It is because of this lack of consistency that the Union also contends that discipline applied in such an inconsistent manner is in violation of the KVP award.

The Union asserts the investigation was fatally flawed as the Company relied on hearsay information without providing picture evidence and forced Engineer Delmage to answer self-incriminating questions. Both above are violations of the Combined Collective Agreement Article 39.05. The Union further asserts article 39.06 was violated for being unnecessarily held from service prior to the investigative process.

The Union contends that The Company has failed to provide the burden required to prove the derailment was the direct cause of Mr. Delmage's train handling. Mr. Delmage switched over the crossovers in question for five hours without incident and the Union asserts the download evidence can't solely be relied upon, there are too many inconsistencies within the download evidence.

As a result, the Union contends the discipline imposed is unwarranted, unjustified and extreme as Engineer Delmage has a positive work record and maintains that the incident has helped him mentor other employees to be mindful of all aspects of switching operations.

The Union seeks an order that the 45-day suspension be expunged from Engineer Delmage's discipline record and that he be made whole for lost wages, with interest, as well as any lost benefits in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

**COMPANY POSITION:**

The Company disagrees with the Union's contentions and denies the Union's request. The company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances and in line with the principles of progressive discipline.

The Union concedes within their grievance submission that Locomotive Engineer Delmage did indeed exceed the specified tractive effort levels. Culpability was established following the fair and impartial investigation conducted as established by article 39, and the 45-day suspension was warranted under all the circumstances when taking his current discipline record into account.

Failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

**4809 JOINT STATEMENT OF ISSUE:**

Following an investigation, Engineer Delmage was dismissed via form 104 described as follows:

Please be advised that you have been DISMISSED from Company service for the following reason(s):

In connection with your tour of duty on 369-334TC on April 18, 2020, while working as the Engineer and more specifically departing North Portal and entering the Weyburn sub with an incorrect lead locomotive number on the clearance to proceed in OCS territory. A violation of Rule Book for T&E Section 4.6 (a) OCS Broadcast Requirements, 10.3 (c) Authorities, and 15.2 (a), (b) & (c) Clearances:

Summary of rules violated:

4.6 A

10.3 C

15.2 A, B & C

OCS BROADCAST REQUIREMENTS AUTHORITIES

CLEARANCES

Notwithstanding that the above-mentioned incident warranted dismissal in and of itself, based on your previous discipline history;, this incident also constitutes a culminating incident which warrants dismissal.

UNION'S POSITION:

On September 25, 2020, the Union properly submitted a grievance regarding the Company's decision to dismiss Engineer Delmage.

The facts of the investigation are not in dispute, Engineer Delmage clearly described the events that took place while working on Train 369-334 TC on April 18, 2020. However, the Union contends that the Company has not met the burden of proof necessary to impose the ultimate penalty of dismissal. Based on the facts, clearly, there was no intentional rule violation but rather an oversight of the Locomotive number. As Engineer Delmage stated in his investigation this may have been due in part to the fact that he was out of sorts, concerned with dealing with the possible contamination of Covid-19 virus within the Locomotive. The Company must consider at this particular time in history, extraordinarily little was known about the virus or how employees could protect themselves and personal work areas during the pandemic. During the unknown period, the Union asserts that many employees were stressed and worried about the effects of the virus on them and their families but continued to remain working heroes by consistently appearing for work during these very disturbing times. Clearly these facts must be considered when determining the appropriate discipline. The Union contends that the incident is not worthy of dismissal.

The facts further reveal that the mistaken Locomotive number was entered into the FIT for Engineer Delmage's train by the RTC. The Union contends that Engineer Delmage cannot be held solely culpable for the incorrect Locomotive number. With all the technological tools and changes within the network of the railway, the Union is perplexed as to why safety measures are not in place to avoid letting this type of mistake from ever taking place.

Engineer Delmage is a long service employee with thirty-three years of dedicated service, his work record indicates he is only a few years away from normal retirement. To end his career prematurely is a great injustice to an employee who has dedicated his entire life to the railway.

The Union seeks an order that the dismissal be expunged from Engineer Delmage's work record and that he be made whole for lost wages, with interest, as well as any lost benefits in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

**COMPANY POSITION:**

The Company disagrees with the Union's contentions and denies the Union's request. The company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances including the facts the union describes as mitigating, and in line with the principles of progressive discipline.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

**FOR THE UNION:**

**(SGD.) G. Edwards**

General Chairperson

**FOR THE COMPANY:**

**(SGD.) L. McGinley**

Assistant Director Labour Relations

There appeared on behalf of the Company:

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| E. Allen    | – Labour Relations Officer, Calgary            |
| L. McGinley | – Assistant Director Labour Relations, Calgary |

And on behalf of the Union:

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|--------------|---|
| M. Church    | – Counsel, Caley Wray, Toronto              |
| G. Edwards   | – General Chairperson, Revelstoke           |
| H. Makoski   | – Senior Vice General Chairperson, Winnipeg |
| G. Lawrenson | – Vice General Chairperson, Calgary         |
| K. Ingalls   | – Local Chairperson, Moose Jaw              |
| W. Delmage   | – Grievor, Moose Jaw                        |

**AWARD OF THE ARBITRATOR**

**Overview**

1. This award addresses two separate grievances, concerning discipline imposed on the Grievor and ultimately his discharge in May 2020. Both grievances were originally scheduled to be heard in January, 2022, but were adjourned pending the determination of another outstanding grievance.

2. The Grievor is a long-service employee; he is fifty-three years old and was hired by the Company in January 1987. At the relevant times, he worked as a Locomotive Engineer.

3. The Grievor was disciplined for a train handling incident in November of 2018. In that matter, the 45-day suspension imposed by the Company was reduced to 20 demerit points following arbitral award **AH 781**. As a result, the Grievor's active disciplinary record now stands at 40 demerit points, with two suspensions.

### **The Grievances**

4. The first grievance before me concerns a 45-day suspension, related to an incident on December 21, 2018. While the Grievor was moving his engine backwards in a busy yard, he briefly exceeded the tractive effort limits. There is no dispute that the limits were exceeded, although the parties disagree as to the implications of this error. The Company maintains that the Grievor's inattention caused a four-car derailment. The Union disputes that there was any causal link between the Grievor's error and the derailment.

5. The second grievance relates to an incident on April 18, 2020, which resulted in the termination of the Grievor's employment. On that date, the Grievor failed to verify that the engine number on the clearance form matched the number of the lead engine of the train. Ultimately, the Grievor's train proceeded to customs with a lead engine that was misidentified.

6. There is no dispute that the Grievor acted on a clearance without verifying the numbers. However, the Union submits that the Grievor's culpability in this instance is mitigated because the initial error was made by the Rail Traffic Controller. The Company disputes that this is a mitigating factor. It states that the Grievor had an independent obligation to verify the engine number, but failed to do so.

7. Again, the parties expressed different views about the significance of the Grievor's conduct. The Union submits there were no real safety concerns and that, at most, the error resulted in delays. The Company maintains that an incorrectly-identified lead engine can cause confusion and jeopardize safety, particularly when operating in dark territory.

### **Decision**

8. There is no dispute that the Grievor's conduct in both instances was culpable and warrants some form discipline. The issue is whether the discipline and ultimately the discharge were excessive in the circumstances.

9. The Grievor is a long service employee and he accepted responsibility for the incidents at issue in these grievances. These are important mitigating factors.

10. However, in considering the grievances before me, it is also significant the Grievor has a lengthy, active disciplinary record, which includes 40 demerit points and two suspensions. For the purposes of this grievance arbitration, he is 20 points away from the 60-point threshold for termination.

11. The Grievor's disciplinary record shows that he was repeatedly advised of issues with his conduct and given a reasonable opportunity to improve. Unfortunately, he was not successful in doing so. The last three incidents of misconduct occurred in very short succession, within a period of approximately six months, not accounting for the suspensions the Grievor served during that time.

12. It is not necessary for me to determine whether the Grievor's conduct caused the derailment or whether his failure to verify the engine number had any significant safety implications. By any reasonable measure, the two incidents before me warrant the imposition a total of at least 20 demerits points. This brings the Grievor to 60 points and justifies the termination of his employment.

13. In the circumstances, I cannot conclude that the termination of the Grievor's employment was unreasonable. The Grievance is therefore dismissed.

April 22, 2022



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**MICHELLE FLAHERTY**

**ARBITRATOR**