

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

CASE NO. 4887

Heard in Calgary, November 16, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 Demerits assessed to Conductor Darren Gaymer (“the Grievor”) of Edmonton, AB.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Gaymer was issued 20 demerits on March 11, 2022, for the following: “For failing to properly ride the footboard while traversing over the south passing track switch and south designated switch at Red Deer Yard on February 2, 2022. This is a violation of company policy- Operating bulletin OPER-AB-039-21.”

Union Position

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above.

The Union contends the discipline assessed is grossly excessive in all of the circumstances, including mitigating factors evident in this matter.

The Union submits the Company has engaged in the unreasonable application of the Efficiency 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. Gaymer 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 with the Union’s contentions and denies the Union’s request.

The Company maintains the Grievor’s culpability as outlined in the discipline letter was established following the fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union.

The Union claims that the discipline assessed was excessive. The Company maintains that the assessment of discipline was appropriate and warranted.

The Union contends that efficiency test failures should not result in discipline or investigations. The Company cannot agree. Arbitral jurisprudence has held that the assessment of discipline for a rule violation identified through the efficiency testing procedure does not void the discipline assessed.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

**FOR THE UNION:
(SGD.) D. Fulton**

General Chairperson, CTY-W

**FOR THE COMPANY:
(SGD.) F. Billings**

Assistant Director, LR

There appeared on behalf of the Company:

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|--------------|---|
| F. Billings | – Assistant Director, Labour Relations, Calgary |
| D. Zurbuchen | – Manager, Labour Relations, Calgary |
| S. Scott | – Observer, Labour Relations, Calgary |
| S. Arriaga | – Observer, Labour Relations, Calgary |

And on behalf of the Union:

- | | |
|-------------|---|
| K. Stuebing | – Counsel, Caley Wray, Toronto |
| D. Edward | – Senior Vice General Chairperson, Medicine Hat |
| D. Fulton | – General Chairperson, Calgary |
| D. Gaymer | – Grievor, Edmonton |

AWARD OF THE ARBITRATOR

Background, Issue and Summary

- [1] The Grievor is a long service Conductor, having entered the Company's service on March 2, 1987.
- [2] On February 2, 2022, the Grievor was working train 469-02 in the Red Deer Terminal.
- [3] At approximately 21:17, Assistant Trainmaster (ATM) Coleman observed the Grievor traversing over the South passing track switch and the South designated Switch and not riding the platform or footboard.
- [4] The Company considered this to not be in compliance with Bulletin OPER-AB-039-21 (the "Bulletin").
- [5] The Grievor was assessed 20 demerits (one third the way to dismissal) for this failure.
- [6] At the time of this incident, the Grievor's discipline record had been described as "heavy" and he had been reinstated by arbitral award without compensation or benefits for time lost. He was placed at Sep 3 of the Company's Progressive Discipline policy: **CROA 4791**.

- [7] The issues in this case are:
- a. Did the Grievor Breach the Company's Policy which gave the Company cause for discipline?
 - b. If so, was the discipline just and reasonable: If not,
 - c. What discipline should be substituted?
- [8] For the reasons which follow, the Grievance is allowed.
- [9] Even if the Company's arguments regarding the meaning of the Bulletin are accepted (which need not be decided), the Grievor had a reasonable explanation for his inability to comply with the Bulletin, which was based on considerations relating to his own health and safety riding an icy locomotive. The Company failed to consider and appropriately assess this issue. The failure to do so resulted in an unreasonable application of the Bulletin.
- [10] No cause for discipline arose. The demerits are vacated.

Analysis and Decision

- [11] The Bulletin at issue states:

TRAINS WORKING / TRAVELLING IN YARDS / INDUSTRY TRACKS
(OPER-AB-039-21 – SEPT.2/21)

For train crews working or operating in yards or industry tracks, effective immediately all employees on the consist with the exception of the Locomotive Engineer (if any), all employees MUST be positioned on the footboard or platform of the leading locomotive in the direction of travel within 10 car lengths of a switch (this includes like engines).

Instances where there are 3 RTE's on the consist, 2 employees will be required to be positioned outside of the cab to ensure diligence in protecting the point within 10 car lengths of a switch. Limits defining yards for application of this rule are as follows:

Edmonton Intermodal Yard – All switches in non-main tracks between South IMS mainline Switch and Labatts mainline Switch.

Lambton Park Yard – All switches between 50th Street and 92 ave NW (including A track)

Clover bar Yard – All Switches between Petroleum Way and 17th street NE (Including A track and siding).

Scotford Yard – All switches between and including the East Yard Switch and the Scotford WYE Switches

Red Deer Yard – All switches between the South Yard Switch and the North Passing tracks switch (including the main track switches).

Hardisty Yard – All switches between the East Yard Switch and the West Yard Switch.

Alberta Summary Bulletin October 28, 2021.

- [12] As a unilaterally promulgated policy, the Bulletin had to meet the requirements of what has come to be known as the *KVP Test*, developed in a 1965 grievance arbitration award¹.
- [13] There are several requirements to the *KVP Test*, which are noted at pp. 85 and 86 of that award. For the purposes of this Grievance, the relevant requirements are that any unilaterally promulgated policy must not be unreasonable and must be clear and unequivocal.
- [14] I am satisfied - as argued by the Company - that the Bulletin was promulgated to enhance safety and ensure crews are aware switches are properly aligned as they are approached. I find no issue with that underlying purpose.
- [15] I am further satisfied that switches cannot “unalign” themselves once they are observed to be aligned.
- [16] The parties disagreed on the meaning of this Bulletin. The Company maintained it required the Grievor to ride the footboards from 10 cars out until past the switch; the Union maintained it only required the Grievor to be satisfied with the location of the switch at the 10 car out mark, and that if crews are to remain for the full 10 car approach, different wording is used.
- [17] In view of the basis for my findings, below, it is not necessary to resolve this question.
- [18] ATM Coleman’s memorandum stated that the Grievor was “not riding the leading piece of equipment or on the footboards of the movement”. He also states he was

¹ Developed in *Re Lumber & Sawmill Workers’ Union, Local 2537 and KVP Co. Ltd.* (1965) 16 L.A.C. 73; 1965 CanLII 1009 (known as “KVP”).

told by the Grievor he had been “riding the footboards until about 2 cars before the switch”.

- [19] During the Investigation, at Q/A 9, the Grievor maintained “I was standing in the nose of the locomotive with the door open as my footing unstable and wind/snow was blowing and obstructing my vision also in the -30 cold”. He also maintained in Q/A 20 that he had already noticed the train was properly aligned with the switch, therefore satisfying the purpose of the Bulletin.
- [20] At Q/A 21, the Grievor stated “I positioned in the nose of the unit with the door opened because the platform had an over and abundance of ice buildup and my footing was uneven and very slippery”; and Q/A 23 that the buildup had not occurred when he got on the power on 469-02 but that it had built up over the trip.
- [21] In Q/A 24 he indicated he reported the ice buildup to the Trainmaster in Red Deer, “who said there was some gravel by the door of the Red Deer yard office”. He also noted at Q/A 25 that there was “no broom with a chip on the end” to clear the ice build up. At Q/A 27, the Grievor stated that while there are brooms at every switch, it would not have been a “quick and easy fix as the ice was an abundance and it would have taken more than half an hour to clean it”. At Q/A 29, the Grievor indicated he observed the “south pass and south yard switch were both lined for our route”.
- [22] I am satisfied ATM Coleman was incorrect in his memorandum and that the Grievor was in fact riding in the leading piece of equipment.
- [23] The Union has pointed out that Mr. Coleman was not called to respond to the Grievor’s statements regarding the unstable footing which had developed on Train 469-02, impacting the Grievor’s ability to comply with the Bulletin.
- [24] I am inclined to agree with the Union on this point. I also note that the Trainmaster from the Red Deer yard was also not interviewed to contradict the report of ice buildup made by the Grievor, and his search for implements to help him clear this.
- [25] It is the Company’s burden to establish there was cause for discipline. That would include providing evidence to refute the evidence of the Grievor that there was a buildup of ice and snow which prevented his safe compliance with the Bulletin, since

the Grievor did say in his Investigation interview that his footing was unstable. The Company did not provide evidence to refute that statement.

[26] I am further satisfied that it would be an unreasonable application of the Bulletin if there was *not* an ability to determine its application to working conditions where footing is rendered unstable and potentially unsafe when riding a moving locomotive.

[27] I am not satisfied the Company either considered or addressed that impact appropriately, in this case.

Conclusion

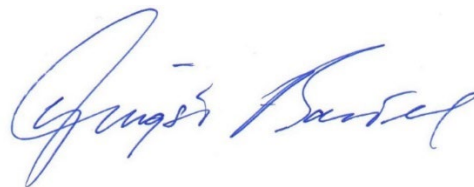
[28] In view of the uncontradicted evidence of the Grievor regarding the unstable footing that existed on his train as the switch was approached, I am satisfied the Company has not met its burden of proof to establish the application of the Bulletin was reasonable in this case and provided cause to discipline the Grievor for failure to comply with the Bulletin.

[29] The Grievance is allowed.

[30] No cause for discipline having been established, the 20 demerits assessed to the Grievor are vacated.

[31] I remain seized to address any issues with the implementation of this Award and to address any errors or omissions to give it the intended effect.

March 1, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**