

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

CASE NO. 4888

Heard in Calgary, November 16, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 demerits and subsequent dismissal of Conductor D. Gaymer or Edmonton, Alberta.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Gaymer was assessed 30 Demerits on April 12, 2022, for the following: "For improperly operating the North Passing Track Switch and for failing to validate the desired route prior to or after lining the switch by pointing to the switch points while working on train 469-17 in Red Deer Yard on March 17, 2022. This is a violation of Rulebook for T&E Employees, Section 2, 2.2A, T&E Safety Rulebook T-26 - Switches, Item 1 and company policy- Operating bulletin of OPER-AB-122-21."

Mr. Gaymer was also dismissed on the same date for the following: "for an accumulation of 80 (EIGHTY) demerits."

Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of Article 39 of the Collective Agreement, in particular, that the investigation was held long after the incident, the questions asked were leading and speculative, asking Mr. Gaymer to agree between Q and A 14 – 23, and asking Mr. Gaymer to admit guilt.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above, specifically that no evidence was submitted validated ATM Coleman's allegations, that Mr. Coleman was alone with no one to validate his observation. The Grievor also disagrees with Mr. Coleman's assessment (Q. 14, 16, 2nd Q. 21)

The Union contends the discipline assessed is discriminatory and excessive in all 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 be reinstated without loss of seniority and benefits and be 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.

The Company objects to the Union's claim that the Grievor was not afforded a fair and impartial investigation as this issue was not brought forward when the Grievor and Union had an opportunity to during the investigation statement. To bring forward this argument only through the grievance process prejudices the Company as it is unable to properly respond to the allegation at the time of the investigation.

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 the Company engaged in the unreasonable application of the Efficiency Test policy and procedures, resulting in discriminatory and excessive assessment of discipline. 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. Edward (for) **D. Fulton**

General Chairperson, CTY-W

FOR THE COMPANY:

(SGD.) D. Zurbuchen (for) **F. Billings**

Assistant Director, Labour Relations

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 & Summary

[1] The Grievor is a Conductor. He is a long-service employee of thirty-seven years, having first entered the Company's service in 1987.

[2] This Grievance is against an assessment of 30 demerits and dismissal for accumulation.

- [3] The allegation is the Grievor improperly handled a switch and also failed to point to switch points while working on March 17, 2022. He was assessed 30 demerits and dismissed for accumulation.
- [4] The three issues raised by this Grievance are:
- a. Was culpability is established?
 - b. If so, was the discipline was excessive and unwarranted? and
 - c. If so, what other discipline is appropriately substituted?
- [5] For the reasons which follow, the Grievance is allowed, in part.
- [6] While culpability for some discipline was established, in consideration of the Grievor's long service and the nature of this offence, the discipline of 30 demerits and dismissal which resulted, was excessive. This is a case which attracts the arbitrator's discretion to substitute another form of discipline. The Grievor is to be reinstated, but without compensation or benefits.

Facts

- [7] On March 17, 2022, ATM Coleman was observing the Grievor line a switch. I am satisfied in doing so he was behind a chain link fence. ATM Coleman estimated the distance was 30 feet; the Union argued it was 75 to 100 feet. Neither party measured the distance and I am unable to resolve this difference without further evidence.
- [8] ATM Coleman created a Memorandum dated that same day of what he observed. It stated he saw the Grievor detrain, walk up to the north passing track switch, unlock the switch, stand in front of the switch, raise the handle and allow the switch handle to direct into himself, and that it was directly in the path of the Grievor's body. He stated the Grievor then pulled the switch towards himself, pushed the handle down and locked the switch. He also stated he did not observe the Conductor pointing before or after alignment, as required.
- [9] He stated he immediately contacted the crew, requested a change of channel, and advised the Conductor that he had "observed him allowing the switch handle to come into his body while lining the north passing track switch, and that I did not see

him pointing”¹. ATM Coleman noted that he was told by the Grievor that he “had his hand there to prevent the switch from hitting him.”.

- [10] ATM Coleman then indicated in his memo that he told the Grievor the importance of using “proper body mechanics while lining a switch and to allow the handle to swing away from you, as you could be injured if the switch was loaded. ATM Coleman indicated he told the Grievor he would “entering a non-compliance test and escalating it”.
- [11] ATM Coleman’s memo also notes the question was asked by the Grievor of whether ATM Coleman was “out to get” the Grievor “as I had previously entered a non-compliance test”. He then stated in his memo ‘I replied no, but yes I have entered a non-compliance for not riding the footboards before, and now improperly lining a switch”.
- [12] As noted in **CROA 4887**, the discipline which resulted from “not riding the footboard” to which ATM Coleman referred in this memo, was found to have been unreasonably imposed and was set aside through arbitral award.
- [13] In his Investigation on March 31, 2022, the Grievor stated he did not have any rebuttal to offer to ATM Coleman’s memorandum and that he did not recall if he told ATM Coleman his hand was there to prevent the switch from hitting him (Q/A 15). In Q/A 14, he did not agree that when he raised the switch handle, his body was in the path of the switch handle. In Q/A 15, the Grievor also stated he could not recall where his hand was.
- [14] ATM Coleman was also interviewed. He indicated he did not see the Grievor pointing at anything. He indicated the only time he could *not* see the Grievor’s hand was for a brief second until he pulled the switch handle down. He indicated in questioning from the Union that he was on the east side, up a slight hill, which he estimated was about 30 feet. In questioning by the Union during the Investigation, ATM Coleman indicated he did not see the switch handle contact the Grievor.

¹ At p. 1

- [15] Later in Q/A 18, the Grievor stated he didn't recall whether he would be in non-compliance with Item 1 of T-26 if his body was in the path of the handle. This is a curious answer for an experienced Conductor as it demonstrates either lack of knowledge of the requirements for the safe handling of switches under Rule T-26, or a dismissive attitude of what is required. The Union also objected to that question as leading, but the Grievor chose to answer the question.
- [16] In Q/A 19 when asked if he agreed that when he lined the switch he did not point at the switch points prior to or after handling the switch, the Grievor's answer was "I do not recall".
- [17] In Q/A 21, when asked to describe what happened when he lined the switch, the Grievor described that he "would have" detrained, walked up to the switch, unlocked it, "would have grabbed the handle with my right hand. Pulled the handle up using my legs and upper body. Set the handle on the table. Come around behind the handle and pulled it over. Then put the handle down, and the switch in the reverse position".
- [18] The Grievor mentioned nothing in this recital about the need to point.

Analysis and Decision

- [19] I do not accept this was a failed E Test, which would attract the analysis developed by this Office for determining if the conduct attract discipline or if coaching, mentoring and education are appropriate responses.
- [20] While the Company is required to conduct Efficiency Tests ("E-Tests") to ensure compliance with railway rules² (the "Efficiency Code"), that Efficiency Code is derived from the Canadian Operating Rules (CROR), which are binding on all railways³. While several such rules relate to switching, the body mechanics to be used relating to switching are not included in the Efficiency Code, and are not subject to these formal "E Tests". Rather, the requirement to use proper body

² *Canada Efficiency Test Codes and Descriptions for Train & Engine Employees*, CP Revised November 2014.

³ The Efficiency Code sets out "Canadian Rail Operating Rules Tests".

mechanics is included in Item 1 of T-26 of the Train & Engine Safety Rule Book (“T-26”).

- [21] Therefore, the analysis for breach of these rules is a disciplinary analysis under *Re Wm. Scott & Co*, rather than a determination of whether coaching, education and mentoring would be appropriate choices.

The First Wm. Scott Question: Culpability

- [22] Item 1 of T-26 of the Rule Book for T&E Employees states “Keep your body, hands, and feet clear of all moving parts and out of the path of the switch handle’. Item 8 directs an employee to “[u]se both hands while operating the switch handle to align the switch points or derail”. Section 2.2(a) of the CP Rule Book states, in part, that “Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken”.
- [23] Operating Bulletin OPER-AB-122-21 (the “Bulletin”) was also referred to in the Form 104 given to the Grievor, supporting the discharge decision. That Bulletin requires that employees “POINT AND OBSERVE” while handling Hand Throw Switches “to reduce incidents and accidents”, similar to railways in other countries, such as Japan and China. The Bulletin states:

With an aim of reducing the incidents of Run Through Switches in our territory, the Local Health & Safety Committee’s[sic] has determined that an additional safeguard be implemented during the handling of Hand Thrown Switches. Run Through Switches have the potential to cause bodily harm and/or death, and is one of the most critical tasks that T&E employees undertake each trip. The Handling of switches and the tasks that surround them is one of the leading causes of Rule Violations and Injuries. It is paramount that employees are fully focused when handling switches”.

- [24] The Bulletin goes on to direct that

Before handling a Hand Operated Switch the employee must, in addition to all current applicable Rules,

- *Observe and POINT your open hand at the switch target (confirming the switch needs to be turned)*
- *Observe the switch points are free of debris and POINT your open hand at the switch points towards the desired route*A contentious issue has been whether discipline should follow non-compliance, or whether an educational and mentoring approach – including coaching – should be followed.
- After Lining that Switch.

- *Observe and POINT your open hand at the switch target, (confirming that the target is reversed or normal as required)*
- *Observe the switch points fit properly and POINT your open hand at the switch points towards the desired route*
- *Communicate*

[italicised emphases in original]

[25] The Grievor is a long-service employee of thirty-seven years, who has handled *thousands* of switches during his career as a Conductor. He should be very familiar with appropriate body mechanics. It is unusual and unexpected that he was not aware that T-26 required that his body not be in the path of the handle. I also find it unusual that the Grievor did not recall key facts from this event and so could not recall such facts at his Investigation. These included whether he pointed and where his hands were. While he did give a recital of facts, I am satisfied he was describing what he 'would have' done – as he stated – rather than what he *actually did that day*, since he could not recall key aspects of his actions.

[26] The Union pointed out the Investigation took place two weeks later. While that is true, ATM Coleman's memo indicates he advised the Grievor on March 17, 2022 that he was observed not handling the switch appropriately and the matter would be escalated. The Grievor would therefore have been aware on the day of the incident that it would be important to make note of where his body had been in relation to the switch, to defend his actions, especially given his precarious disciplinary record and the very real risk of discharge due to accumulation which existed at that time.

[27] Upon review of all of the evidence, I am satisfied ATM Coleman was in a position to observe whether the switch handle was brought towards the Grievor's body and whether the Grievor pointed as required.

[28] I am satisfied on a balance of probabilities standard that the Grievor failed to both use proper body mechanics while handling the switch and to point to validate the switches, either before or after he lined the switch.

The Second Wm. Scott & Co. Question: Appropriateness of Discipline

[29] The next question is the appropriateness of discipline.

- [30] Since the Grievance in **CROA 4887** was allowed, the Grievor stood at 30 demerits after this event, and not 50. The assessment for this discipline must be *less than* 30 demerits – or in the nature of a suspension – to avoid dismissal for accumulation.
- [31] While this industry is highly safety-sensitive – and the job of a Conductor is safety critical – I am prepared to accept that failing to use proper body mechanics and point – while an important event to avoid injury to that employee – does not carry the level of significance as does other incidents in this industry. Incidents with more significant safety consequences include cancelling a TGBO; occupying a track without authority; failing to set handbrakes; or running through a switch. Those types of incidents carry a more significant safety consequence, as they have the potential to injure not just the Grievor, but also other employees and the broader community.
- [32] Arbitrators are rightfully very concerned with breach of rules which carry significant potential safety consequences in this industry.
- [33] A complicating factor in this case is **CROA 4791**. That case imposed a suspension of time served – which was over 600 days. That discipline was for “Conduct Unbecoming” and not a rules violation.
- [34] In that case, the arbitrator noted the Grievor had a “heavy” discipline record in the two years prior to his discipline, and a “long discipline history” before that. In reinstating the Grievor, the arbitrator noted that the “vast majority of the grievor’s discipline history relates to rule violations” – which this Grievance also does - instead of conduct unbecoming offences - which was at issue in that case.
- [35] However, that reinstatement also placed the Grievor at Step 3 of the Company’s Hybrid Disciplinary Policy. The next step for Non-Major Offences – if followed in lock step – was stated under that policy to be the assessment of 30 demerits or “At company discretion a 30 day Suspension in lieu of dismissal for accumulation of demerits”.

- [36] If 30 demerits is applied in this case, it would support dismissal for accumulation, since the Grievor was already at 30 demerits, even given that **CROA 4887** set aside the demerits issued in that case.
- [37] While that Hybrid Discipline Policy is now under grievance, the Arbitrator in **CROA 4791** had a broad jurisdiction under the *Canada Labour Code* to fashion a remedy and to provide for the application of that Policy to the Grievor's case, as part of that imposed remedy.
- [38] I am also satisfied, however, that this placement cannot take the place of my own jurisdiction to assess discipline under *Wm. Scott* and fashion an appropriate remedy for the incident now before me.
- [39] As noted in *Re Wm. Scott*, in making an assessment of an appropriate level of discipline, an arbitrator's determination of whether "the misconduct of the employee is serious enough to justify the heavy penalty of discharge" must be "especially searching"⁴:
- ...[I]t is the statutory responsibility of the arbitrator, having found just cause for some employer action, **to prove beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question.**⁵
- [40] Further on in that same paragraph, Chair Weiler noted that arbitrators have the discretion to substitute a new penalty, "properly tailored to the circumstances of the case, *perhaps even utilizing some measures which would not be open to the employer at the first instance under the agreement*".⁶
- [41] The jurisdiction of an arbitrator in determining an appropriate penalty is not therefore limited to a determination of whether the Employer's disciplinary policy was appropriately applied, or to measures it may contain.
- [42] The Company relied on several cases from this Office to support its position.

⁴ At para. 14.

⁵ At para. 14 (emphasis added)

⁶ Emphasis added

- [43] Each case must be addressed on its own factual basis. While I will not address all of this jurisprudence, a close review shows those facts are either distinguishable or support a reduction in penalty.
- [44] For example, **CROA 4193** is also a case involving multiple incidents, for a Grievor of relatively short service. The Grievor's short service distinguishes the applicability of that case.
- [45] **CROA 4098** is also distinguishable as it involves detrainning facing forward, as well as throwing a switch with one hand. The grievor was assessed 20 demerits for *both* infractions. The Arbitrator also found that "discharge of the grievance is excessive given the relatively minor nature of each of the infractions". The Arbitrator held that the Grievor's actions did not involve "flagrant violations of safety rules and procedures so much as a failure to follow best practices. In my view there were errors of judgment..." (at p.3).
- [46] **AH695** involved the termination of a grievor with thirty-three years of service and was an appeal of three suspensions and a dismissal (6 failed proficiency tests; not properly riding equipment; failing to walk in a safe location and instead walking on the ties; and not riding outside of the cab to observe switch alignment). That case is distinguishable from the facts before me.
- [47] In **CROA 4806 & 4807**, the Arbitrator was deciding four different incidents, attracting 15 demerits, 20 demerits, 30 day suspension and 30 demerits and dismissal, for a Conductor with twenty-three years of service. She had both a 5 day and a 19 day suspension and 20 active demerits. One of the incidents involved failing to keep herself clear of all moving parts in the throwing of three switches, and another involved failing to maintain three points of contact when detrainning and failing to advise the locomotive engineer she would be doing so. The Arbitrator found the Grievor did not "throw the switches in a manner that created a significant danger or a likely risk of injury. The Arbitrator held 20 demerits was excessive and imposed 10 demerits. 25 demerits were imposed for all four incidents.

- [48] While Mr. Playfair also had an “unenviable discipline record” in *TCRC and CP*, he was an employee with less than eight years of service, which does not put him in the same category as this Grievor.
- [49] Turning to the Grievor’s record, considering the last decade – between 2014 and 2024 – the Grievor had a 14 day suspension (occupying track without a TGBO); a 5 day suspension (for booking sick on duty) and in October 2017, the Grievor was disciplined for failing to line a bull switch, resulting in a run through (20 day “record” suspension, but with no time served). This last discipline was at the five year mark before the incident at issue in this Grievance.
- [50] In considering **CROA 4791**, I find it relevant that the Grievor did not have any further discipline for 2.5 years after he was reinstated. He then incurred 30 demerits for booking off sick after his EDO’s were denied, which was an incident without safety consequences but which showed very poor judgment.
- [51] The incident in **CROA 4887** was next, but that discipline was set aside. This incident followed one month later.
- [52] The event which has led to this next discipline was not of the same sort as that disciplined in **CROA 4791**. While not determinative, that does have some relevance for providing comfort the Grievor has learned what he was to be learned from his lengthy suspension regarding treating his colleagues and managers with respect.
- [53] While I am troubled by the Grievor’s lack of forthrightness and inability to recall facts in his Investigation – and I note his attitude appeared dismissive of that important process – I do understand that by that point he felt defeated as he felt targeted, as was noted in ATM Coleman’s memo.
- [54] In making this decision, I have had regard to the very long service of this Grievor and have considered his discipline record – and the jurisprudence – very carefully. In view of the very long service of the Grievor; the relatively minor nature of this incident in comparison to others in this industry as recognized in **CROA 4098**; the jurisprudence; and also understanding that the Grievor had already been placed at Step 3 on his reinstatement, I am satisfied that 30 demerits was excessive and

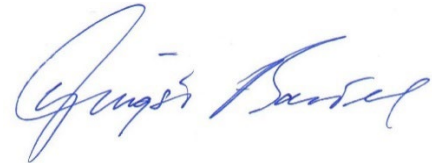
unwarranted for this incident. I am prepared to exercise my discretion to set aside that discipline and to substitute reinstatement, however given that the Grievor had been reinstated at Step 3 and his record was therefore precarious, I do so with time served as a suspension (so a reinstatement without compensation and benefits).

[55] The Grievor is cautioned to be diligent with rules compliance in future, to continue to rehabilitate his record.

[56] That said, I would not expect the Company to be relying on an infraction of a minor nature to substantiate dismissal of this long service Grievor.

[57] I retain jurisdiction to address any issues arising from the implementation of this Award, and to correct any errors or omissions in order to give it the intended effect.

March 1, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**