

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

CASE NO. 5020

Heard in Montreal, March 14, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor E. Aire.

JOINT STATEMENT OF ISSUE:

On November 24, 2020, the Grievor and Union signed an Offer of Continued Employment (Deferred Dismissal) Agreement in relation to an incident that occurred on November 4, 2020. This agreement states in part:

4. If additional discipline is issued to Mr. Aire within the one-year period for under Article 39.1(3) then the discipline that has been deferred (30 demerit marks) will be added to the employee's discipline record.

An incident occurred on November 23, 2021, and on November 26, 2021, the Grievor attended a statement in connection with his "tour of duty on the CR02-22 more specifically your alleged failure to properly release test PT05 resulting in a runout".

On December 4, 2021, the Grievor attended a supplemental statement in connection with the aforementioned.

Following an investigation the Grievor was dismissed on December 20, 2021, for the following: *"In connection with your tour of duty on November 23, 2021, while working RCLS assignment CR02-22 in Alyth Yard, and your failure to properly release test and secure track PT05, a violation of the following rules:*

- *T&E Safety Rule Book – T-0 Job Briefing*
- *GOI Section 13, Item 1.6 Coupling*
- *GOI Section 4, Item 6.0 Securing Unattended Cars – All Other Tracks*
- *GOI Section 4, Item 2.3 Confirmation of Securement*
- *GOI Section 4, Item 2.2 Testing Hand Brake Effectiveness*
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Notwithstanding the above-mentioned incident is dismissible in and of itself, based on your previous discipline history, this incident constitutes a culminating incident which warrants dismissal." Mr. Aire was issued a second Form 104, advising he was dismissed for the following:

"Please be advised that in light of your December 20, 2021, assessment of discipline, you are hereby DISMISSED from

Company service for an accumulation of 65 demerits under the Hybrid Discipline and Accountability Guidelines.”

On June 8, 2022, Mr. Aire was unilaterally reinstated. As such, the time between his dismissal and subsequent reinstatement is in dispute.

UNION POSITION

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement.

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 discriminatory, unjustified, unwarranted, and excessive. The Union further contends the Company has failed to consider mitigating factors evident in this matter.

The Union disputes the application of the Hybrid Discipline & Accountability policy in the instant 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 submits that Mr. Aire was wrongfully held from service in connection with this matter, contrary to Article 39.06 of the Collective Agreement.

The Union submits the Company has improperly applied discipline that was previously deferred, after Mr. Aire remained discipline free for more than one year, in violation of Article 39.13 of the Collective Agreement.

The Union requests the dismissal be expunged from Mr. Aire’s record, and that he be made whole for all benefits and lost earnings with interest from the date of dismissal to the date of unilateral reinstatement. In the alternative, the Union requests the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union’s request.

The Company maintains the burden of proof has been met and that 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 Company maintains that the Grievor was properly held from service as per Article 39.06 of the collective agreement as it states, “an employee is not to be held off unnecessarily in connection with an investigation unless the nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual or to expedite the investigation.”

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, Labour Relations

There appeared on behalf of the Company:

- S. Scott – Manager Labour Relations, Calgary
- F. Billings – Assistant Director, Labour Relations, Calgary
- D. Zurbuchen – Counsel, CPKCR, Calgary

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairperson, LE-W, Calgary
- T. Haug – Local Chairperson, Division 335, Calgary
- E. Aire – Grievor, via Zoom, Calgary

AWARD OF THE ARBITRATOR

Context

1. The grievor was a short service employee, with two years of service. He was dismissed on December 21, 2021 and unilaterally reinstated on June 8, 2022. He has since resigned in January 2024. This matter concerns the six month period between the time of his dismissal and his reinstatement.

2. Issues

- A. Did the Deferred Discipline Agreement Result In 30 Demerits Becoming Applicable?**
- B. Was the Investigation Fair and Impartial?**
- C. Were the Actions of the Grievor Properly the Subject of Discipline?**
- D. Was the Discipline Imposed Reasonable?**
- E. If not, What Discipline Should Have Been Imposed?**

A. Did the Deferred Discipline Agreement Result In 30 Demerits Becoming Applicable?

Position of the Parties

3. The Company takes the position that the grievor was working under a Deferred Discipline Agreement signed on November 24, 2020 (see Tab 5, Company documents). At that point, the grievor had 65 demerits and would have been subject to dismissal for accumulation of demerits.

4. On November 23, 2021, the grievor had a Major Rules violation, thereby activating the terms of the Agreement activating the 30 deferred demerit points. As such, he again would have more than 60 demerits and would be subject to dismissal.

5. The Union argues that no discipline was issued during the one year period foreseen by the Agreement, and pursuant to article 39.13, the deferred discipline was expunged.

Analysis and decision

6. The Deferred Discipline Agreement (see Tab 5, Company documents) notes the following:

“If additional discipline is issued to Mr. Aire within the one-year period for under Article 39.13(3) then the discipline that has been deferred (30 demerit marks) will be added to the employee’s discipline record.”

7. Based on the clear wording of the Agreement, I find the Union argument persuasive. While the incident occurred on November 23, no discipline was imposed until December 21, 2021, following an investigation.

8. The Agreement refers to “additional discipline is issued” during the relevant one year period. No additional discipline was issued prior to December 21, 2021. The Company’s own Discipline record confirms this (see Tab 6, Company documents).

9. Accordingly, I find that the terms of the Deferred Discipline Agreement expunged the deferred 30 demerits.

10. This finding also means that the second Form 104 invoking dismissal (see tab 1, Company documents) which relies on an accumulation of 65 demerit points, must be set aside.

B. Was the Investigation Fair and Impartial?

Position of the Parties

11. The Union submits that the grievor is entitled to a fair and impartial investigation and discipline can be considered void ab initio if this is not obtained (see CROA 2934 and 3952).

12. The Union relies on Q and A's 52, 53, 54, 55, 58 and 59 (Tab 7) and Q and A 21 (Tab 9) as evidence of a pre-determined mindset on the part of the Investigating Officer.

13. The Union objects that the purpose of the crane cameras in the yard is not for disciplinary purposes.

14. The Company disputes that the investigation was in any way unfair or partial. It notes that the grievor was represented by a Union representative, who did not contest that the investigation was unfair or partial. The grievor was given the chance to tell his side of the story.

15. The Company submits that the photo from the crane camera was merely to establish lighting levels in the yard.

Analysis and decision

16. It is not strictly accurate that the Union representative did not contest the manner of the investigation. There were in fact several objections made to leading questions or to questions which would tend to self-incriminate (see Q and A's 52, 53 and 54).

17. However, the overall investigation does not portray an investigating officer whose mind is made up in advance. This investigation differs greatly from the one conducted in **CROA 2934**, in which the grievor was repeatedly accused of lying.

18. Indeed, the grievor's answers that he was unaware who had done various tests was accepted, a supplemental investigation was conducted, and the roles of Mr. Collins and Mr. Aire were established.

19. With respect to the photo taken from a crane camera, I accept that it is introduced for the purpose of establishing lighting levels in the yard. I do not view this as an invasion of privacy, as it shows a work place, even if two individuals can be discerned in the photo.

20. Accordingly, this argument is dismissed.

C. Were the Actions of the Grievor Properly the Subject of Discipline?

Analysis and decision

21. The memorandum of James Rapinda, Assistant Superintendent Calgary (see Tab 8, Company documents) sets out the seriousness of the situation:

“At 12:07 on November 23, 2021 I was informed by the Car department planner via a rail car mechanic that PT05 was not properly secured. Only 5 hand brakes were reportedly found in the middle of the track containing 97 cars at 10228 tons.

I immediately drove alongside PT05 to verify and only found 6 hand brakes in the middle of PT05. The CE11-23 crew re-secured PT05 with enough hand brakes to prevent a potential rollout.”

22. The proper securing of trains is obviously critical to the safety of those working around them, as well as to prevent possible rollout. Rollout, should it occur, can result in catastrophic consequences, as seen at Lac Mégantic.

23. The grievor was dismissed for the following reasons:

“In connection with your tour of duty on November 23, 2021, while working RCLS assignment CR02-22 in Alyth Yard, and your failure to properly release test and secure track PT05, a violation of the following rules:

- T&E Safety Rule Book – T-0 Job Briefing
- GOI Section 13, Item 1.6 Coupling

- GOI Section 4, Item 6.0 Securing Unattended Cars – All Other Tracks
- GOI Section 4, Item 2.3 Confirmation of Securement
- GOI Section 4, Item 2.2 Testing Hand Brake Effectiveness

Notwithstanding the above-mentioned incident is dismissible in and of itself, based on your previous discipline history, this incident constitutes a culminating incident which warrants dismissal.”

24. Here, there is no doubt that PT05 was not properly secured. It is not contested that six hand brakes were insufficient for the number and weight of cars, nor were they correctly positioned, being placed in the middle, rather than at one of the ends.

25. This situation, which fortunately did not result in injury or rollout, appears to be the result of a combination of errors. The switch list indicated twenty-five (25) cars, when in fact the number of cars was much longer, with some ninety-seven (97) cars (see Tab 4, Union documents). The grievor relied on the switch list to set hand brakes and perform the cut and failed to visually confirm the number of cars on PT05. As he did not know the number of cars, the number of hand brakes placed were insufficient.

26. Because he did not verify the number of other cars on the track, he also failed to release the air brakes on these other cars. That meant that the air brakes on the other cars were applied when the hand brake test was performed by Mr. Collins, rendering the test meaningless.

27. The investigation established that the grievor was not present for the “hard coupling”, which was done by Mr. Collins. Accordingly, he cannot be responsible for this violation.

28. The investigation further established that the grievor was not present when Mr. Collins performed the hand brake test. However, his failure to verify the number of cars, the proper number of hand brakes and the release of air brakes on the other cars, made the test by Mr. Collins useless. The fact that he was not present when the hand brake test occurred does not lessen his responsibility for his earlier errors.

29. The grievor has admitted that he erred in not visually confirming the number of cars present on PT05:

Q 40 Referring back to above Q and A, did you know how many cars were in track PT05 and tonnage of the cars?

A I did not.

Q 22 Did you physically confirm that the track had no other equipment other than the 25 cars?

A It was pretty dark and I could not see any cars beyond other than what was on the switch list.

Q 28 Do you agree that when trying a handbrake on the last car that if the track had more cars in it, that you notice that?

A Yes, I must have missed it.

Q 31 Do you have anything you wish to add to this investigation?

A ...While I was tying on the hand brakes I was unable to see down the track due to the fact it was dark. I was really just focused on the cars on my list. After this investigation, and in the future, when my work is done and when I'm finished with a track, I will make sure to seek clarification as to how many cars are left in the track.(underlining added).

30. In contributing to the failure to properly secure PT05, the grievor is clearly subject to discipline.

D. Was the Discipline Imposed Reasonable?

31. The failure to properly secure, given its critical importance, can result in the termination of the person or people involved (see **CROA 4171**).

32. Usually, however, such a failure results in a maximum penalty of a lengthy suspension (see **CROA 4471**, where a 40 day suspension was imposed where the grievor's failure was a second offense and had a relatively poor safety record, and **CROA 4577**, where a 60 day suspension was imposed for a third offense), or reinstatement without compensation (see **AH 828** and **CROA 4564**).

33. Where the fact situation shows mitigating circumstances, such as other contributing factors, long seniority, a good discipline or proper remorse, discipline can range from 7 days suspension or 10 demerits (see **CROA 4622, 3938 and 4384**).

34. Here, the grievor was a short service employee and had a mixed disciplinary record with 35 active demerits on his record at the time of dismissal. Against this is the grievor's recognition of his error and no previous failures to secure. The error appears to be an over reliance on the switch sheet, rather than any wilful decision to violate the Rules.

35. In all the circumstances, I find that the dismissal should be substituted with a penalty of 15 demerits. The grievor should be reimbursed for lost wages and benefits, less mitigation.

36. I remain seized with respect to any questions of interpretation or application.

May 17, 2024



JAMES CAMERON
ARBITRATOR