

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

**CASE NO. 5025**

Heard in Calgary on April 9, 2024

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The assessment of 30 Demerit Points to Conductor H. Jackson of Winnipeg, MB for “your failure of CROR Rule 115 resulting in the derailment that occurred at the Patterson Elevator in Morris Manitoba during your tour of duty on February 10, 2020 on train L53341-10”, and his subsequent discharge for accumulation of Demerit Points.

**THE JOINT STATEMENT OF ISSUE:**

On February 10, 2020, the Grievor worked as Conductor on train L53341-10 from Emerson, MB to Winnipeg, MB. During the tour of duty, the Grievor’s train was involved in the derailment of 10 empty grain cars at the Paterson grain elevator in Morris, MB. Following a Company investigation, the Grievor was assessed 30 Demerit Points and automatically discharged for accumulating more than 60 Demerit Points.

The Union’s position is that the Grievor accepted full responsibility for the incident, making no attempt to downplay or minimize his involvement, and demonstrated genuine remorse and a clear understanding of what caused the incident and how to prevent a similar incident from occurring in the future. The discipline assessed, which the Company knew would cause the Grievor to be discharged, was unwarranted, or in any case excessive in the circumstances. The discipline should be expunged, or in any case reduced to a level short of discharge, and the Grievor reinstated with no loss of seniority and made whole.

The Company’s position is that, despite the Grievor’s remorse and acceptance of responsibility, the discipline and subsequent discharge were fully warranted. Given this is the third such incident on the Grievor’s record in a seven month time frame, all involving a failure of CROR Rule 115 and a subsequent derailment, the Company has legitimate concerns regarding the Grievor’s ability to work safely. Additionally, the actual and potential consequences of his repeated failures to follow operating rules have severed the bond of trust between the Company and the Grievor. As such, the grievor has been disciplined accordingly for his actions.

**FOR THE UNION:**  
**(SGD.) R. S. Donegan**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.) L. Dodd**  
for – Senior VP Human Resources

There appeared on behalf of the Company:

- L. Dodd – Senior Manager, Labour Relations, Winnipeg
- S. Bahl – General Manager, Yellowhead
- S. Fusco – Senior Manager, Labour Relations, Edmonton
- R. Singh – Manager, Labour Relations, Vancouver

And on behalf of the Union:

- R. Church – Counsel, Caley Wray, Toronto
- R. S. Donegan – General Chairperson, Saskatoon
- J. Thorbjornsen – Vice General Chairperson, Saskatoon
- M. Anderson – Vice General Chairperson, Edmonton
- J. Thorbjornsen – Vice General Chairperson, Saskatoon

## **AWARD OF THE ARBITRATOR**

### **Background, Issue and Facts**

- [1] The Grievor was hired as a Conductor Trainee in 2017 and qualified as a Conductor as of March 30, 2018. He was eighteen years old when he hired on and was twenty years old at the time of this Incident.
- [2] The Grievor therefore had just over two years of service at the time of this Incident.
- [3] There is no dispute between the parties that the incident occurred as described, on February 10, 2020, resulting in the derailment of ten empty grain cars at the Paterson grain elevator, in Morris, Manitoba.
- [4] The issue between the parties is the reasonableness of the discipline assessed, which in this case led to the Grievor's discharge, due to accumulation of demerits.
- [5] For the reasons which follow, the Company has met its burden to establish the discipline was just and reasonable in this case. The Grievance is dismissed.

### **Relevant Rules**

CROR ("Canadian Rail Operating Rules") 115(a) – Shoving Equipment

#### **115. Shoving Equipment**

(a) When equipment is shoved by an engine or is headed by an unmanned remotely controlled engine, a crew member must be on the leading piece of equipment or on the ground, in a position to observe the track to be used and to give signals or instructions necessary to control the move.

**EXCEPTION:** A crew member need not be so positioned when the portion of the track to be used is known to be clear. However, equipment not headed by an engine must not approach to within 100 feet of any public, private or farm crossing unless such crossings are protected as described in Rule 103 paragraph (b) or (g).

(b) Known to be clear is defined as seeing the portion of the track to be used as being clear and remaining clear of equipment and as having sufficient room to contain equipment being shoved. This determination must be made by a qualified employee who can observe the track and has radio contact with the employee controlling the movement. Where a track that has been seen to be clear and no access to that track is possible by another movement, the track may be considered as “known to be clear”.

**Note:** When it can be determined that other movements are not on duty or will not be performing work in the track to be used, the requirement of “known to be clear” can be considered to be fulfilled continuously.

- [6] The General Operating Instructions (“GOI”) of the Company also have instructions for Shoving equipment. They state:

### **12.3. Shoving Equipment**

**PURPOSE:** It is imperative that the movement of rail equipment be carefully controlled and properly protected at all times to avoid serious injury and damage.

All shove moves must be protected to ensure the equipment will not; make contact with other equipment unintentionally, operate through a switch not lined for the route, operate over a derail in the derailing position, or occupy a portion of track without proper authorization (ie. rule 26 / 41 / 80 / 105 and 105 (c)).

**PROCEDURE:**

To properly protect the shoving move, one of the following procedures must be applied:

#### **1) Riding the leading piece of equipment:**

- i. Take a position on the leading car to observe the track to be used,
- ii. Control the speed to be able to stop within half the range of vision of equipment and if applicable for track units, and
- iii. Be able to stop short of derails, switches, flags.

#### **2) Observing from the ground:**

Note: This may entail walking with or ahead of the movement.

- i. Take a safe position on the ground to continuously observe both the movement and the remaining track to be used,
- ii. Control the speed to be able to stop within half the range of vision of equipment and if applicable for track units, and
- iii. Be able to stop short of derails, switches, flags.

3) **Employee, other than a member of the crew, delegated to observe the point**

- i. A job briefing must be conducted between the locomotive engineer and the observer. This briefing will identify:
  - o who will be protecting the point
  - o how the point will be protected
  - o the track designation where the shoving move is being protected,
- ii The observing employee must:
  - o verify there are no derails in the derailing position, switches not properly lined, flags or equipment on the portion of track to be used
  - o be able to maintain continuous communication with the Locomotive Engineer and control the speed to be able to stop within half range of vision of equipment and if applicable for track units, and to stop short of derails, switches and flags
  - o remain in position to see the movement and the remaining track to be used
  - o NOT be involved in any unrelated tasks for the duration of the shove
- iii The Locomotive Engineer and observer must confirm with each other when the move has started and when it has stopped. When using a camera, if the observer notices the equipment is not moving once advised, they will contact the crew and verify if they are still stationary or have stopped. If they are still moving, the crew must be directed to stop.

**Note 1:** The above also applies when the observer is using a camera or on another movement. A camera can only be used to verify if the track is clear of equipment, track units and flags, it must not be used to verify derails or switches position.

**Note 2:** An employee providing point protection must not be inside a vehicle nor be on moving railway equipment.

### **Facts**

- [7] The facts of the incident are not in dispute. An Investigation was held and the following facts were established:
- a. On February 10, 2020, the Grievor was required to spot 104 empty grain cars to customer tracks, at the Paterson Grain Elevator, in Morris, Manitoba. He believed the track would hold 28-29 cars.

- b. He was positioned at the East end of the Track, not at the point of the movement. His explanation for not riding the cars on the point of the movement was that he “believed the track held 28-29 cars. So I thought I would put in 27 without issue” (Q/A 16).
- c. The Grievor’s evidence was he planned on putting 26-27 cars into the track. He was using his hand counter, but admitted he “must have miss counted by two cars”.
- d. The crew set out the 28 cars into that track, which only held 24 cars.
- e. Unknown to the Grievor, this cut then fouled the opposite end of the track, as the Grievor did not confirm that the cars placed into LE32 were not foul at the west end of the track (Q/A 17).
- f. The Grievor carried on with his plan to put 26 cars into LE33, “believing it had sufficient room to hold the cars”.
- g. Again, he was standing at the fouling point on the East end, to watch the cars go into the track (which was now fouled by the earlier movement).
- h. He explained that he did not ride the cars, as he “believed there was sufficient room to hold the cars in the Track” (Q/A 21).
- i. Before the movement came to a stop, the Grievor heard a “bang” and saw the cars in the adjacent track move. The Grievor’s movement in LE33 had struck the fouled cars from LE32.
- j. When the movement came to a stop, the Grievor looked and saw the cars in LE 32 were moving, walked to the end of the track to investigate and discovered that 10 cars had derailed, with two staying upright, and the remaining eight on their sides.

[8] The Grievor admitted in his Investigation he was not in compliance with Rule 115(b); and apologized for his “lapse of judgment” in his Investigation statement. He stated he knew what he did wrong, and how to prevent it from happening in the future.

- [9] The LE was also Investigated and given 15 demerits for his culpability, which was later reduced to a written reprimand.
- [10] The Grievor was notified he would be assessed 30 demerit points and discharged for accumulation (70 demerits total; 60 needed for discharge).

### **Arguments**

- [11] The Company argued the discipline assessed was fair and reasonable. It noted the Grievor was not in position to view the point of his movement when he made the first cut of cars as required; he lost count of the cars; and he put four cars too many in the track, which were pushed out the opposite end, fouling the adjacent track. To compound this error, the Grievor was unaware of this occurring and again failed to protect his movement when he put the next cut of cars into LE33 and instead, he was on the opposite side of where the movement was occurring;.
- [12] It argued the Grievor disregarded his obligation to comply with the relevant rules. The damage took place at a customer's location, which it argued put the Company's reputation with the Company at significant risk.
- [13] The Company noted his poor discipline record for the same infraction, and that for the July 4, 2019 incident, the Grievor also "thought there was more room on track". It argued after that incident, he had committed to complying with CROR Rule 115, yet once again the Rule was breached one month later in August 2019. He also noted remorse after the July event. The August 2019 incident also involved failing to properly ensure the route was clear, and he committed to compliance with the Rule after that event, as well.
- [14] It was the Company's position it had reasonably lost faith and trust in the Grievor to comply with important safety rules, with three derailments in eight months. It argued the Grievor had failed to learn from his earlier discipline of 20 demerits and that an assessment of 30 demerits was fair reasonable given the jurisprudence.
- [15] While the Union did not dispute the seriousness of a derailment, it argued there were significant mitigating factors in this case, which were not considered.
- [16] It noted the Grievor only had 18 months' experience; that the Company required employees with less than two years' experience to wear high visibility vests of a different

colour, as such employees made need support and guidance, which has been recognized by CROA arbitrators; that in hindsight, the Grievor was aware the incident could have been avoided had he ridden the point; that he agreed he should have done so; and he committed to doing so in the future. The Union agreed riding the point would be the “best practice”.

- [17] The Union argued the Grievor understood the seriousness of what happened; that the incident had a significant impact on him; that this was not a “cardinal rule” violation, and that the LE was only assessed 15 demerits, reduced to a written reprimand. It pointed out that - had the Company made the same assessment here - the Grievor would not have been discharged and it would have served as a clear warning he was at risk of losing his employment, but he would have had the chance to rehabilitate his career. It argued the Company treated the two crew members very differently, which was not justified.
- [18] It also argued the previous discipline was distinguishable, caused by incorrect operation of a beltpack; and that the Company had disciplinary options that would not have resulted in dismissal, such as assessing 19 demerits, or a suspension, which actions the Company has taken in the past, to allow a “final opportunity” for an employee to demonstrate rules compliance. It argued the employment relationship was not “beyond repair”.
- [19] In Reply, the Company pointed out that it is not just “best practice” but mandatory to protect the point; that the incident was expensive to the Company; that the assessment of 30 demerits was progressive given the Grievor’s record; that the LE and Conductor had different roles in this incident, with the LE following the instructions of the Conductor; that any derailment is a serious violation; that there was a trend with this Grievor of failure to comply with important safety rules, and that significant discipline was warranted.
- [20] In Reply, the Union argued the Company exaggerated the facts and significance of the incident and the Grievor’s record; and that the two previous incidents were distinguishable, for “moving in the wrong direction”, because of lack of attention with a beltpack.
- [21] Each party distinguished the others’ jurisprudence.

## Analysis and Decision

- [22] The Grievor was not in a position to know that the track was clear and in fact admitted he had violated Rule 115 (b) in his Investigation. He made multiple errors, and had several opportunities to avoid the sideswipe which occurred, including checking to see that the cars he had placed into LE32 actually *fit* into LE32 before cutting cars into LE33, and counting the cars accurately.
- [23] I cannot agree the Company has exaggerated the facts as alleged by the Union. The Grievor failed to protect the point both for the movement into LE32 and LE33. When eight rail cars are tipped onto their sides due to the Grievor failing to protect the point, that is a significant and serious violation of a key responsibility of his employment.
- [24] The Employer had cause for discipline in this case.
- [25] The Grievor and the LE did not bear the same level or type of responsibility for this incident. The Conductor was in charge of the movement, had a responsibility to protect the point and the LE was following the Grievor's instructions. The treatment of the LE does not constitute discretionary discipline towards this Grievor.
- [26] Considering the jurisprudence, the Union relied on **CROA 4581**, which can be distinguished as that involved a missed stop signal (CROR Rule 411 and 439 violations) and caused a major collision. **AH 695** involved a thirty-three year Grievor, and efficiency testing, **CROA 4759** involved a run through switch. Those cases are distinguishable.
- [27] The most analogous case to this one for both facts, service and disciplinary record is **CROA 4351**. It also involved an assessment of 30 demerits for failing to protect the point, which assessment was upheld. In that case, the Grievor had accumulated 45 demerits and a suspension in two and one half years of employment. The Arbitrator noted the "purpose and intent" of Rule 115 "provides that the crew must be in a position to observe the track" and "[t]hat conduct must attract discipline, given the seriousness of the violation and the serious consequence of what can flow from it in a safety critical position"<sup>1</sup>. Like in this case, the Grievor was not compliant with Rule 115 to protect the point. In that

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<sup>1</sup> At p. 5.



case, an assessment of a 15 demerits or more resulted in discharge, given the Grievor's record.

- [28] The factors under the second question of the *Re Wm. Scott & Co*<sup>2</sup> analysis must be considered. The nature of the offence is serious and significant, as noted in **CROA 4351**. The Grievor is a short service employee of just over two years, so his service level is not mitigating. His active discipline record at the time of this Incident was 40 demerits for his involvement in two derailments, occurring July 4, 2019 and August 6, 2019, which is aggravating.
- [29] In the first incident, the Grievor's crew shoved cars in the wrong direction, causing a derailment. The Grievor was serving as Foreman on that crew. That incident occurred on a customer's site, and was reported by a customer. The second incident occurred just one month later. The Grievor was again working as a Foreman, once again, the cars were shoved in the wrong direction, causing a derailment. The Company was lenient in not progressing the discipline beyond 20 demerits in that case, given the earlier incident.
- [30] While the earlier incidents may have been with a backpack, it is the lack of care and attention to the requirements of Rule 115 that are a common theme. A further common theme is the Grievor's remorse and commitment to Rules compliance in the future after each event, yet the same event occurs again. All three incidents also occurred in a short period of time, which is also an aggravating factor.
- [31] Any assessment of 20 demerits or more in this case results in discharge. The only other manner in which the Grievor is reinstated is if this Arbitrator's discretion is exercised to substitute a suspension or demerits less than 19, which the Union has argued will give him "one more opportunity" to understand his job would be in jeopardy unless greater care and attention is exercised and given him "one more opportunity" to demonstrate his commitment to rules compliance.
- [32] The Grievor's lack of care and attention for the important requirements of Rule 115 has *already* resulted in an assessment of 20 demerits, on two recent occasions. Under the principles of progressive discipline, another incident leads to an *increase* in those

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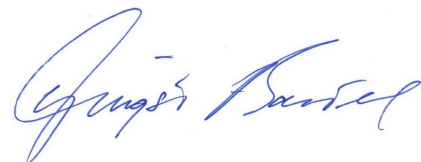
<sup>2</sup> 1976 B.C.L.R.B.D. No. 98

demerits, and not a decrease, back to 19 demerits, as it is the *progression* that is intended to teach.

- [33] Despite the able argument of the Union on this point, the leniency it argued for was *already* given when the Company did not progress the *second* discipline in August of 2019 *beyond* 20 demerits, as it could have done. The risk to the Grievor's employment while sitting at 40 demerits for two Rule 115 infractions, should have been at the forefront of the Grievor's mind.
- [34] Further, the Grievor's *own* commitment to Rule 115 compliance had also been anew after each of the two earlier events, yet that commitment did not materialize. That another incident occurred within a short span of time, also involving a lack of care and attention, supports the Company's determination that the bond of trust with this Grievor to follow the important safety rules for moving heavy train cars has been broken.
- [35] Like the Arbitrator in **CROA 4351**, I can find no circumstances which would attract my discretion to mitigate the penalty chosen by the Company, or to give the Grievor "one more opportunity", given the facts in this case. The Company's discipline is upheld as fair and reasonable, in all the circumstances of this case.
- [36] The Grievance is dismissed.

I remain seized for any questions regarding the implementation of this Award. I also remain seized to correct any errors and address any omissions, to give this Award its intended effect.

June 4, 2024



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**CHERYL YINGST BARTEL**  
**ARBITRATOR**