

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

CASE NO. 5026

Heard in Calgary, April 9, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 30 Demerit Points to Conductor S. Rafiqui of Saskatoon, SK for “Violation of CROR 115 and CROR 114 during your tour of duty on L50151-22 on September 22, 2021 resulting in a run-through switch (BG04 East end)”, leading to his discharge for accumulation of Demerit Points.

THE JOINT STATEMENT OF ISSUE:

On September 22, 2021, the Grievor worked as Conductor on assignment L50151-22 in turnaround service out of Biggar, SK. During the tour of duty, the Grievor’s movement ran through the switch at the east end of track BG04 in Biggar yard. Following a Company investigation, the Grievor was assessed 30 Demerit Points and automatically discharged for accumulating a total of 70 active Demerit Points.

The Union’s position is that the incident was a singular occurrence due to momentary inattention. The Grievor had no active discipline for violating operating rules or safety regulations, and demonstrated a thorough understanding of what caused the incident and how to prevent similar incidents in the future. In the circumstances, the discipline assessed was unwarranted, or in any case excessive, particularly considering the fact that the Company knew the assessment of 30 Demerit Points would lead to the Grievor’s discharge for accumulation of demerit points. The discipline should be expunged, or in any case reduced to a level short of discharge. The Grievor should be reinstated with no loss of seniority and made whole.

The Company disagrees with the Union’s contentions and maintains the discipline assessed to the Grievor was warranted, appropriate and fair. Further, the Company contends the Grievor was negligent and complacent in his disregard and failure to follow the most basic of rules, rules critical to the safe operation of the railway. These violations, along with the Grievor’s long history of varied discipline, clearly demonstrate the Grievor’s lack of regard and respect of rules, regulations and standards, a regard that is critical in the bond of trust necessary in the employee/employer relationship.

FOR THE UNION:
(SGD.) R. S. Donegan
General Chairperson, CTY-W

FOR THE COMPANY:
(SGD.) L. Dodd
for J.G. – Senior Vice President

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

- [1] The Grievor was employed as a Conductor, since 2013.
- [2] On September 22, 2021, The Grievor was assigned to L50151-22 as Conductor. While performing switching duties in the Biggar Yard, the Grievor's movement ran through a switch.
- [3] This was a violation of Rule 114 and Rule 115 of the Canadian Rail Operating Rules ("CROR").
- [4] At the time of this incident, the Grievor had eight (8) years of service.
- [5] The Company assessed 30 demerits for the incident, leading to the Grievor's discharge for accumulation of demerits.

Issue

- [6] There is no dispute the incident occurred or that discipline was warranted.
- [7] The issue between the parties is whether the assessment of 30 demerits was just and reasonable discipline.

CRO Rules

114. Fouling Other Tracks

- a) Equipment must not be allowed to move foul of another track unless properly protected.
- b) A movement must not foul a track until the switches connected with the move are properly lined, or in the case of semi-automatic or spring switches, the conflicting route is known to be clear.

EXCEPTION: A movement may foul a track connected by a hand operated switch provided that:

- (i) neither the track occupied nor the track to be fouled are main tracks;
 - (ii) the conflicting route is known to be clear; and
 - (iii) the switch is properly lined before the movement passes over it.
- c) Equipment must not be left foul of a connecting track unless the switch is left lined for the track upon which such equipment is standing.

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.

Facts

- [8] The Grievor and the LE were in the westernmost of two locomotives, which were coupled back to back. The movement was proceeding east. An Assistant Conductor (“AC”) was initially on the leading piece of equipment on the eastern end, protecting the point. Following an eastward move, the AC detrained and began coupling air hoses on the cars in other tracks, to prepare for the crew’s next move. When the AC detrained, the locomotives were approximately 15 to 20 cars from the BG04 east switch (Q/A 12).
- [9] The Grievor and the LE then continued eastward with the two locomotives. The movement approached a switch, which was not lined for the locomotive’s movement and the movement ran through the switch. Running through a switch led to the locomotive entering a “foul zone”, where several tracks converged onto a leading track. This led to the locomotive occupying track for which it did not have authority. There were no people or equipment at that location.
- [10] An Investigation occurred. When asked what the peer to peer communication was when the AC detrained, the Grievor stated that the LE asked if the AC was getting back on, was told “no” by the Grievor, and then the LE “just started to shove back. I asked him if he could see the switch, he said he would be able once we got closer and that I got this” (Q/A 13). The LE was on the opposite side of the track as the switch stand, as that stand is on the Conductor’s side of the locomotive cab.
- [11] The Grievor was aware that Rule 115 required that a crew member must be on the leading edge of equipment when that equipment is shoved, to observe the track and give signals or instructions and that Rule 114 stated that equipment must not occupy the foul zone. He also acknowledged that it is the Conductor “who is in control of the crew and gives communication for direction and distance of the movement” (Q/A 18).
- [12] When asked why he allowed the movement to begin shoving without proper point protection, the Grievor said “that is why I asked if he could see the switch so he could protect our point that way. We knew the track was clear from when we first started working” (Q/A 21). When asked how his actions complied with Rule 115(a), the Grievor acknowledged he was not compliant, but he also said he thought the track was “known to be clear” up to the fouling point (Q/A 22). He also acknowledged he did not

communicate distance to his engineer, as required by GOI 8.12.15(12) and that he did not give direction to start shoving (Q/A 26). When asked why he did not then give a direction to the LE to stop, he answered “[b]ecause that is what we job briefed about” (Q/A 27), referring to a job briefing before the AC detrained.

- [13] In response to a question of this Arbitrator at the hearing, the parties were both given an opportunity to address the concept of “known to be clear”. It was explained that it was not possible to know that a track was clear just because you had lined switches, as someone could come behind you and change them again, and trains can be more than two miles long, so it is not practical to line them for miles ahead. To keep those switches clear, they could be locked out, or the Yardmaster or Transportation Manager could tell you the track is yours and remains clear, or a rules qualified employee could be protecting the track.
- [14] The Grievor apologized for “not taking more initiative to protect the point as it is a life critical rule. He stated “I really enjoy my job and take pride in having the responsibility and challenge of working the 501 in Biggar”. He indicated he was “trying to plan our next move and should have been more focused on the task at hand”. He indicated he would never take the “easy route ever again” and that “safety is always on my mind and not taken lightly” and that his record demonstrated he had not had any issues safety-wise (Q/A 32).
- [15] The Grievor was assessed 30 demerits. When added to his existing 40 demerits, this resulted in 70 demerits and he was discharged for accumulation.
- [16] The Grievor had been discharged and reinstated through **CROA 4772**, for carelessly and negligently submitting expense claims.

Arguments

- [17] The Company argued that CROR Rules 114 and 115 are “life critical” rules, designed to ensure that equipment and its hazardous energy does not come into contact with other equipment or people, which could be catastrophic; that continuing forward after the AC had detrained left the movement unprotected, as both the Grievor and the LE were in the second locomotive; and that this was a blatant violation of both rules as no one was protecting the point for the movement which occurred.

- [18] It argued the Grievor was responsible for the safe operation of the movement, which required strict adherence to CROR Rules 115 so as not to foul the track in violation of Rule 114. While CROR Rule 115 does provide an exception when the track is “known to be clear”, the Company noted the track was *not* clear, as it was restricted by a switch that was not lined for the locomotive. It argued the Grievor erroneously and recklessly *assumed* the track was clear. There was a visual marker on the switch, which could be seen by an employee protecting the point. While the Grievor noted the comment of the LE, it was the *Grievor’s* responsibility for directing the safe operation of the locomotive, and not the LE. It argued he negligently deferred to the LE as to whether their movement was safe to move, but the LE also did not know if their movement was safe to move. As the point was not protected, the movement entered a foul zone, which was a violation of CROR 115, which is a serious incident, due to the negligent and careless behaviour of the Grievor. It argued his tendency to cut corners and make invalid assumptions caused this violation.
- [19] The Company noted this was the 11th violation on the Grievor’s discipline record, which stood at 40 active demerits. It argued the Grievor demonstrated a pattern of being untrustworthy, careless and negligent and demonstrating questionable judgment, with an alarming escalation in the seriousness of that behaviour, and that his record included multiple violations of the Company’s most critical rules, standards and expectations. It noted that the Grievor had previously been discharged, which was converted to a lengthy suspension (**CROA 4772**), regarding careless and negligent expense claims. It argued he had numerous opportunities to change his behaviour. The Company also pointed out that several important customers are located at Biggar, and that the Grievor worked largely unsupervised. Which was in violation of Rule 115, since no one was protecting the point of the movement. It argued the Grievor had destroyed the fabric of trust necessary to maintain employment and that he had not learned from past mistakes and could no longer be trusted to work safely. It relied on several CROA authorities in support of its position.
- [20] For its part, the Union conceded the crew ran the switch, however it argued that remaining in the cab was not a blatant violation of Rule 115, given the “known to be clear” aspect of the Rule. It argued the track was “clear” in the sense there was no equipment in the way

or other form of blockage. It argued that at all times leading up to the foul zone, the crew was not in violation of Rule 115. It argued the fact the LE received the same discipline confirms he was also responsible for this incident. It noted the LE was disciplined, he grieved and it was then withdrawn, as he retired.

- [21] It argued the crew was authorized to work on all tracks in the yard, and did not need permission to go past the switch. The only issue with the 'foul zone' in this case was that they did not stop to line the switch. The "potential" to cause a catastrophic accident is therefore overblown in this case, as the Grievor's crew were the only crew working in the Biggar Yard at that time. The actual risk was minimal.
- [22] It argued this incident was immediately reported and that the Grievor cooperated fully with the Investigation; that the Grievor had demonstrated "rehabilitative potential", which was a key factor. It argued the damage to the switch was not significant, being a bent rod, which is designed to be the "weak link" to protect the switch.
- [23] It argued the LE *did* have reasonable visibility down the track, and that riding the leading equipment is not an "absolute requirement", as it is very situationally dependant. It argued there is a tradeoff between "absolute safety" and "actually moving", which is made every day. It also argued there is a "spectrum" for Rule 114 and 115 violations, and that this was on the lower end of that spectrum of seriousness. It argued the Conductor attempted to follow the rule. It argued these violations generally support a discipline of a written reprimand to 15 demerits for a situation which is on the lower end of the spectrum, rather than 30 demerits, with the higher end of the spectrum for more serious cases, involving not just run through switches but also derailments, filing jurisprudence in support. It argued the Company had applied an "extremely severe" level of discipline with a deliberate intent to discharge the Grievor, and could have assessed 19 demerits in this case, without causing the Grievor to be discharged.
- [24] While the Union does not deny the Grievor's record, it argued the Company's emphasis on this record was not warranted, and that his record was not aggravating, because the Grievor only had one other rules violation, and had long spaces of time working without any discipline. It argued that only one of the Grievor's 10 incidents of discipline was related to an operational rule, and that this current discipline is the Grievor's first incident

of this nature, so he does not have a record for such violations, and that – while he works largely unsupervised – so does the vast majority of train crews. It argued if he was as careless and dangerous as the Company argued, he would have more rules violations. It argued the Grievor's discharge was for filing improper meal and mileage claims, and not for an operational rule violation. It argued that resulted from laziness and carelessness, but not deceit.

[25] It argued the Grievor had demonstrated he could work safely over the course of his career; that even 20 demerits would have been at the “high end of the scale” for this violation and the Company did not give the Grievor credit for his apology and the lack of similar offences since his hiring in 2013. It argued he is not a dangerous or reckless employee.

[26] In its Rebuttal, the Company noted this is the most recent in a series of careless acts by the Grievor; that the Union was attempting to downplay the serious nature of the violation; and that the LE was clearly mistaken saying “I got this”, when only minutes earlier he did not know if the track was safe to proceed. It noted the Grievor acknowledged his culpability, which was part of a pattern of careless behaviour. It also noted the Grievor was absent for almost two years between 2017 and 2021 due to disciplinary suspensions, in a career that only spanned eight years. It argued he violated both CROR Rule 114, as well as CROR Rule 115, which adds to the seriousness of this violation. While he has apologized in several Investigations, the Company has not been given reason to trust those apologies. In its Rebuttal, the Union

Analysis and Decision

[27] Rule 115 requires that the point be protected. That is a non-negotiable safety rule in this industry. I accept it is fundamental, whether called “life critical” or by some other term is immaterial to that reality. The Rule is designed to achieve safety and protection when moving equipment. Rule 114 is likewise an important safety rule. To foul a switch is to occupy track without authority.

[28] Both rules were violated by this Grievor.

- [29] The Union argued that the crew knew the track was “clear” as they were the only crew in the Yard and there was no equipment on the track. It also argued they had “permission” for all switches.
- [30] I cannot agree with this conclusion.
- [31] To be “clear”, a track must not just be clear of equipment, as argued by the Union, but clear of any obstruction that would interfere with the movement of the consist. That would include a switch that is not lined for a movement. Being the only crew in the yard does not lead to all switches being lined for their movement, which is made evident by this incident. This track was not “known to be clear”, as this crew did not know that the switch was lined for their movement.
- [32] The Grievor had an important responsibility to ensure that the point was protected and he failed in that responsibility. To protect the point as he was required to do, the Grievor would have had to detrain and go to the leading movement, to take the place of the AC who had left, prior to the eastern movement. Had he done so, he would have had the view of the switch that was necessary; would have seen the switch was not aligned, and would not have run through the switch. He would have “protected the point”.
- [33] The Grievor is not absolved of his responsibility to ensure the switch was lined by the unreasonable assumption of the LE. The Grievor was silent and did not even question the LE’s assurances of “I got this”, even though he had to have been aware that the LE did not know any better than he did of whether the track was “clear”. Due to laziness and/or carelessness, he simply accepted the LE’s assurances that “I got this”, when he was aware – or should have been aware – the LE had no basis to make that assurance, and he – the Grievor – was in charge of the movement and needed to ensure the point was protected.
- [34] In effect, this Grievor “gave up” his responsibility to protect the point. He failed to adequately explain why he did not go into the leading locomotive and protect the point. As argued by the Company, this is an example of a pattern of laziness or carelessness towards a fundamental and important safety rule.

- [35] It is confounding why the Grievor would chose that course instead of detraining and riding the point, given his precarious employment record, of 40 demerits, which is 2/3 along the path to dismissal. It is also curious that – while the Grievor apologized and said he would be careful in future – he makes no mention of what he should have done in this apology.
- [36] As the Grievor did not know the track was ‘clear’, it was also disingenuous for him to suggest he did. That statement undermines his statements of culpability and remorse. This gave the Company a further basis to doubt whether the Grievor was willing to obey what is a foundational safety rule in this industry.
- [37] The Union argued 15 demerits is the discipline that should have been assessed for these violations.
- [38] The jurisprudence relied on by the Union does not support that assessment when there is a violation of *both* Rule 114 and Rule 115.
- [39] The factors in *Re Wm. Scott & Co.*¹ are the factors that must be considered when assessing discipline. The nature of a violation is only one of those factors. Other factors such as the length of service, disciplinary record, provocation, remorse and accountability must also be considered in assessing the reasonableness of discipline.
- [40] The Union relied on **CROA 4251**, which was decided a decade ago. A 30 day suspension was found excessive, given both the Grievor’s length of service of 22 years, and his disciplinary record and 15 demerits were substituted. That case can be distinguished for length of service and disciplinary record from the facts before me. The Union also relied on **CROA 4411-B**, decided in 2015. In that case there was no suggestion of a Rule 115 violation. The Grievor was assessed 15 demerits. That can also be distinguished from this case. The third decision relied on by the Union is **CROA 2990**, decided more than 25 years ago. That case only involved a violation of Rule 115 and not a violation of Rule 114. That case is also distinguishable.
- [41] For its part, many of the Company’s cases are also distinguishable, for example, **CROA 3607** (involving a much more dangerous situation and a failure to report the incident, leading to discharge); and **CROA 3099** (involving theft of merchandise, leading to

¹ [1976] B.C.L.R.B.D. 98

discharge); **CROA 3027** (violation of CROR 104 and 114; failed to observe a switch lined against movement; side collision with extensive damage; 20 demerits); and **CROA 4087**, (40 demerits upheld; Rule 114 and 115 violation; disregarded instructions and ran through switch; employed for less than three years; discharged twice (conversion to lengthy suspensions), one of which was also a run through switch. That case is also more serious than the facts in this case.

[42] In **CROA 4455** discipline of 20 demerits was upheld as reasonable for a three year employee, with a second Rule 115 violation and several other violations, and a record of 25 demerits. In that case, the violation resulted in a derailment. Likewise in **CROA 4351**, where two rules were violated (Rule 115 and 103), the Grievor was a short service employee of 2.5 years, who had 45 demerits as well as a suspension; his actions resulted in a sideswipe and derailment as part of a shoving manoeuvre and 30 demerits assessed. The arbitrator noted that even 15 demerits would result in discharge and chose not to mitigate the penalty, as discipline found to be progressive and appropriate. Both those situations were worse than the facts in this case.

[43] This is not a case where a crew just runs through a switch accidentally because it was not noticed. Two violations occurred – of Rule 115 *and* 114. The switch was not noticed *because* no one was riding the point to protect the movement. While there was no catastrophic consequences, the Rules were designed because there could be.

[44] The jurisprudence has recognized these types of violations are serious and significant. It was up to the Grievor to act carefully and diligently when following important safety rules, and he did not do so. The Grievor's eight years of service was broken through serving various disciplinary suspensions, so is not a true eight year record. I agree with the Company that the Grievor's disciplinary record was poor, which is an aggravating factor, as is the Grievor's reliance on the track being "clear", which undercut his acceptance of responsibility.

[45] Considering all of these factors, I agree this is another incident which showed carelessness, laziness and questionable judgment by this Grievor. He did not detrain and proceed to the leading equipment to protect the point. The Company had no obligation to

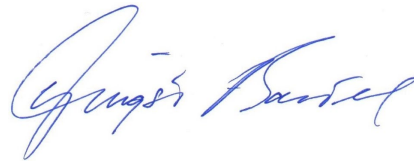
act in a manner which would protect the Grievor's employment, when he did not act in that manner himself.

[46] Regrettably for the Grievor, while I find that 30 demerits was an excessive disciplinary response and I am prepared to exercise discretion to substitute a response of 20 demerits, even that level of demerits results in discharge, so the outcome does not change.

[47] The Grievance is allowed, in part. The discipline of 30 demerits is set aside and a discipline of 20 demerits is substituted. Having reached 60 demerits, however, the Grievor remains discharged for accumulation.

I remain seized for any questions relating to 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



CHERYL YINGST BARTEL
ARBITRATOR