

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

CASE NO. 5032

Heard in Calgary, April 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 day suspension assessed to Yard Helper A. Jolicoeur of Toronto, Ontario.

THE JOINT STATEMENT OF ISSUE:

Mr. Jolicoeur was assessed a 20 Day Suspension on February 23, 2023 as shown in his CP Form 104 as follows:

“Formal investigation was issued to you in connection with the occurrence outlined below:

In connection with your alleged failing to protect the point while working assignment HT13 on February 13, 2023 causing a one car derailment and company asset damage.

Formal investigation was conducted on February 17, 2023, to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that, investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- CROR 115 – Shoving Equipment
- CROR 104 - Switches
- Train & Engine Safety Rule Book – T-26 Switches
- Operating Bulletin No. SO-003-23-Hand Operated Switches - Ontario

In consideration of the decision stated above, you are hereby assessed a twenty (20) Day. The remaining ten (10) days of your suspension will end at 07:45 on March 3, 2023. A record of a major rules' infraction will be placed on your file.”

Union's Position:

The Union contends as provided within our grievances that Mr. Jolicoeur has been assessed excessive discipline.

Mr. Jolicoeur took responsibility for what happened and explained why. This of course does not free him of responsibility but the educational process that took place should also be considered. The purpose of the investigation is to find out the facts, provide education so the incident will not happen again, it is not solely about punitive discipline on an employee which the Company uses as their educational component.

Mr. Jolicoeur was forthright in what happened and the mistake that he made. The Company was in position to assess if required a much lesser form of discipline. Instead, they assess a 20-day suspension.

The Union further looks at the length of time this employee has been working. It is the Company who wants all new hired employees regardless of how long they have been training to be qualified on RCLS where the Union has requested a longer period. The Company will of course state this this is the simplest of rules to follow by protecting the point. Had a conventional crew been working this would allow those on the ground still in green vests to better apply all rules etc. instead of also focussing on acting as a Locomotive Engineer.

The Union further looks at the Form 104 and the Company piling on of alleged violations which Arbitrator Simms has previously dealt with.

The Company in assessing discipline alleged he was in violation of CROR 115 Shoving Equipment, Mr. Jolicoeur was always adhering to this rule and thus it has been used against him wrongly.

The Company also uses CROR 104 Hand Operated Switches. Mr. Jolicoeur did not violate this rule.

The Company uses T-26 Switches, again Mr. Jolicoeur adhered to this rule.

What Mr. Jolicoeur which he clearly provides did not adhere to the Operating Bulletin by not pointing to his route. This has been a valuable education lesson for him but the need to also assess punitive discipline does not help, education and mentoring does.

The Union requests that the discipline assessed to Mr. Adam Jolicoeur be expunged from his file and paid all compensation with interest, in the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position:

The Company disagrees and denies the Union's request.

The Company maintains that culpability was established through a fair and impartial investigation.

The Company's position is that the discipline assessed was appropriate, warranted and just in all the circumstances. Discipline was determined following a review of all factors, including those the Union describes. The Company maintains that the discipline was properly assessed under the Company's Hybrid Discipline and Accountability Guideline.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

(SGD.) W. Apsey

General Chairperson, CTY-E

FOR THE COMPANY:

(SGD.) F. Billings

Assistant Director, Labour Relations

There appeared on behalf of the Company:

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|-------------|-------------------------------------|
| A. Harrison | – Manager Labour Relations, Calgary |
| E. Carriere | – Manager Labour Relations, Calgary |
| R. Araya | – Labour Relations Officer, Calgary |

And on behalf of the Union:

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|--------------|--|
| R. Church | – Counsel, Caley Wray, Toronto |
| W. Apsey | – General Chairperson, CTY-E, Smiths Falls |
| A. Jolicoeur | – Grievor, via Zoom, Toronto |

AWARD OF THE ARBITRATOR

Background and Issue

[1] The Grievor is employed as a Conductor. He entered Company service on August 8, 2022.

[2] This Grievance was filed against the assessment of a 20 Day Suspension for failing to protect the point, while working assignment HT13 on February 13, 2023. He was in his first year of service, having six months of experience. He was a “green vest” employee, which is a reference to the colour vest which is worn by new employees.

[3] The only issue between the parties is the quantum of discipline assessed.

Facts

[4] The events leading to this Grievance are not in dispute.

[5] On February 13, 2023, the Grievor was working as a Yard Helper in Toronto Yard. He was working with a Yard Foreman. He was operating a “Remote Control Locomotive” (“RCL”), as “Operator B”. The RCL is a method that operates locomotives remotely.

[6] The Grievor made a reverse movement to perform a securement test and then initiated forward movement to cut away from F Yard and to clear the FL04 switch. After traveling 3214 feet, he cleared the FL04 switch then initiated a reverse movement from the FL04 switch and selected “stop” on the RCL. He came to a complete stop after traveling 826 feet. The Grievor detrained the locomotive and lined the OV/L1 cross over switch, intending to go into the OV track for lunch.

[7] His evidence was he looked in the gap ensuring there was no debris and then changed the switch to line it for what he thought would be his movement. When lining the switch, the Grievor did not “point and observe” as required.

[8] The Grievor did not realize the switch was already lined for the OV when he had approached it, so by changing it, it was then *not* lined for his intended route.

[9] The Grievor then got back on the engine. He initiated a “reverse shove” movement. After traveling 15 feet, he made a speed increase input, requesting 15 miles per hour.

Within moments of doing so, he recognized that his movement had started to veer to the right down the crossover, as the switch was not lined correctly

[10] He then selected stop (nine seconds had elapsed), but was unable to stop before impact of his movement with other cars. The download indicated speed was 12.3MPH with a rapid deceleration to 6.3MPH in 3 seconds, traveling 31 feet, which was the time after the Grievor initiated the stop.

[11] The Assistant Superintendent was in the tower and heard the Grievor on the radio making an exasperated remark of "I need a new profession" and that he was "ok", which made the A/S "perk up and see what was going on". The A/S then looked at the camera and saw the impact. As described by the A/S, the "east power slammed into the rear of the cut of cars the pound had been ahold of, a car derailed with raking damage leaning against cars on the track adjacent (Havelock track) and the head end of the Pound job stopped under Finch St. Bridge with a damaged car on its tail".

[12] The A/S went down to the scene. He described the Grievor as very remorseful and the Grievor took him through the steps he had followed.

[13] An Investigation occurred. The Grievor stated that he was on the leading end of the locomotive and was protecting the point, but that the "only thing he did wrong" was to line the switch the wrong way. He noted that when he made the statement that "I need a new profession", after the incident occurred, he was in a "shaken state of mind" as he had realised how "close to being killed" he had come. The Grievor admitted he did not fully comply with CROR Rule 115 (Shoving equipment); CROR 104 (Hand Operated Switches) and Operating Bulletin No. SO-003-23 (Pointing to the route). He admitted responsibility for failing to line himself with the intended route, causing a one car reportable derailment.

[14] At the time of the incident, the Grievor had a Formal Reprimand on his discipline record for an incident 15 days earlier, where he had also lined his movement for the incorrect route, resulting in a run through switch, which caused a one car derailment.

[15] Bulletin No. SO-003-23 describes "run through switches" as "one of the most critical tasks that T&E employees undertake each trip", with the potential to "cause bodily

harm and/or death”, and the handling of switches as “one of the leading causes of Rule Violations and Injuries”.

[16] As a result, the Company implemented “Point & Observe”, where employees are required to point a hand at switch targets, both before and after lining switches. This is a form of “check” to ensure awareness of where the switch is lined both before it is manipulated and after. This requirement was implemented as of January 31, 2023, which was approximately two weeks before this incident.

[17] The Grievor admitted he did not comply with this requirement and that this was because he “had a lapse in judgment”. He noted he had only had three weeks of RCL training, and that he wasn’t consistently operating the RCL while on his training shifts. He stated he was not excusing his behaviour as he took full responsibility for the “huge mistake” which “almost costed me my life”; stated he had learnt from the incident; and that he planned to move forward “as a better railroader”.

Arguments

[18] The Company argued the Grievor was solely responsible for failure to line for his intended route, resulting in a derailment, which placed both himself and others at significant risk. It argued the discipline assessed was just and reasonable.

[19] It argued the Grievor was properly trained and qualified and had admitted culpability for failure of both CROR rules and the Bulletin. It argued the conduct gives rise to a serious degree of discipline, with 20 days being a minimum, under the Company’s discipline policy, as this is a serious collision or derailment and a major offence. It noted the Grievor had a run through switch 15 days before as well, with a one car derailment. It argued that applying a lesser form of discipline for that event did not result in the necessary education and the Grievor failed to be diligent a second time. It argued safety rules are not suggestions or guidelines.

[20] The Union argued the Grievor took full responsibility for his actions. It noted he only qualified as a Conductor on January 9, 2023, and is a very junior employee. It argued he was very remorseful, as noted by the A/S; answered all questions in a forthright manner, and provided a straightforward account of the incident. It pointed out he complied

with Rule 115 as the track was clear and he was protecting the point; and that he “mistakenly believed he was lined for a different movement”; that this was an inadvertent lapse of judgment” and he lined the switch the wrong way. It argued he had never previously violated the Bulletin before. The Union also argued the incident should be viewed as a single Rule 115 violation, and not the several violations noted by the Company, which it considered was “piling on”.

[21] It argued the appropriate penalty for a Rule 115 violation was 15 demerits, which it argued equated to a 3-day suspension.

[22] In Reply, the Company argued the conduct was serious; there was no “piling on” and the infractions were properly listed and required for the Grievor’s education; the Union’s argument was inconsistent regarding whether or not there was a Rule 115 violation; that the Union is attempting to “dilute” the issue and confuse the issue by suggesting it now is “only” a Rule 115 violation; that the Grievor admitted responsibility; that the Union’s jurisprudence is distinguishable; that the Grievor was fully qualified; and that the Union is seeking the arbitrator to comment on training, which is not appropriate as beyond the arbitrator’s jurisdiction.

[23] The Union argued in Reply that the Company has not justified its harsh discipline and it opposed the application of the Company’s discipline policy. It noted the Grievor had only worked as a Conductor since January 9, 2023 and that the Company ought to have taken the opportunity to coach him after the incident, allow him to attend more familiarization trips and have additional training, as the incident resulted from lack of experience. It argued RCLS operators are no longer afforded an appropriate learning period, even though they are doing the same work as LE’s, who have at least two years’ experience and a four month long training course focused on switching in yards. It argued that current employees are not given the important “traditional breaking-in periods” and errors are unsurprising. The Union urged that the significance of the decision to reduce the mentorship, training and break-in periods be considered, which has resulted in a sharp increase in discipline rates in new hires. It noted both employees on this crew were inexperienced. While noting the Arbitrator could not correct this systemic issue, the Union submitted it was relevant to discipline and the Company should treat such incidents as

coaching incidents. The Union also objected to notice of the Formal Reprimand, where no statement was taken. It argued the Company's decision to escalate from that to a 20 day suspension runs contrary to progressive discipline. It distinguished the Company's cases and reiterated a 3 day suspension was equivalent to the range of 15 demerits seen in the jurisprudence.

Analysis and Decision

[24] The factual context of any incident is important in assessing discipline, especially when the issue is quantum.

[25] I cannot agree with the statement that the "only" action the Grievor did wrong in this case was to line the switch for the wrong route, as argued by the Union and expressed by the Grievor in the Investigation.

[26] The Grievor admitted in the Investigation that he did not comply with the Bulletin which required him to "point and observe". That is the first rule he violated. Had he done so, I am satisfied he should have noticed that the switch he had pointed to was *already* lined for his movement. Had he done so, the incident would have been avoided.

[27] Second, the Grievor then improperly lined a switch that was already properly lined. He failed to notice what was there to be seen in the way the switch was *already* aligned, when he handled it.

[28] Third, Grievor put his train to 15 MPH immediately. This speed made it more difficult to stop when the train began to veer and he realized the switch was lined for the wrong route.

[29] Fourth, he failed to "protect the point". The Grievor is required to ride the leading equipment *in order to* watch and ensure protection, which must include not just being "on" that equipment, but also noticing what is there to be seen, which would include misaligned switches. If the point was adequately protected, the impact would not have occurred, as the Grievor would have noticed the switch he had just lined was *not* actually lined for his route.

[30] This was the final opportunity he had to avoid this collision, and is connected to the previous issue of speed. Had the Grievor proceeded more slowly *and* looked ahead

to protect the point while doing so, he should have noticed he had lined the switch incorrectly and been able to stop this movement before impact.

[31] Equivalencies between suspensions and demerits are difficult to determine and apply. I am not convinced that a 3 day suspension equates to a 15 demerit penalty, as argued by the Union. **CROA 4512** on which the Union relied for that argument, is simply not that clear. That arbitrator in that case noted that a “10 to 30” demerit penalty was the range for that case (which is a large, 20 demerit range) and then stated that a 3 day suspension would have been appropriate. It is not clear if that suspension was to equate to the higher or lower end of the range.

[32] That finding is not the same as saying 15 demerits equates to 3 days. Neither does that case concern a Rule 115 violation.

[33] There are also distinguishing factors in several of the cases relied on by the Union. For example, in **CROA 4251**, 30 days was found to be excessive and 15 demerits was substituted for a run through switch, but in that case the Grievor was a twenty-two year veteran, whose long service and discipline record was mitigating. There is no such long service or mitigating record here.

[34] In **CROA 4455**, 20 demerits was upheld as reasonable, which is 1/3 the way to dismissal under the Brown System, in a situation where six months before a Rule 115 violation occurred. While a derail occurred in that case, no damage was mentioned. That case demonstrates that context must be considered, even under the Brown System, and that a certain level of demerits is not “automatic”, even under that System.

[35] **CROA 4552** likewise was not a Rule 115 violation but involved a sideswipe.

[36] While demerits were reduced in **AH794**, demerits were also assessed in the first place.

[37] It is aggravating the Grievor had a previous “run through switch” on his discipline record, two weeks before this incident. As a Formal Reprimand, it is part of the Grievor’s disciplinary record and forms part of the context for assessing discipline for this event. Since he had improperly lined a switch just two weeks previously, the Grievor should have been very vigilant to ensure his handling of switches was appropriate and followed all of

the rules. His “lapse of judgment” does not seem a compelling explanation, given this previous and recent event. The Grievor was a very short service employee, so does not have length of service to mitigate discipline.

[38] While the Grievor was a junior employee, which the Union argued was relevant, as noted in **AH775**, “safety/sensitive/critical occupations are not those where new employees should plan on learning on the job. It is a place where rule knowledge and compliance should be at a higher standard from day one”¹. This is especially the case where a junior employee has *already* been disciplined for a certain offence two weeks earlier.

[39] **AH775** involved a Grievor with two years of service, and one disciplinary incident on his record. He was dismissed for failing to properly line a switch and reinstated, leading to a lengthy suspension.

[40] Earlier assessment of discipline is meant to lead to a level of increased vigilance. A repeat offence a short time later demonstrates the earlier discipline did not reach its mark and progression is warranted.

[41] In this case, the Grievor had four opportunities to avoid this offence had he followed three important safety rules. He did not. If he was unfamiliar with the RCL unit, as he stated, he should have made sure to both double check his work, and to proceed slowly. Given his earlier discipline, he also should have been watching for the switch as he did so, and ensuring it was correctly lined as it was approached. The Grievor’s earlier offences in failing to point to the switch; failing to see where it was lined; and lining it incorrectly, then compounded the later violations of failing to protect the point.

[42] It is beyond this arbitrator’s jurisdiction to address any systemic issues of training raised by the Union.

[43] I cannot agree the various rule violations were “piling on” by the Company. The Grievor violated several rules, which led to this event. Had he complied with “point and observe”, he would have noticed the switch was aligned before he ever touched it. Had he properly considered which way his movement was to go, he would have realized the

¹ At para. 28.

switch was in fact properly lined and not moved it to the improper placement. Had he protected the point, the accident would not have occurred. Those multiple violations are not the fault of the Company, but the Grievor.

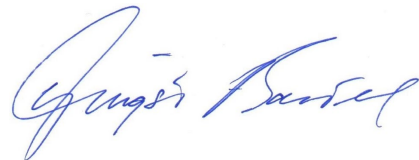
[44] The Company was lenient with the Grievor for his first violation, two weeks before, likely for the reason noted by the Union, being that the Grievor was a new employee. That leniency, however, does not foreclose a stiff and severe penalty if the same conduct is repeated again in a short time. This was a serious and significant incident, which resulted from several rule violations, and which caused a collision with another train and a derailment.

[45] Given the circumstances of this case and the multiple rule violations which lead to a collision and a derailment, the assessment of a 20 days' suspension was just and reasonable.

[46] The Grievance is dismissed.

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

June 14, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**