

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

CASE NO. 5035

Heard in Calgary, April 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 day suspension assessed to Conductor C. Lumsden of Revelstoke, British Columbia.

JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Lumsden was assessed a 30 –day suspension on August 9, 2022, described as: “For going in –between equipment without proper 3 –Point Protection, at East Greely Backtrack Switch, Mile 119.6 Mountain subdivision on your tour of duty on 8BAL –04 on July 6, 2022. A violation of T&E Safety Rule book Section T –27.”

UNION 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 the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Lumsden be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above.

The Union submits the Company has engaged in the unreasonable application of the Efficiency Test policy and procedures, resulting in the arbitrary, discriminatory, unjustified, unwarranted, and excessive assessment of discipline. The Union further contends the discipline does not conform with the principles of progressive discipline.

The Union disputes the application of the Hybrid Discipline & Accountability policy in the instant matter.

The Union requests that the discipline be removed in its entirety, and that Mr. Lumsden is 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 maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104 and the discipline was properly assessed in keeping with the Hybrid Discipline and Accountability Guidelines.

Regarding the Union's allegation that the discipline was arbitrary, unjustified, unwarranted, excessive, and discriminatory, the Company cannot agree with this allegation. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed. Discipline was determined following a review of all pertinent factors, including those described as mitigating by the Union.

The Union submits that the Company has engaged in unreasonable application of Proficiency Test policy and procedures. 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 rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

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.) D. Fulton

General Chairperson, CTY –W

FOR THE COMPANY:

(SGD.) F. Billings

Asst. Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen – Manager, Labour Relations, Calgary
R. Araya – Officer, Labour Relations, Calgary

And on behalf of the Union:

R. Church – Counsel, Caley Wray, Toronto
D. Fulton – General Chairperson, CTY –W, Calgary
J. Hnatiuk – Vice General Chairperson, CTY –W, Mission
J. Lind – Local Chairperson, Div. 657, via Zoom
C. Lumsden – Grievor, via Zoom

AWARD OF THE ARBITRATOR

Facts and Argument

- [1] The Grievor is a Conductor. He is a short service employee, having qualified for that position in September of 2020.
- [2] This Grievance was filed against an assessment of a 30 day suspension, for conduct which occurred on July 6, 2022.

- [3] Unknown to the Grievor, on that date, Trainmaster Gauld and Trainmaster Edmunds were listening to – and observing – the Grievor’s work, performing efficiency testing. I am satisfied from the Union’s evidence that they were more than 2800 feet away from the Grievor when conducting this testing.
- [4] The Grievor’s work that day was to lift a cut of cars from the backtrack at East Greely. As the Grievor went about his work, he had initially requested three point protection to remove the hand brakes from a car, and then cancelled that protection to perform a handbrake test. After that test, the Grievor then communicated to his Engineer that the “angle cock is closed...”.
- [5] The angle cock was located on the *opposite* side of the train from the Grievor. It is not disputed that to properly close the angle cock without three point protection, the Grievor would have been required to go up and over the equipment to the other side of the train.
- [6] The Company officials considered the Grievor had not done so. They approached the Grievor, approximately fifteen (15) minutes later, and had a discussion with him.
- [7] There is some disagreement about what was said at this meeting. According to the Trainmasters, they spoke to the Grievor, told him what they had seen, and asked how he closed the angle cock, if he did not have three point protection, as they had not seen him cross over. He responded “I don’t recall” and walked away and stated “just put a fail in for me”. He was called back over, where he was told they needed to discuss with him what they had observed, as this was not about testing but about being safe at work. They stated the Grievor agreed it was not a safe practice to reach over coupled knuckles without three points on contact, to close the angle cock. Mr. Edmunds indicates the Grievor stated that what *he* did was not safe (being an admission he had reached over to close the angle cock). Mr. Edmunds indicated that the proper ways to close the angle cock were discussed – by either climbing over equipment and close it from the other side, or obtaining three point protection to close it. The Grievor was then observed performing that task correctly.

[8] The Grievor's evidence at the Investigation was different. He stated:

Yes, in both memos from the trainmasters it makes it seem like they stopped me right away after allegedly witnessing a rules violation. But it was not until after I had made more moves with my work by going back out to the main track and returning to back track that they finally approached me. This was roughly 15 minutes from the alleged incident to finally being approached by the Trainmasters. They watched me do the exact same move on the main track i.e. tying onto cars, testing hand brakes, closing the angle cock, getting the pin and directing the Engineer ahead to clear a switch to go back into the back track again before talking to me...Then Callum asked me if I had the angle cock shut before testing the hand brakes on the cars I was leaving behind. To which I responded no I had not closed it yet. He then asked when and how the angle cock was shut. To which I responded normally how it is done. He said you must have reached over the drawbar to close it and I said I don't remember doing that. Callum said you must have. I said did you see me close the angle cock like that? He said no but it wasn't closed like that how was it closed? I told him this was 4 moves ago and don't you need to see the fail to give me a fail? Then he said from what we heard on the radio and what we could see, it was impossible it could have happened any other way.

Also I said if you saw this happen you can put the fail in. The whole conversation at this point was 5 –6 minutes long. The way they are portraying me walking away is not the case I was standing close to them and took a couple steps away then walked right back down to them after they told me the conversation was not done. I was never walking away just taking a few steps out of frustration. Also I never admitted to reaching over the drawbar I only agreed that it is not safe to do so without 3 point protection.

[9] The Company officials considered the Grievor's actions were a violation of the Safety Rule Book for T&E Employees, T27, which is meant to protect the Grievor when he is working with equipment.

[10] Given the conclusion reached, below, regarding the evidence offered to support discipline, the arguments need only be briefly stated.

[11] The Company argued this was a further flagrant rule violation by this Grievor, regardless of whether it resulted from an E Test, and that – given the Grievor's previous disregard for rules and his discipline record of a 20 day suspension (also under Grievance at the same CROA session and upheld in **CROA 5034**) – as well as the seriousness of violating this safety rule – a progression of discipline to a 30 day suspension was a just and reasonable response.

[12] The Union argued the delay in approaching the Grievor of 15 minutes was unreasonable and prejudiced his ability to remember what he had done and defend against this

accusation. It argued he did not admit to the rule violation. It also disputed whether the Company officials were able to make their conclusion that this misconduct even occurred, given their positioning, over 2,800 feet away. It argued their conclusion regarding the Grievor's actions was speculation. Even if the conduct were established, the Union disputed the appropriateness of discipline, given that this was observed through an E Test. It noted the Company officials spoke to the Grievor and coached him and educated him, which was a sufficient response for this incident. It also argued that even if discipline was appropriate, the quantum was excessive.

Analysis and Decision

- [13] I do not find there was any prejudicial delay in the approach to the Grievor. This is not a case where the Grievor made so many similar moves in that 15 minute span, that it would be unreasonable to expect him to remember what he did 15 minutes ago. It was not an unreasonable expectation that the Grievor would recall how he closed an angle cock on a car, done 15 minutes previously.
- [14] In this expedited process, witness evidence is rare. Documentation used in the Investigation – as well as the Investigation transcript – is filed and is intended to take the place of a major portion of the fact – finding normally undertaken by an arbitrator. This allows multiple cases to be heard in a day. However, to provide the support intended, it is critical that the evidence which the Company relies upon – and which is filed into the Investigation to support discipline – is accurate.
- [15] In their memorandums, both Trainmasters stated that the Grievor “*went between the equipment and reached over the knuckle to close the angle cock*” (Trainmaster Edmunds) and “Callum Edmunds and myself *observed Connor reach over a knuckle and closed the angle cock*” (Trainmaster Gauld). However, I am drawn to the same conclusion as the Union that the Company Trainmasters could not have actually seen the Grievor “reach over the knuckle and close the angle cock” in between the equipment, given where they were situated.
- [16] As noted above, the Union presented evidence at the Investigation which demonstrated that the Company officials were not close enough to the Grievor to view *what* he did

between the equipment, as they were approximately 2,850 feet away, at the Greely Back Track Switch.

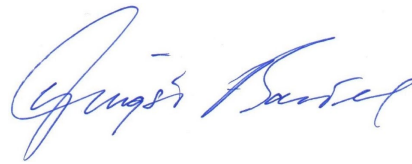
- [17] At the Grievor's Investigation, Trainmaster Gauld was questioned. He stated that he saw the Grievor *go between the equipment – "duck in –between cars" – for approximately five seconds, which he knew was not long enough for the Grievor to go up and over the equipment; close the angle cock and come back into view again. When combined with the radio transmission, this the led these officials to determine the Grievor "must have" reached over the knuckle and closed the angle cock.*
- [18] It was clarified in the Investigation, therefore, that what both men "saw" was the Grievor "duck in" between the equipment, and then they "heard" the radio transmission that the angle cock was closed, and drew a conclusion of what had occurred: They *surmised* that the Grievor must have reached across the drawbar to close the angle cock, since in their view there was there was not time for the Grievor to have gone up and over the equipment in the brief period of time the Grievor was out of their sight. Surmising what the Grievor "likely" or "must have" done is not the same as stating what the Grievor was *seen* to do.
- [19] The Memos filed both state that each Trainmaster not only "saw" the Grievor go in between the equipment, but also that they "saw" what he did in between that equipment – reach over a knuckle and close the angle cock". I am satisfied this was not an accurate statement by either Trainmaster. What they should have expressed was they surmised what had occurred, rather than seen what had occurred. This is not merely a difference in semantics.
- [20] Given that discrepancy, the credibility of the evidence of the Trainmasters is tainted and the balance of their evidence is also impacted.
- [21] The only other evidence left is that of the Grievor. I am satisfied the Grievor did not admit to the misconduct, as noted in his description of the conversation.
- [22] Without an admission – and without reliable and credible evidence of what actually occurred – the Company has not established cause for any discipline – or even for any proficiency test "fail".

[23] No cause for discipline having been established, the Grievance is upheld.

[24] The Company is directed to remove all reference to the 30 days' suspension from the Grievor's record and to make the Grievor financially whole. The Company is likewise directed to remove any reference to a proficiency test "fail" from the Grievor's file, for this event.

I retain jurisdiction for any issues of remedy; to correct any errors; and to address any omissions to give this Award its intended effect.

June 17, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**