CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5057

Heard in Edmonton, June 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the forty (40) day suspension (thirty (30) days served and ten (10) days deferred) of Locomotive Engineer B. Trevors of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Trevors was issued a forty-day suspension, thirty days served and ten days deferred on March 23, 2023, described as:

> *"Please be advised your discipline record has been assessed with 40 Day Suspension (30 Days to Serve, 10 Days Deferred) from Company Service without pay (effective April 3 to May 2, 2023) and a warning letter for the following reasons:*
> *In connection with your tour of duty on February 15, 2023 on train 315-321 and specifically the events surrounding your meet at Ernfold; whereby you failed to be on the ground and in position to do a proper pull by inspection on train 100-14.*
> *A violation of:*
> - *Rule Book for T&E Employees, 11.7 Inspecting Passing Movements*
>
> *NOTE: At this time you are not required to serve the deferred portion of the above referenced suspension (the "Deferred Suspension"). If you do not commit another offence for which discipline is warranted within 6 months of the date of this notice, you will no longer be in jeopardy of having to serve the Deferred Suspension. However, if you commit another offence for which discipline is warranted within 6 months of the date of this notice, you will be required to serve the Deferred Suspension as well as being assessed any appropriate consequences for the new offence."*

The Union asserts the Company is in violation of Article 39.05. The article provides that an employee will be advised of any disciplinary action assessed within 20 days from the date the investigation was completed. Failure to notify the employee within the prescribed mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed. The Company did not request a time limit extension and did not assess Mr. Trevors with any discipline within the 20-day time limit. There are no provisions for the Company to

unilaterally decide that an investigation can be “expunged” and hold a “new” investigation for the exact same incident. This is double jeopardy and a veiled attempt to circumvent the timelines described in the Consolidated Collective Agreement as there was no new evidence to warrant a supplemental investigation.

The Union submits a violation of Article 39.13 has occurred as the article does not allow for suspension-based discipline to be deferred and possibly activated later. The Union has previously gone on record that deferred suspensions must be regarded as a warning or reprimand on the employee’s file for a culpable offense. The so-called activation of the deferred discipline later must also be considered double jeopardy, as adjudicated in CROA 4620. As a result, the Union insists the 10-day deferred suspension be stricken from the record entirely.

The Union submits that efficiency testing is intended to be a learning tool used by management for running trade employees to further their commitment to safety, not to entrap crews to punish them. This is confirmed by CP’s own Efficiency Test Descriptions which states. Testing is not intended to entrap an employee into making an error but is used to measure efficiency, knowledge and experience to isolate areas of non-compliance for immediate corrective action.

The Union maintains that the information from the conversation with Trainmaster Ross and the investigation have more than met the needs of the Company to address this situation. Mr. Trevors commits that he understands the requirements for passing train inspections and has demonstrated his compliance since.

The Union asserts that the level of discipline assessed was heavy handed, it would serve better to adopt an appropriate amount of discipline including that which would be conducive to prevent future violations. Discipline that amounts to a fine is extreme, arbitrary, and excessive punishment.

The Union requests that the Arbitrator expunge the forty-day suspension issued to Engineer Trevors and that he be made whole for wages and benefits lost with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees

COMPANY POSITION

The Company disagrees and denies the Union’s request.

Contrary to the position advanced by the Union, the assumption that the investigation was completed on February 22, 2023 and that the discipline assessed was out of timelines is inaccurate. The Union has purposefully chosen to omit the rest of the facts that occurred. As previously stated in the investigation statement dated March 16, 2023, the investigation statement previously scheduled on February 22, 2023 was expunged and rescheduled based on a previous procedural objection that the Union made in the February statement. As the Union is aware, the Company has an obligation under Article 39 to provide a fair and impartial investigation.

The Company took into consideration the procedural objection the Union made and remedied the issue by expunging the original statement and conducting a new investigation. The Company re-issued a new Notice to Appear and proceeded with the fair and impartial investigation pursuant to the Collective Agreement. It is trite for the Union to make the objections throughout the investigation statement that the investigation was not being conducted in a fair and impartial manner and then when the Investigating Officer asked to explain how it was neither fair nor impartial, neither the Union nor Grievor took it upon themselves to provide any explanation. For the Union to continue to claim the process was not conducted in a fair nor impartial manner is prejudicial to the Company. Given the above, the Company maintains no violation of Article 39.05 occurred.

The Company maintains that the alleged violation of Article 39.13, advanced by the Union, is without merit. As the Union is aware, CROA 4630 and 4638 are examples where arbitrators substituted deferred suspensions with suspensions. In this situation, the Company maintains that its action of issuing the Grievor a deferred suspension was to promote correctness of behavior

through deterrence, while reducing the immediate financial impact of a suspension. The Union submits the Company engaged in an unreasonable application of the Efficiency Test policy and procedures, citing CROA 4621. Arbitrator Sims stated "The Union objects to the use of efficiency testing as a stepping stone to discipline. That is addressed above. I do not find this voids the discipline."

The Company maintains the Grievor's culpability as outlined in the discipline letter and the Union does not dispute the culpability in its grievance submission. After reviewing this matter in its entirety, culpability was established following the fair and impartial investigation into this matter and the discipline was properly assessed after considering all mitigating and aggravating factors. The quantum of discipline assessed was in no way excessive nor unwarranted.

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

For the Union: **For the Company:**

(SGD.) G. Lawrenson **(SGD.) F. Billings**

General Chairperson, LE-W Assistant Director, Labour Relations

There appeared on behalf of the Company:

L. McGinley	– Director, Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary
S. England	– Manager, Labour Relations, Kansas City
A. Harrison	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chair, LE-W, Calgary
C. Ruggles	– Vice General Chair, LE-W, Calgary
K. Ingalls	– Local Chair – via zoom
B. Trevors	– Grievor – via zoom

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Grievor is a Locomotive Engineer. At the time of this incident, he had 12 years of service as a running trades employee.

[2] On February 15, 2023, the Grievor was called as a Locomotive Engineer on 315-321 in straight-away service from Moose Jaw to Swift Current, Saskatchewan. That Train arrived at Ernfold siding to meet Train 104-14 and Train 602-025 in short succession. The Grievor was not positioned on the ground to conduct a pull by inspection of Train 104-14.

[3] Trainmaster Ross conducted an Efficiency Test of the crew of Train 315-321 at this location and informed the crew of their "fail" for not inspecting Train 104-14.

[4] The crew then “passed” for inspecting Train 602-025.

[5] The Union objected to the Efficiency Test during that Investigation, considering it was ‘targeted’ against the Grievor.

[6] There is a twist to this process that is unusual, which has led to two “preliminary” issues between the parties, apart from the issues of culpability and reasonableness of discipline.

[7] On February 17, 2023, the Grievor received a Notice to Appear in connection with this failed Efficiency Test. That Notice to Appear listed that the failed Efficiency Test took place ***at Parkbeg.***

[8] This was an error. There was no failed Efficiency Test at *Parkbeg*. The alleged Efficiency Test failure too place ***at Ernfold****.*

[9] The Investigation proceeded on February 22, 2023 (the “First Investigation’) under this incorrect Notice to Appear. Neither the Investigating Officer, the Union representative, nor the Grievor initially realized that there was an incorrect reference to where this incident occurred.

[10] That incorrect reference was repeated during the questioning at the Investigation:

a. At Q/A 22 of the First Investigation Transcript, the Grievor was asked why he was not on the ground to inspect the passing 100-14 Train “*at Parkbeg*”. The Grievor answered “poor judgment”.

b. When asked to elaborate in Q/A 23, the Grievor stated “We simply made an error & should’ve been on the ground to inspect”.

c. At Q/A 24, the Grievor was asked “Did you or anyone in your crew inspect the passing 602-025 *at Parkbeg*?”. He answered “yes”.

[11] At this point, there must have been certain “off the record conversations”, as the Investigating Officer then asked in Q/A 25: “In regards to the previous union objections [*none of which related to the place where the misconduct occurred*], it is correct the incident occurred at Ernfold & not Parkbeg?”, to which the Grievor answered “Yes to the best of my knowledge”.

[12] In the next question, the Grievor was asked what he would do differently regarding inspections, and the Interview continued. The Grievor answered he would “ensure I am

compliant with rules in the future" and "ensure I am on the ground well in advance to inspect all types of movements".

[13] A few questions later, the Grievor also stated later in the interview that he considered himself a "model employee" who "walked the walk and talked the talk" of rules compliance; that this was an "unfortunate situation" and a "hard learned lesson" on his part. (Q/A 28).

[14] Despite these comments, this was not the first time the Grievor failed to conduct a Train inspection.

[15] On November 13, 2021, just over one year earlier, the Grievor had also failed to inspect a passing train. While the discipline record filed into this proceeding by the Company still records that discipline at 20 days, that discipline was in fact reduced to 10 day by arbitral Award through an Informal Expedited Arbitration hearing before this Arbitrator, with the non-precedential Award issued in May of 2024.

[16] Having realized its error regarding the reference to "Parkbeg" in both the Notice to Appear and in the Investigation, the Company decided to unilaterally "expunge" the First Investigation, issue a new Notice to Appear with the correct location, and conduct a *second* Investigation to correct this error. The Company did not seek an extension of the timelines in Article 39.05.

[17] The Company issued a *second* Notice of Investigation on March 14, 2023. A *second* Investigative interview then took place on March 16, 2023. This was 22 days after the First Investigation took place.

[18] The Union objected to the Second Investigation at the start of that process, as it considered the Investigation process was already completed on February 22, 2023. However, the Grievor attended and cooperated with the *second* Investigation. He was asked very similar questions, with similar answers given. No new evidence was brought forward by the Company at the Second Investigation.

[19] This leads to the first "preliminary" issue between the parties:

a. Did the Company conduct a fair and impartial Investigation process when it unilaterally "expunged" the First Investigation in these circumstances?

[20] For the reasons which follow, I am satisfied the answer to that question is "no".

[21] As the Company failed to conduct a fair and impartial Investigation, the discipline is *void ab initio.*

[22] As that question resolves the Grievance, it is not necessary to address the merits. This analysis will only address this preliminary issue.

Relevant Provisions

> 39.04 EXAMINE WITNESSES DURING AN INVESTIGATION
> Note: Formerly November 16, 1992 Letter Re: Examine witnesses during an investigation.
> (1) In respect of a witness from whom a statement will be taken, the employee under investigation will be notified of the time and place in order that that employee or accredited representative may be in attendance if they so desire. Should they attend, they will be permitted to ask questions of the witness and/or offer rebuttal at the conclusion of the witness' statement. It should be noted that all questioning must be directed to the witness through the investigating Officer in order to ensure the orderly conduct of the statement. Only questions or cross-examination on subjects directly pertaining to the evidence or matter under investigation will be allowed. When, in the opinion of the investigating Officer, a question is wholly irrelevant, it may be declined. The question will be recorded in the statement, together with the action of the investigating Officer in declining to direct the question to the witness. If rebuttal is offered or questions asked by the employee under investigation or accredited representative, such rebuttal and questions asked together with the answers given by the witness will be recorded in the statement. Should the employee elect not to question the witness, this will also be recorded in the witness' statement.
> (2) On the other hand, should the employee under investigation not attend the witness' statement, the fact that they had been notified that a statement would be taken will be recorded in their own statement at the time the witness' evidence is being introduced. In such cases, the employee or representative will be allowed only the opportunity to offer rebuttal to such evidence.
> (3) When a Company Officer gives evidence in the form of a memorandum, the Officer, if requested by the employee under investigation or accredited representative, will be present at the statement of employee. The employee or accredited representative will be permitted to ask questions of the Company Officer through the presiding Officer or to offer rebuttal. The rebuttal offered or questions asked and the Officer's answers will be recorded in the statement in the same manner as noted above.
> (4) There may be instances where the employee or the Union may request that certain witnesses be called on behalf of the employee under investigation. Such request will not be denied unless it can be demonstrated that these people could not have witnessed the incident under investigation nor could they provide any pertinent evidence in this regard.
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> 39.05 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed,

> mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

Analysis and Decision on Procedural Fairness of Investigation

Arguments

[23] The Union took the position that the Company could not unilaterally choose to "expunge" an Investigation transcript and thereby create for itself a "do over" of the Investigation process, when an error such as this one occurred. It argued this situation was distinct from when a "supplementary" investigation is brought, when new evidence comes to light. Rather, this situation it is simply a repeat of the Investigation process.

[24] It argued this situation is analogous to that in **CROA 4758**, and the same reasoning and conclusion should result in this case. As the Company had not provided to the Grievor his discipline within 20 days of the completion of the First Investigation, the Union argued that Article 39.05 dictated that the discipline was to be vacated.

[25] The Company argued it had not yet completed its Investigation on February 22, 2023 when the First Investigation was conducted. It argued that it properly "expunged" the First Investigation when it realized what had occurred, and that the Grievor was appropriately provided his discipline within 20 days of the *second* Investigation. The Company relied on **CROA 3221**.

Analysis and Decision

[26] I am drawn to the same conclusion as the Union that **CROA 4758** is an analogous case to that raised in this Grievance. I can find no meaningful distinction between the facts, reasoning and result in that case and this case.

[27] In **CROA 4758**, this Office considered whether the Company has the power which it argued it had in this case, which was to unilaterally "expunge" an Investigation and give itself what the Union in that case – as in this case - described as a "do over".

[28] The Arbitrator found that such actions threatened the fairness and impartiality of the Investigatory process, which has a critical role to play in this expedited arbitration regime.

[29] The reasoning in that decision is logical and persuasive. It is also capable of resolving this issue. I can do no better that to quote that reasoning and result, with approval:

> 5. On September 6, 2019, the Company issued another investigation notification to Mr. Carron to be held on September 10, 2019. The Union claims that this second investigation was improperly held as it re-examined the same evidence that was obtained in the first investigation. The Company did not provide the Union with "new facts or evidence" to conduct the second investigation. The Union had raised this objection at the outset of the second investigation and qualified it as a "do over".
>
> 6. According to the Company, the second investigation is not a "Supplemental Investigation" but rather a retake. It claims pertinent items were missing when the statements were taken the first time, and decided to conduct a new investigation. The Company argues it has the unfettered right to expunge the first investigation from the file, conduct a second investigation and only rely on the latter in assessing discipline.
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> 7. The investigation procedures correspond to a pre-hearing examination, a means of fact finding utilized in labour relations. In these expedited arbitrations, it requires full disclosure of the evidence to the employee before he is questioned on the record. The entire record of the investigation, comprised of the written transcript of the investigation and all supporting documents, are critical to the CROA process. The investigation transcripts often serve the purpose of viva voce evidence in these expedited proceedings. They form a crucial part of the evidence that the arbitrator reviews in arriving at the arbitrator's findings. This underlines the importance of a "fair and impartial" investigation.
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> 8. The principles referenced above are found in Article 39 of the Collective Agreement. More specifically, the right to notice accompanied with particulars and evidence is codified in article 39.01 (4) of the Collective Agreement with explicit reference to providing the employee with time to study the evidence at the commencement of the investigation:
>
> > (4) The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility. Upon request, the Company shall confirm to the employee whether or not technical evidence, such as Q-Tron tapes, will be used at an investigation in order that they might arrange for a qualified accredited representative. The employee and their representative will be allowed time to study this evidence as well as any other evidence to be introduced at the commencement of the investigation. Should any new facts come to light during the course of the investigation, this will be investigated and, if necessary, further memoranda would be placed into evidence during the course of the investigation (Note: Formerly July 25, 1989 Letter Re: Investigation & Discipline.)
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> 9. The Company has failed to identify any "new material facts" that could justify holding another investigation. The Union continuously objected to the questions during the second investigation given their repetitive nature and lack of new information. This is properly characterized as a "repeat proceeding" and an abuse of process in the present case. This finding is reinforced by the language the parties have incorporated framing the parameters within which a supplemental investigation may be conducted. Article 39.02 of the Collective Agreement stipulates:

> 39.02 Sub-clause 39.01 (4) above will not prevent the Company from introducing further evidence or calling further witnesses should evidence come to the attention of the Company subsequent to the notification process above. If the evidence comes to light before commencement of the investigation, every effort will be made to advise the employee and/or the accredited representative of the Union of the evidence to be presented and the reason for the delay in presentation of the evidence. Furthermore, should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation.

10. If new facts arise in the course of the investigation, the Company may hold a supplemental investigation. A careful review of the material before me indicates that no new witnesses were called, and no new appendices were entered. The Company would have to present new evidence or compelling reasons to justify a second investigation. In this instance, I find that the Company had no valid justification to restart the investigation process and expunge the first one.

11. The Company referred to CROA 3221 where the grievors were assessed discipline for failing to secure locomotives, leading to the derailment of one locomotive. The issue was whether the Company conducted a “fair and impartial investigation.” An error had been made. The grievors were not provided with notice to the examination of a Yard Master, an important witness the Company relied on in assessing the grievors’ responsibility. Arbitrator Picher dismissed the matter on procedural grounds.

12. In response to the procedural flaw, Arbitrator Picher suggested that the flaw could have been remedied by setting aside the statement of the Yard Master and rescheduling another investigation, with proper notice to the grievors and their Union. Essentially, a retake would have remedied the procedural flaw and provided the grievors with a fair and impartial investigation. This differs from the case at hand. No evidence was presented suggesting the first investigation was flawed. In fact, the first investigation was conducted with proper notification and is deemed fair and impartial. In CROA 3221, Arbitrator Picher reiterated the importance of the fair and impartial investigation:

> > “For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and failure to respect them must result in the ensuing discipline being declared null and void (CROA 628, 1163, 1575, 1858, 2077, 2280, 2609 and 2901). While those concerns may appear “technical”, it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized.”

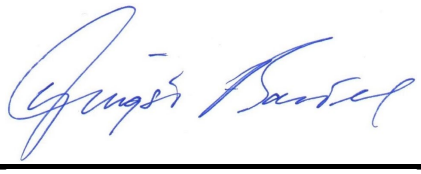
13. The Company has not demonstrated a reason to warrant a second investigation. In this case, the second investigation is the only evidence upon which the Company relies to assess discipline. I find that the second investigation was not conducted within the requirements of Article 39. Therefore, I am striking the investigation transcript from the record. Absent any evidence supporting the discipline, I find the discipline null and void and order it be expunged from Mr. Carron’s file.

[30] The Company has not provided to the Grievor a fair and impartial Investigatory process by unilaterally “expunging” the First Investigation and repeating it in the Second Investigation. The discipline is therefore *void ab initio.*

[31] The Grievance is upheld.

[32] The Grievor is to be made whole for all financial losses resulting from this suspension.

I retain jurisdiction to address any questions regarding the implementation of this Award and those surrounding remedy, should the parties be unable to agree on the amount. I also retain jurisdiction to correct any errors and address any omissions to give this Award its intended effect.



July 30, 2024

CHERYL YINGST BARTEL
ARBITRATOR