ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY

- and -

UNIFOR LOCAL 101R

Shopcraft Award #731 (SHP 731)

A W A R D

BEFORE A BOARD OF ARBITRATION COMPOSED OF:

Andrew C.L. Sims, Q.C..... Chair

REPRESENTATIVE OF CANADIAN PACIFIC

Caroline Gilbert ..... Manager Labour Relations
Cavina Tsoi ..... Officer Labour Relations

REPRESENTATIVE FOR UNIFOR LOCAL 101R

Bruce Snow..... National Rail Director, Unifor
Karine Desjardin ..... Vice President Eastern Region, Local 101R
Simon Smith..... Grievor

HEARD in Winnipeg, Manitoba on November 10, 2017

AWARD ISSUED on November 21, 2017

Our file: 7976

AWARD

Mr. Simon Smith grieves his June 28, 2016 termination. He began his career as a rail car mechanic apprentice at CP's Winnipeg yard on September 12, 2011.

The Union accepts as fact that Mr. Smith locked and flagged, and then began work upon, the wrong track. They agree that he could and should have contacted his co-worker, Mr. Deimuth, faster, via radio, to notify him of the mistake as soon as it was discovered. Thus they concede the Company had cause for discipline. However, the Union asserts that outright termination was excessive. They urge that a lesser penalty be substituted, based on the authority given arbitrators under s. 60(2) of the *Canada Labour Code*.

A slightly fuller account of the event is necessary. It was Mr. Smith's day off. He was called in to work on the road track but that work was cancelled. As a result, he was forced to work traffic in the yard, inspecting track FG07 along with co-worker Jason Deimuth. There may have been some difference of opinion over whether Mr. Smith should have been paid for being called in, but allowed to go home. If so, it is not part of these proceedings. Besides that, the importance of strict adherence to the safety rule does not vary depending on such matters; they apply whenever work is undertaken. Mr. Smith's account of the events was as follows:

> Danny Krann briefed Jason Deimuth and myself that we were to inspect track FG07. Jason went to the East end of FG07 to line lock and flag for protection. I was a little behind Jason as I had just been called in and was preparing myself to work traffic yard as opposed to the road. I recall Jason calling to advise the East end was locked and flagged and I was still doing a safety inspection on my ATV, I replied to Jason I will be there in two minutes and stand by. I pulled into G yard and for some reason when I saw the traffic in FG02 I thought that was the traffic to inspect and I proceeded to line away, lock, and flag the West end of FG02. I announced on the radio that my protection was up at the West end. I do not recall if I said FG02, or FG07 or any track at all. I have never had a failed PTR related to track protection lock out and communication before, so this was very out of character. I knew there was a problem when Supervisor Krahn called over the radio to confirm that we were both working FG07. At that point I dropped my protection on FG02 and applied it to track FG07 as quickly as possible.

Mr. Smith's initial error was in making an assumption that, because he saw traffic on FG02, it was the track they were to work upon. That assumption ended up displacing Mr. Krahn's express instructions. Mr. Smith could have, but did not, double check the track number with Mr. Krahn or Mr. Deimuth. I accept the Union's suggestion that this was unintentional, but it was not "an accident"; it was avoidable through greater care and by double checking instructions rather than working on an assumption.

The error could have been identified sooner if Mr. Smith had radioed Mr. Deimuth more precisely, giving the track number rather than just saying he had protected the west end. Mr. Deimuth too should have sought clarification on this. Precision on such points is the antidote to erroneous assumptions.

Mr. Smith's second error involves his reaction once he recognized his initial error as a result of Mr. Krahn's call and reference to FG07. Rather than reply "Oops – I'm on FG02" or something to that effect, Mr. Smith says he replied "Ya G7" and proceeded immediately to drop his protection on FG02 and rectify his error by protecting FG07. What he should have done, immediately, is advise his co-worker Mr. Deimuth that he was or might be working on unprotected track. Mr. Smith conceded, in his interview, that his response was motivated, partially at least, by the potential consequences for admitting over the air that he had locked out the wrong track. While this was no doubt an embarrassed "spur of the moment" reaction, it still left Mr. Deimuth actually or at least potentially exposed over the couple of minutes it took Mr. Smith to protect FG07.

Mr. Smith's explanation, during the investigation was that:

> A17 I wanted to correct the situation as quickly as possible and I was at the West end of the yard and could see there was no traffic in the area and no immediate danger by protecting it this way. I now realize it still would have been better to inform Jason immediately that west end was not protected.

The Union takes issue with the Employer's assertion that Mr. Deimeuth was in fact working on the track at the time. The evidence suggests to me this was more likely than not, but in any event, what is important is that he was working in that vicinity and working on an assurance from Mr. Smith that where he was or would soon be working was protected when it was not. There is little room for the "no harm no foul" approach in safety lockouts of which the railway's blue flag system is but a subset.

Mr. Smith's investigatory interview took place 6 days after the incident on June 16, 2016. During that interview Mr. Smith was open and frank about what happened and appears to have taken full responsibility for the mistakes he made, and by then recognized. Asked at the conclusion if he had anything he wished to add, he said, and I believe in a genuine way:

> A25 I would like to apologize to Jason Deimuth for jeopardizing his safety, I have always been a dependable, productive, and safe employee and value my career at Canadian Pacific Railway and have learned a valuable lesson from this experience. If given an opportunity to prove myself as being safety conscientious I can assure you that nothing like this will ever happen again. I

> would also like to thank Trainmaster Chris Scheitor for being as observant as he was and will personally thank him at the first opportunity.

At the time of his termination, Mr. Smith had two disciplinary events on his record, although each of the two were either at the time or soon after, subject to grievances. As a result of these grievances, one item of discipline was expunged, and the penalty on the second very substantially reduced. The result is that this arbitrator is assessing the quantum of discipline in from a different disciplinary background than the one assumed to be justified by the Employer. When deciding upon the termination they considered a record of 7 and then a 30 day suspension (for two breaches arising out of the same event). Mr. Smith's record, following the resolution of the grievances, is as follows:

Date of Incident	Description of the Incident	Discipline Assessed
May 29, 2016	Failure to apply zip ties to glad hands did not identify hanging banding and missed an applied hand brake all on train 411-29	3 day suspension

I note that the settlement of the grievances, over the March 29, 2016 discipline, only occurred in June 2017. Thus, in almost 5 years of service Mr. Smith had just one item of discipline, albeit for an incident less than two weeks before the incident which is the subject of this grievance.

Both parties provided examples of the discipline in comparable cases, all of which are subject to the usual distinguishing factors of length of service, prior disciplinary record, and the seriousness of the infraction itself, even if involving the same or similar rule violations. The Employer emphasizes that, since August 2015 it has not used the "Brown system" points approach to discipline and that it is inappropriate for arbitrators to re-impose that system on the basis of the *Canada Labour Code's* s. 60(2).

The Employer notes that blue flag violations are agreed to be so serious that they are included in the collective agreement:

> Where yard and repair tracks are coupled up at both ends, a standard Blue Flag suspended from a staff clamped to the rail or ties by day and Blue Light hung on the same staff by night must be displayed at both ends of each track and in addition, the switches at both ends of each track must be lined to prevent movement onto track, and secured with a special personal lock, before employees commence work.

This seriousness of the infraction is supported by Arbitrator Picher's comments in SHP 616:

> It is difficult to overstate the danger created by the grievor's negligent failure to properly line the switch so as to avoid the possibility of any cars entering track 'M" off the lead while the inspection of the coal train was ongoing. The prospect of a train moving unexpectedly while car mechanics are working around and under it during the course of the train inspection process is extremely serious.

I note that, while the result of that decision was a dismissal, that was due in large part to the grievor's pre-existing 55 demerits. Arbitrator Frumkin's decision in AH332 upheld the termination of a Rail Traffic Controller for a blue flag violation, although his responsibilities were somewhat senior to those of Mr. Smith, with "ultimate responsibility to ensure that all [employees] are aware of the authorities in place at all times." The arbitrator expressed a preference for something short of termination, but ultimately upheld that step due despite the grievor's very long service due to an alternative position being unavailable, the grievor's past record, and the seriousness of the breach in that case.

The Employer also refers to Arbitrator Picher's decision in SHP 706. The grievor in that case totally failed to apply blue flag protection while working on a drop table line up, but advised his supervisor that he had done so. The failure was identified by another crew and then corrected. The termination was set aside and the grievor given a second chance, but without compensation. He was a 24 year employee with extended periods of discipline free service.

Lastly, the Employer refers to CROA 4519. It too involved a 25 year employee, but it also involved "a horrifying collision between his hi-rail truck and a CP train". Again, the employee was reinstated, but without compensation and subject to a demotion. The grievor "did not sport a spotless discipline record" (see para. 6).

The Union's position is that there was nothing willful or deceitful in Mr. Smith's action. Termination, it says, is grossly excessive and should, under progressive discipline principles, attract reasonable, corrective discipline.

The Union submits authority from Brown and Beatty, *Canadian Labour Arbitration in Canada*, 7:4000 and 7:4300 on the appropriate approach. It also refers to four prior awards which, it argues, set the norm for discipline in cases like this.

In SHP 291 the grievor (a 4 year employee) reported to work impaired and failed to apply blue flag protection. Arbitrator Picher wrote:

> There is no doubt, however, that the grievor rendered himself liable to a serious measure of discipline for having reported for work after consuming a significant amount of alcohol. He is also liable to discipline, albeit on a lesser scale, for his failure to place the blue flag.
>
> …
>
> Mr. Tola shall be reinstated into his employment, without compensation or benefits, and without loss of seniority. The lengthy suspension so imposed shall be in substitution for his discharge arising out of the infraction relating to the consumption of alcohol prior to reporting for duty. In respect of his failure to place the blue flag, his disciplinary record shall be assessed ten demerits.

In SHP 445 a terminated grievor brought two grievances, one against the assessment of 10 demerits for failure to apply blue flag protection. The consequence of that, given the grievor's prior record, was termination due to the accumulation of points. Of the 10 point penalty, Arbitrator Picher said:

> Firstly, it does not appear substantially disputed that for a number of years the failure to properly provide a blue flag for track protection, while treated seriously, was not normally dealt with by the assessment of ten demerits in all cases. It seems, however, that commencing in 1994, prior to the incident giving rise to this grievance, that at least two employees received demerits for a similar infraction.

Arbitrator Dolgoy, in SHP 684 canvassed several authorities (including SHP 445) and wrote:

> 60. In looking to the examples provided by the Union in paragraph 21 of its written submissions, I note the following:
>
> > i. In the case of DM Horne, 20 demerit points were assessed by CN for "failure to follow blue flag rules while performing a #1 Air Break test". Unfortunately, the form 780 is too difficult to read to get the complete reasons.
> >
> > ii. Alan Digby was assessed 20 demerits by CN for blue flag violation in the citation it states "Note that you failed to follow blue flag rules as you commenced a #1 Air Brake… (note again illegible). Subsequently Alan Digby was assessed 15 demerits.
> >
> > iii. Jason Dumontier was assessed a 3 day suspension for failure to properly display a blue flag while inspecting a freight car.
> >
> > iv. R. Hamilton was assessed a 2 day suspension for failure to display a blue flag while working on freight cars.
>
> 61. There were other cases of 10 demerits for similar infractions.
>
> …
>
> 63. The Union has suggested that the standard range is 10 to 20 demerits. Based on the cases before me I have to agree that that is the case.

Having assessed these arguments and the facts at hand, my view is that termination was an excessive response in the circumstances. I come to this conclusion in part because of the fact that, at the time of termination, Mr. Smith's record stood at a much more serious level than was subsequently accepted as appropriate. Further, while Mr. Smith's conduct was negligent and could have had very serious consequences had it gone (a) undiscovered and (b) uncorrected, he freely and completely accepted responsibility and apologized. There was no defiance or deliberateness in his conduct. I find this is a case where progressive discipline is the appropriate response, based on this only prior discipline of a three day suspension. While the Brown system is passé, I consider the range of penalties used under that system of some guidance. The seriousness of blue flag – essentially lockout - violations requires a serious penalty which I assess as a 25 day suspension. Other than the period of this suspension the grievance will be made whole, subject to mitigation. I will remain seized of the matter to quantify his loss should the parties be unable to agree.

I note one evidentiary point that arose during the hearing. At one point during the grievance procedure the Employer made a "with prejudice" written offer which it sought to introduce, primarily to rebut the argument that the Employer was being systematically unreasonable, but also as the basis for a mitigation argument. The Union objected to the letter being introduced as it was an integral part of grievance negotiation. It cited Arbitrator Hope's award in:

> *B.C. Rail v. Canadian Union of Transportation Employees Local #1* (unreported decision August 27, 2002)

The offer however was followed by further negotiations that both parties agree proceeded on a without prejudice basis. The offer was also made well before the July 2017 alteration to the grievor's outstanding record. Based on these facts, I declined to receive the letter into evidence, but without ruling that such letters can never be used, or never be relevant. In this case, the letter was inextricably tied into ongoing, without prejudice, negotiations on both this and the earlier grievances.

I thank the parties for their very helpful submissions.

DATED at Edmonton, Alberta this 21st day of November, 2017.

ANDREW C.L. SIMS, Q.C.