

IN THE MATTER OF ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

AH: 784

DISPUTE

Appeal of the 20 demerits assessed to Conductor Wade Blackwood.

JOINT STATEMENT OF ISSUE

Following an investigation, on April 22, 2020 Mr. Blackwood was disciplined as shown in his discipline letter as follows,

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

In Connection with “Your tour of duty while working 118-05 on April 9, 2020. It is alleged that you were in violation of “Section 2- General, Paragraph 2.2, subsection C, item V of the Rulebook for Train & Engine Employees” by not complying with “Subject: Trains Working/Travelling in Yards/Industry Tracks” Of the SOSA Region Summary Bulletin ”.

Formal investigation was conducted on April.16th, 2020 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:

- T&E Rule Book “Section 2- While on Duty General, Paragraph 2.2, subsection C, item V”.*
- SOSA Region Summary Bulletin, effective 0001 April.1st, 2020 RSB Number 20-04-01, page 5, Subject: Train Working/Travelling in Yards/Industry Tracks*

In consideration of the decision stated above, you are hereby assessed twenty (20) demerits

Please note that your employment status is in jeopardy. Any further incident, which may occur where you may be found culpable, may result in your dismissal from Company service.

As a matter of record, a copy of this document will be placed in your personnel file.”

UNION POSITION

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position of an assessment of 20 demerits is unnecessary and the continuation to discipline before or even when education of the employee takes place.

The Company has not proven without a doubt that Mr. Blackwood violated the Rule and as provided throughout the Manager did not take the time of the alleged violation to advise and educate the employee. Instead much later (at the end of Mr. Blackwood's shift) he is advised to contact the Trainmaster. Had the issue been as important as it was to call a formal investigation why would the Manager not contact Mr. Blackwood immediately to correct any alleged violation of the Rules as well as allow Mr. Blackwood provide any needed rebuttal at the time.

The Company did not respond to the Union's Step 2 grievance within the timelines. In the Union's view this is a violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA. The Union objects to any expansion the Company may take from what was provided in the Form 104 and Step 1 grievance response.

The Company has unreasonably disciplined Mr. Blackwood. The facts of the investigation do not warrant, nor justify this quantum. If Mr. Blackwood was in violation this should have been a discussion, education and test again in the future for compliance.

The Union requests that the discipline assessed to Mr. Blackwood be removed. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees with the Union's contentions 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.

The Union suggests the Company has failed to respond to the step 2 grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the step 2 grievance response, Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's intent to proceed to arbitration, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure.

The Company maintains its rights to utilize efficiency tests which it is mandated to conduct as part of its safety management program and assess progressive discipline as required for rule violations identified during such testing. Further, CROA jurisprudence supports discipline as a possible outcome when merited.

Failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. 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:
Signed

Wayne Apsey
General Chairperson
CTY – CP Rail East
TCRC

FOR THE COMPANY:
Signed

Lauren McGinley
Assistant Director Labour Relations
CP Rail

January 11, 2022

Hearing: February 17, 2022 - By videoconference

FOR THE UNION:

Ken Stubing, Caley Wray
Wayne Apsey, General Chairperson
Wade Blackwood, Grievor

FOR THE COMPANY:

Elliot Allen, Labour Relations
Lauren McGinley, Assistant Director Labour Relations

AWARD

JURISDICTION

[1] The parties agree I have jurisdiction to hear and resolve this dispute with all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*. This is an Ad Hoc Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument.

[2] I have carefully reviewed the parties written submissions and case law. In keeping with the parties' process agreement, I will only specifically refer to the case law to the extent necessary for purposes of the determination required in this matter.

ANALYSIS AND DECISION

[3] The Company maintains that Mr. Blackwood failed to be on the footboard of the locomotive while traveling over the XW02 Crossover Switch. It says rail yards are a place where the utmost caution, care and diligence must be used by employees who operate equipment. Employees must exercise due diligence ensuring the proper precautions are adhered to in order to prevent catastrophe and injury to members of the crew, community and railroad.

[4] CP says the Grievor clearly violated a rule governing the safe and efficient operation of the railway. Based on the investigation, the Company maintains the Grievor's conduct gave rise to discipline and he was properly assessed 20 demerits.

[5] CP submits that under the rules as outlined in the 2020 SOSA Summary Bulletin, an employee other than the Locomotive Engineer must be positioned outside the cab of the locomotive within 10 car lengths from a switch to observe the switch alignment. The Grievor was the only other crew member aside from the Locomotive Engineer. There was also no extenuating circumstance that prevented the employee from being located on the footboard.

[6] CP argues that arbitral jurisprudence has long supported the assessment of substantial discipline for employees who are culpable for failing to ride the footboard/failing to protect the point of a movement. It relies on CROA 4639 in which the Grievor failed to properly protect the point of his movement and was assessed 20 demerits. In reaching his decision to dismiss the grievance, Arbitrator Hornung stated:

Having reviewed the cases referred to me, it can be fairly said that the normal range of demerit points for similar misconduct is within the range of fifteen (15) to twenty (20) demerit points.

[7] CP submits that the Grievor's previous record has two recent minor infractions placing him at Step 3 of the Hybrid Discipline and Accountability Guideline. Given his length of service and experience in this type of territory, the Grievor ought to have known better and this case is likely just the first time the Grievor was caught.

[8] The Company referred to the often cited case of *William Scott & Co. v. C.F.A.W., Local P-162* (1976), [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B.); *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009 CanLII 31586 (ON LRB); SHP 595. The Union referred me to CROA Case No. 4621, 4603, 4604, 4248 and Ad Hoc 695.

[9] The Union submits that the discipline is unwarranted in the circumstances of a single, decidedly minor efficiency test failure that was not addressed at the time that it was observed. It contends that the assessment of 20 demerits is in effect 1/3 of dismissal which triggers at 60 demerits. The Union argues that the Company's assessment of a penalty of 20 demerits is unjustified and unreasonable in the circumstances.

[10] The TCRC maintains that the Company has administered a disciplinary response to proficiency testing that appears to be contrary to its own policy. It submits that the Company policy regarding proficiency tests reflects that it is to be used with the objective of education and counselling, as noted in the CP Proficiency Test Codes and Descriptions providing:

A proficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure proficiency (knowledge and experience) and to isolate areas of noncompliance for immediate corrective action. Proficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results.

[11] The Union argues that the Company has not articulated what was so significant about this efficiency test that warranted resort to discipline. It says Proficiency Testing is not intended to be a discipline tool. It says CP is improperly building a record against this 15-year employee rather

than properly utilizing the Proficiency Test to identify and educate the Grievor on the very minor infraction.

[12] The TCRC maintains that the Company did not act on the efficiency test result at the time. Therefore it cannot be that an isolated incident that did not warrant any intervention or comment by the Company's officers until several hours after the fact on April 9, 2020 properly warrants the assessment of a full 20 demerits.

[13] At the outset of the investigation the Grievor was provided crew information relating to his assignment on the day in question and an undated memo from Trainmaster Dylan McMurray. He was advised that the purpose of the investigation was to get to the facts.

[14] There is no reason to find that violation of a rule was factual nor that the Grievor did not respond to the questions regarding his compliance with the rule honestly. He respond that:

Q20: When you were departing Vaughan Yard, can you please explain where you were positioned?

A20: I don't recall I was asked hours after the fact.

[15] In Trainmaster Dylan McMurray's undated Memo to File provided at the investigation he states:

At approximately 07:30 on April 9th, 2020 it was observed by Asst. Supt. Ken Gough and myself that Mr. Blackwood was not in position to be riding on the footboard of the leading locomotive over the XW02 crossovers while departing Vaughan IMS terminal on 118-05. Mr. Blackwood was located in the cab of the locomotive.

Upon discussion with Mr. Blackwood regarding his noncompliance of the most recent summary bulletin, specifically Subject: Trains working travelling in Yards/Industry Tracks, "all employees other than the locomotive engineer must be positioned outside the cab of the locomotive when the locomotive is leading in the direction of travel".

Mr. Blackwood stated he didn't know why he didn't ride the footboard. He "could not recall but it must have been something."

[16] Clearly, Mr. Blackwood indicated that there must have been a reason if he was not on the footboard. Unlike the investigation and other document provided during the investigation Trainmaster McMurray's memo was undated and unsigned. He does not indicate what time he spoke with Mr. Blackwood. Concern for the accuracy of his undated and unsigned memo arises when compared the information he recorded in the Company's Test Report for the Grievor.

[17] Trainmaster McMurrays says the incident occurred at approximately 07:30. However, in the Company Test Report Mr. McMurray recorded that on April 9, 2020 at 10 AM the Grievor failed to ride over crossover switches out of Vaughan yard as per issued bulletin. Not 07:30 as stated in his memo for the investigation. One of the Trainmaster's times was wrong by 2 ½ hours. More concerning is that the Trainmaster's memo only mentioned 1/3 of what happened in his observations of the Grievor regarding the rule.

[18] There were actually three Test entries that day by the Trainmaster on the same rule. On the same day at 11:00 he also recorded a Test pass for the Grievor on the same rule as he was on the point on the arrival to Toronto yard. In addition, at 13:35 he recorded having a discussion with the

Grievor regarding the same rule and recorded that as a Pass. This information was not provided to the Grievor at his investigation. It does not appear to have been considered in assessing discipline or when the discipline was reviewed in the Grievance process.

[19] The Grievor was assessed 20 demerits or 1/3 of dismissal. It was significant discipline for a serious incident that was alleged. However, the Trainmaster did not call the Grievor at the time to see why he was in the locomotive as he stated in his memo. He did not challenge the Grievor's statement that there must have been a reason he was not outside the cab of the locomotive. He did not seek or obtain an incident report from the Locomotive Engineer to confirm what specifically the Grievor may have been doing at the time. Mr. Mc Murray said he was with Trainmaster Gough, but no memo or incident report was provided by him. The investigation could have easily sought information from both of those involved. The Grievor's explanation was not challenged yet he was assessed with 20 demerits.

[20] Failing to mention the other two tests on the same day for the same rule undermine the credibility of the information in the Trainmaster's memo. The difference in the times stated increases the concern.

[21] In my opinion, seeking detailed knowledge about the facts of what occurred is best drawn from all the evidence available. It would not be just to allow the Company to pick and choose what evidence to disclose respecting the facts in issue. Particularly since the Union consistently asks for full disclosure of all evidence available to the Company and an employee's employment may be ultimately at stake.

[22] The Grievor in this case is a long service employee with an excellent record who had properly attracted the attention of the Company in matters previously before me. I overturned the discipline in those grievances and they serve no consideration by me in the determination of this matter.

[23] This grievance is one of a large backlog of grievances between the parties. Extensive submissions and documentation was provided to me by the parties in an agreed expedited arbitration process. The Union argues that the Company is targeting the Grievor for discipline. I make no finding in this case regarding the Union's targeting claim. I advised the parties that I would carefully review the evidence. This case is about evidence and process for a proper investigation. I cannot agree with the Company that a fair and impartial investigation was conducted to establish discipline being assessed.

[24] In view of all of the foregoing the 20 demerits will be removed from the Grievor's record.

[25] I remain seized with respect to the application and interpretation of this award.

Dated this 10th, day of May, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges", is enclosed in a thin black rectangular border.

Tom Hodges
Arbitrator