

IN THE MATTER OF AN ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(The Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(The Company)

DISPUTE

Appeal of the 30 demerits and subsequent dismissal of Conductor Dustin Playfair of Kenora, ON.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Playfair was assessed 30 demerits, which was described as “In connection with your rule violation on October 23, 2020 whereby you detrained moving equipment without communicating to the Engineer; a violation of T&E Safety Rule Book, Section T-11 Entraining and Detraining Equipment. In addition to the above-mentioned assessment of 30 demerits, the deferred 30 demerits associated with your Offer of Continued Employment (deferred Dismissal) Agreement dated September 30, 2020 have been added to your discipline record in accordance with said agreement.”

Mr. Playfair was subsequently dismissed, which was described as “Please be advised in light of your December 4, 2020 assessment of 60 (Sixty) Demerits, you are hereby DISMISSED from Company Service for an accumulation of 95 Demerits under the Hybrid Discipline and Accountability Guidelines.”

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR

UNION POSITION

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement based on the allegation that the subject matter of

the notice of investigation predetermined the outcome of the investigation, inclusion of Appendix 5, as well as Q&A 22, 26, 28, 29, 32-34, 37 and 38.

The Union contends the Company has failed to meet the burden of proof or establish culpability based:

- On the accuracy of ATM Hopkins' memo.
- ATM Hopkins and the Investigating Officer do not have a proper understanding of the rules. There was no requirement to confirm the speed of the movement under the rules.
- The Company failed to introduce any other evidence establishing a violation.
- Mr. Playfair provides a clear explanation of the event as it occurred.

The Union contends the discipline assessed is grossly excessive in all the circumstances, including the following mitigating factors:

- No incident occurred.
- The movement coming to a stop.
- Mr. Playfair detained the light engines, on the engineer's side, in plain sight of the engineer.

It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union submits the Company has engaged in the unreasonable application of the Efficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Playfair be reinstated without loss of seniority and benefits and be 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 objects to the Union's allegation that the Grievor was not afforded a fair nor impartial investigation. Both the Grievor and the Union were provided with the ability to state any procedural concerns during the investigation statement and failed to do so. The Company maintains the Union's attempt to bring forth an argument for an alleged unfair and/or impartial investigation only after the investigation was completed and during the grievance process prejudices the Company.

The Company maintains that after a fair and impartial investigation was conducted, culpability was established and the quantum of discipline was appropriate, given the circumstances and the Grievor's disciplinary history. The assessment of enacting a deferred dismissal and last chance

agreement which was signed by the Parties less than one month prior to the Grievor's detrainment incident was progressive in nature and in no way excessive. The Company maintains this incident also constitutes a culminating incident, warranting dismissal.

Failures of efficiency tests are evaluated on their own merit. Upon review and if deemed necessary and appropriate, the Company has the right to decide to conduct an investigation into the matter as well.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole".

Accordingly, the Company maintains no violation of the Collective Agreement has occurred and seeks that the discipline assessed and deferred dismissal enacted should not be disturbed.

FOR THE UNION:



Dave Fulton
General Chairman
TCRC CTY West

FOR THE COMPANY:



Lauren McGinley
Assistant Director, Labour Relations
Canadian Pacific Railway

February 6, 2023

Hearing: By videoconference February 22, 2023

APPEARANCES

FOR THE UNION:

Ken Stuebing, Counsel, Caley Wray
Dave Fulton, GC CTY West
Jason Hnatiuk, Senior Vice General Chairman
Doug Edward, VGC CTY West
John Rousseau, LC Kenora
Dustin Playfair, Grievor

FOR THE COMPANY:

Diana Zurbicon, Manager Labour Relations
Sharney Oliver, Labour Relations Officer
Jillian Penner, Trainmaster – Kenora, Ontario

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant to 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. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the Canada Labour Code.

BACKGROUND

[2] The Grievor, Dustin Playfair, entered Company service on January 23, 2012 and was working as a qualified Conductor on train 320-169 on October 23, 2020 when the Company maintains he was subject to an E-Test or Efficiency Test. While he was working in Kenora, Assistant Trainmaster (ATM) Jade Hopkins was observing and assisting crews when she observed the Grievor riding a reversing train.

[3] Following her observations ATM Hopkins reported in a memo that day stating:

I was in the yard observing and assisting crews and was at the East end of G yard watching Conductor Playfair backing up in G6 light engine. He told his Engineer 3 cars to a stop, followed by 2 cars and then he detrained at one car failing to inform his engineer that he was off and clear and was not informed that the train was at speed. When I asked to speak to him he told me he thought that the intent was there, as the engineer was stopping. I told him that as per the rule you need to know that you are at speed and to let your engineer know you are off and clear. I reminded him that it's starting to get cold and that slips and icy conditions can happen.

[4] On November 13, 2020 the Grievor attended an investigation

In connection with: Exception for detraining moving equipment without communicating with the Locomotive Engineer on October 23, 2020.

[5] On December 4, 2020 the Grievor was notified by Alex Lamb Superintendent Operations Winnipeg that: Please be advised that your discipline record has been assessed THIRTY (30) Demerits for the following reason(s):

In connection with your rule violation on October 23, 2020 whereby you detrained moving equipment without communicating to the Engineer; a violation of T&E Safety Rule Book, Section T-11 Entraining and Detraining Equipment.

In addition to the above-mentioned assessment of 30 demerits, the deferred 30 demerits associated with your Offer of Continued Employment (deferred Dismissal) Agreement dated September 30, 2020 have been added to your discipline record in accordance with said agreement.

COMPANY SUBMISSIONS

[6] The Company submits that the investigation statement established culpability. It maintains that the Grievor did not comply with Rule T-11 when he detrained the moving equipment. The Grievor also confirmed he did not communicate his intent to the locomotive engineer prior to detraining the moving equipment. It relies on the Grievor's:

Q18: As per appendix 3, Assistant Trainmaster Hopkins identified you detraining equipment and not communicating to the Engineer. Is that correct?

A18: Engineer could visually see me detraining and that I was off.

[7] CP submits that the Grievor also confirmed he knew and understood the T&E Safety Rule Book T-11 Entraining and Detraining Equipment yet provided conflicting and non-credible responses when asked about his compliance with the rule. At one point, he stated he could not recall whether he communicated his intent to detrain to the Locomotive Engineer. At another point, he stated he did not follow the rules, leaving conflicting responses in his answers providing:

Q19: Was there any form of communication (visual or verbal) made to the engineer to assure you had safely detrained from the engine?

A19: I don't recall.

Q20: Did you receive any form of communication (visual or verbal) from the engineer acknowledging you had detrained safely from the engine?

A20: I don't recall."

Q26: As per appendix 4, do you understand the T&E Safety Rule Book, T-11 Entraining and Detraining Equipment?

A26. Yes.

Q27: Referring to Rule T-11, do you feel you were in compliance with this rule on October 23, 2020?

A27: Yes

Q28: As per previous question, what communication was made with the engineer that you were detrained on October 23rd 2020, (sic.)

A28: See previous answer to question #19.

Q29: What is the difference between what you did and what the T&E Safety Rule Book T-11 states?

A29: I don't believe that I did not follow the rules stated in T-11.

Q37: Referring to Question 18, you stated "Engineer could visually see me detraining and that I was off." In Question 20 you stated you were not sure if the engineer acknowledged you detraining safely, explain the discrepancy?

A37: The engineer visually seen me but I do not recall receiving a visual confirmation.

[8] The Company maintains dismissal was an appropriate quantum of discipline, given the Grievor's employment standing. The Grievor's unenviable discipline record over the course of his less than 8 years of service cannot go unnoticed. It submitted that he had been assessed 14 assessments of discipline for various reasons including attendance issues and four safety/operating rule violations including failing to provide manual protection at a crossing, derailing two tail end cars, not following work orders provided prior to his incident of failing to detrain his moving

equipment properly. His history demonstrates a continued inattentiveness, disregard and neglect to rules compliance and following direction.

[9] At the time of the incident CP submits that the Grievor's discipline record reflected the following:

December 5, 2020	30 Demerits (issue in dispute)	Rule violation – failed to detrain moving equipment without communicating to Locomotive Engineer on October 23, 2020.
December 5, 2020	Dismissal (issue in dispute)	Dismissed for an accumulation of over 60 demerits (total of 95) under the Hybrid Discipline and Accountability Guidelines.
September 30, 2020	30 Demerits and Deferred Dismissal	Deferred dismissal and Last Chance Agreement for being late for work on the 101-26.
May 6, 2020	20 Demerits	Not following work order provided, causing delayed trains and customer failures while working as Conductor on Train 420-11 out of Kenora on April 11, 2020.
April 27, 2020	15 Demerits	Excessively booking unfit for 36 hours and 45 mins on April 9, 2020.
October 9, 2019	Formal Reprimand – Admission of Responsibility	Violation of the T&E Availability Standard (attendance issue).
March 5, 2018	10 Demerits	Missed call on February 10, 2018.
May 14, 2017	5 Day Deferred Suspension	Two missed calls on May 14 and 15, 2017.
December 7, 2015	14 Day Suspension	Derailing the 2 tail end cars of his movement while shoving his train into the North Stage Track at Molson, MB without protecting the point of his movement.
April 16, 2015	Written Warning	Booking unfit on March 14 and missing call on 3 separate occasions.
October 31, 2014	Written Warning	Booking Unfit on 5 separate occasions when called.
July 11, 2014	3 Day Suspension	Failing to provide manual protection at a crossing at mile 144.39 Ignace Sub on June 15, 2014.
November 21, 2012	20 Demerits	Attendance Management Policy violation between August 14 – October 26, 2012.
August 14, 2012	10 Demerits	Attendance Management Policy violation in June, July, August 2012 and missed call on August 11, 2012.

[10] The Company maintains this attitude of nonchalance cannot be accepted by the Company in a safety critical industry such as the railway industry. However, on June 24, 2022 the Company maintains it unilaterally reinstated the Grievor without compensation on a managerial leniency basis. The Company submits that it discussed expectations and that his return to service is viewed as a last chance arrangement for continued employment.

UNION SUBMISSIONS

[11] The Union submits that on the day in question the crew commenced working with a two-locomotive consist and operating light-engines. While assembling their train, the crew worked on stand-by channel 1 end to end. This is the requirement for Kenora based crews working in the Winnipeg Yard. The crew backed into track G6 at the east end of the yard to begin doubling its train together for departure. Conductor Playfair was on the point of the locomotives at all times as they were backing westward to the first joint. He was also positioned within Locomotive Engineer Campbell's line of sight.

[12] As the movement approached the joint on the cars in track G6, the Grievor was counting the movement down to his crewmate via radio. As the movement was approaching the joint, he counted down three cars, two cars and the movement slowed to a crawl. He identified one car on the radio and instructed his Engineer to stop. At that point, in plain sight of the Locomotive Engineer, he stepped off of the locomotive consist in order to make the joint and prepare the cars being lifted.

[13] The Union maintains that Mr. Playfair was subsequently approached by Assistant Trainmaster (ATM) Jade Hopkins. She advised that him that he had not announced his detrainning on the radio. Ms. Hopkins and Mr. Playfair discussed the safety aspect of what had occurred.

[14] The Union argues that Ms. Hopkins erred when she stated that she advised Mr. Playfair that "as per the rule you need to know that you are at speed". The Union says that in fact, to the contrary, in October 2020 it was not a requirement of the applicable rule (T-11) to be informed of the speed of the train prior to detrainning. It relies on the Company's October 27, 2021 bulletin revising Rule T-11, adding the requirement to confirm the speed before entraining/detraining. The update now requires the Locomotive Engineer to verbally confirm to the employee prior to entraining or detrainning that the movement speed is 4 MPH or less. This revision occurred more than one year after Mr. Playfair was efficiency tested on October 23, 2020.

[15] The Union also notes that the Grievor was not removed from service and was permitted to continue working his assignment without incident. The Union also stated that the Locomotive Engineer was not questioned by ATM Hopkins at the time of the incident nor were either her or the Locomotive Engineer Campbell required to give statements or required by the Company at the Grievor's investigation.

ANALYSIS AND DECISION

[16] The Company maintains that this incident arises from an Efficiency Test. It submits that Train and Engine employees work in largely unsupervised environments. It is impossible to have Company Officers with every train and every moment. In order to ensure compliance with all company rules, policies, special instructions and operating instructions, Company Officers must regularly observe employees as they go about their daily duties.

[17] To reduce human failures, incidents and to improve compliance with safety rules, the Company engages in Efficiency testing or (E-testing) where they observe employees as they

complete routine tasks to provide a measure of compliance and performance. E-testing plays a vital role in Canadian Pacific's safety and rules training programs. They are meant to achieve and maintain the highest possible degree of employee and operational safety, as well as ensuring rules and operating practices are clearly written and understood so training programs are effective and address critical issues.

[18] The Company submits that an E-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 rule compliance and to isolate areas of non-compliance for immediate corrective action. Regardless of the outcome of an E-test, pass or fail, employees are given prompt feedback on their performance. To be clear, E-Testing itself is not a discipline tool; however, depending on the frequency and severity of particular rules violation and the individual employee's work history, formal investigation and disciplinary action may be taken.

[19] I agree with the comments CP relies on in CROA 4728 Arbitrator Hornung regarding potential discipline flowing from E-test. I also agree with the the comments of Arbitrator Sims in CROA 4626 stating:

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.

[20] I agree with the Company's position on the use of E-tests as a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. I recognize that in the case of this Grievor and his discipline record they have every reason, if not obligation to properly perform E-tests, investigate rule violations if suspected and the right to assess discipline if appropriate.

[21] In cases before me I have found the Grievor to present himself in investigations showing his intelligence, knowledge of the rules and ability to respond to question in a repeatedly self-serving manner. His statements during investigations I have reviewed demonstrate his the ability to remember favourable detail, while not remembering other facts that occurred at the same time.

[22] That said, this is a disciplinary matter and CP has the burden of proof. This involves demonstrating, on a balance of probabilities that its evidence is to be preferred over the Union evidence. In this case the Grievor was assessed 30 demerits setting out the reasoning as:

In connection with your rule violation on October 23, 2020 whereby you detained moving equipment without communicating to the Engineer; a violation of T&E Safety Rule Book, Section T-11 Entraining and Detraining Equipment.

[23] I find that on October 23, 2020 Assistant Trainmaster (ATM) Jade Hopkins was at the East end of G Yard, as she stated, observing and assisting crews when she observed the Grievor riding a reversing train. She properly discussed what she felt she saw and reminded him that it was starting to get cold at that time and that slips and icy conditions can happen.

[24] At no time did ATM Hopkins indicate she was conducting E-test that day or appear to conduct a proper E-Test with the Grievor. She did not conduct a re-test or discuss the rule issue with the Locomotive Engineer. Her memo did not indicate her conversation was part of or intended as an E-Test. She did not give evidence at the investigation. Here brief memo is in direct contrast to the extensive question put only to the Grievor. Had ATM Hopkins given the Grievor any indication of conducting a normal and proper E-Test the Grievor would have been able to properly

collect his thoughts, make notes if necessary and request that ATM Hopkins discuss the matter with the Locomotive Engineer. I find no evidence of the planned E-Test procedure suggested by the Company in its submissions.

[25] I also agree with the regard for safety as stated by Arbitrator Jones in SHP 595:

As I have noted before, safety is not negotiable and not optional; safety rules must be complied with 100% of the time.

[26] However, in SHP 595 Arbitrator Jones reduced the discipline assessed in that case when he stated:

In dealing with this grievance, I am not prepared to take into account any of the additional allegations about the incident which were not contained in Mr. Mills' original description of the events and were not put to the Grievor during the interview process.

[27] In that regard, I find the limited memo written by ATM Hopkins is in direct contrast to the questioning put to the Grievor during his formal investigation. The Grievor directly challenged the facts stated the ATM's brief memo and his answers were ignored by the investigating officer. Specifically rebuttal comments at Q&A 11 and his reference to his Efficiency Test records at Q&A 12. I find it concerning that ATM Hopkins was not questioned at the investigation or in a supplemental investigation. The Grievor was also questioned regarding rules clearly applicable to all crew members yet Locomotive Engineer Campbell was not questioned by the ATM or the investigating officer. I find the disputed facts could have easily been clarified or corroborated by him. Without such easily obtained corroboration, I find a balance of probabilities determination of the alleged violations is not possible in these facts and circumstances.

[28] The Company submitted that it relies on the foundations in *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) in support of the rightful decision in assessing dismissal as a disciplinary response. I also agree with the reasoning in *William Scott supra*. It provides for consideration of mitigating factors including the record of the Grievor, the length of service of the Grievor and whether or not the offence was an isolated incident in the employment history of the Grievor. In this case, while the Grievor's record is significant, however there is no evidence of any previous incident or E-test involving concerns for getting on and off equipment.

[29] The Company states that the fact Mr. Playfair was in plain sight of the Locomotive Engineer when he stepped off of the locomotive consist is irrelevant and therefore not a valid mitigating factor. It says Rule T-11 is very clear in that an employee must communicate with its Engineer its intent to Entrain/Detrain. I find the Company did not establish that the Grievor did not communicate with Engineer Campbell.

[30] The Company argues that simply being in plain sight is not sufficient to ensure the safety of an employee getting on and off moving equipment. The alleged offence placed doubt on his continued employment. Mr. Playfair was subject to dismissal given his employment standing, not because of the infraction itself.

[31] Like the Company, I find that train crews must be held high standards of responsibility and accountability if the movement of trains is to be safe and productive. Regrettably, the Grievor's discipline record raises concern for a reasonable person to find his ability to meet those standards. However, that concern is not supported by evidence to suggest that a proper E-test was conducted or that the Company established a violation of the rules as alleged. The Company submitted that

the alleged offence placed doubt on his continued employment. In spite of this alleged doubt the Company reinstated the Grievor before the hearing on this matter.

[32] In view of all of the foregoing the arbitrator orders that the Company remove the 30 demerits points and resulting dismissal from his record and compensate him for his losses accordingly.

[33] I remains seized to resolve any issues or questions arising from this award.

Dated at Niagara-on-the Lake, this 8th, day of May, 2023.

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

Tom Hodges
Arbitrator