

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

TEAMSTERS CANADA RAIL CONFERENCE
(the "Union")

- and -

CANADIAN PACIFIC KANSAS CITY RAILWAY
(the "Company")

DISPUTE: Appeal of the 30-day suspension assessed to Conductor Neil Lashley.

JOINT STATEMENT OF ISSUE

Following a fair and impartial investigation, Conductor Lashley was disciplined as shown in his discipline letter as follows:

Formal investigation was conducted on January 30, 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 Rue Book item 9.1 – non main track. In consideration of the decision above, you are hereby assessed with a time served 30 day suspension. Your suspension will commence on Tuesday February 18, 2020 at 0001 until Thursday March 19, 2020 at 2359. 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 on your personnel file.

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

UNION POSITION

Mr. Lashley received a 30-day suspension while Mr. Ruzicka received 15 demerits. Mr. Ruzicka was in control of the movement and Mr. Lashley had reminded him that a switch might be against them, Mr. Lashley was the one that put the movement into emergency.

The Union submits the incident in question involved no damage to track, switch mechanism, rolling stock nor injury to any person. It was proven in memo from Company officials and through the continuation of tasks at the time that no disruption in service occurred. In fact, the switch in question is a semi automatic (run through capable) switch that was used this way for years until the targets were changed to indicate a hand throw. The mechanism is still semi automatic.

On that day, Mr. Lashley and his RCLS mate are mentored, and provided education. They followed the rules regarding point protection, minimum requirements of air applied to rail cars, job briefing, and safe protection of train after an alleged incident.

There was no need to have a formal investigation let alone discipline the employee, as rules understanding was evident and a rules review took place.

The job brief took place, Mr. Lashley was in a position as per rule, and did not have control of the RCLS movement. Mr. Lashley isn't culpable to the severity of discipline issued. Mr. Lashley's discipline vs. his crew mate is outrageously disproportionate.

The Company has unreasonably disciplined Mr. Lashley. The facts of the investigation do not warrant, nor justify this quantum. Education should be promoted not penalty.

Mr. Lashley acknowledged understanding of the rules and has taken a great educational and learning experience from the rules review. This was an opportunity to establish a positive result through open communication.

He was honest and forthright and did not try to hide the issue. He simply made an error and it is the Union's view that the discipline is excessive under the circumstances.

The Union requests that the discipline assessed to Mr. Lashley be removed and that he be made whole with interest. 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 the Union's request.

The Company maintains that following the investigation, the Grievor was found culpable for the reasons outlined in his form 104. The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The Company's position continues to be

that the discipline assessed was just, appropriate and warranted in all the circumstances.

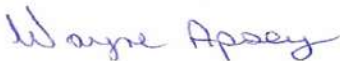
The Grievor failed to control his movement to stop short of the switch improperly lined for his movement, as required per the rule. The Grievor did not confirm the tonnage of the cars, did not confirm the position of the switch and failed to discuss the speed of the movement in the event that the switch was not lined for his movement. In the investigation, the Grievor admitted he was familiar with T&E Rule Book item 9.1 – non main track, yet failed to comply with the rule resulting in a run through switch.

The Union in their grievance do not dispute that the Grievor violated the rule outlined in the Employee Notification Letter issued, nor does the Union dispute that the investigation was anything but fair and impartial. Of note, the Union acknowledges the Grievor's error. The Company maintains that the safe course of action must always be taken.

As the Union is well aware, when considering the appropriate disciplinary assessment, each case must be considered individually and on its own merits.

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:



Wayne Apsey
General Chairperson CTY East
Relations TCRC

FOR THE COMPANY:



Lauren McGinley
Assistant Director Labour
CPKC

April 20, 2020

Hearing: By video conference. May 10, 2023

APPEARING FOR THE UNION:

Ken Stuebing, Counsel, Caley Wray
Wayne Apsey, General Chairperson, CPKC Rail East
Neil Lashley, Grievor

APPEARING FOR THE COMPANY:

Rene Araya, Coordinator Labour Relations
Lauren McGinley, Assistant Director Labour Relations

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. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND,

[2] The Grievor entered Company service on April 6, 2015, and works as a Conductor based out of Smith Falls, ON. During the time of his January 2020 violation, the Grievor worked out of Toronto Yard.

[3] On January 20, 2020, the Grievor was working as a Yard Service Foreman along with Yard Helper James Ruzicka on an Extra RCLS assignment, switching on the East End of Toronto Yard. Before pulling from track F5, The Grievor gave permission to a foreman to cross from L4 over to the Havelock.

[4] The Grievor and his helper pulled 42 cars from F5 and the Grievor put 5 cars on air. Both the Grievor and his helper were on the point with the helper in control of the remote. Both crew members noticed that the F-Yard Hi/Lo switch was lined against their movement, and the yard helper applied a full independent and automatic brake which was not enough to stop the movement in time. The Grievor then put the train in emergency, but ultimately ran through the switch by 2 to 4 cars. The Grievor contacted the manager on duty and Road Foreman Daryl Monk talked to the crew to determine the facts. The Engineering Supervisor inspected the switch and advised it was safe to pass through.

POSITIONS OF THE PARTIES

[5] The Company maintains it had cause to assess discipline and that a 30-day suspension was a fair and appropriate quantum of discipline given the circumstance. There is no dispute as to the rule:

Rule Book for T&E Employees

CP

SECTION 9 – METHODS OF CONTROL AND AUTHORITY

9.1 NON-MAIN TRACK

Other Than Non-Signalled Siding In CTC

- (a) Unless otherwise specified in special instructions, when operating on non-main track, a movement must operate:
- (i) prepared to stop:
 - o within one-half the range of vision of equipment or a track unit;
 - o short of:
 - a red or blue signal between the rails;
 - a switch not lined;
 - derail in the derailing position; and
 - end of track.

[6] The Company maintains that as a yard service foreman, the Grievor was the more experienced member of the crew, therefore having a higher degree of responsibility. At the time of the incident, the Grievor just over 5 years' experience, while the Yard Helper Ruzicka had 1 year of experience

[7] The Company submits that with his experience, the Grievor ought to have known that the movement's speed of 10 MPH, approaching a switch not lined was not enough to stop the movement in time. Knowing that entraining and detraining speed is 4 MPH, the Grievor ought to have known that the movement speed was much faster than that and could have easily advised the helper to slow down immediately, or request for primary control (pitch).

[8] As stated in the investigation, the Grievor admits he did not:

- Discuss the speed requested (Q&A 13, 14)
- Ask the Helper the speed of their movement (Q&A 19)
- Discuss with his Helper the speed they should be travelling in regards to approaching the switch. (Q&A 27)
- Look at his RCLS box to check requested speed (Q&A 20)
- Know his exact tonnage (Q&A 17 and 26)

[9] The Company maintains that the Grievor ought to have known to check his box to see the requested speed and advise the Helper to take it down a notch, knowing the number of cars on air and that the switch was lined against their movement.

[10] The Company submits that the Grievor made a guess on his tonnage while deciding to put cars on air. He states in the investigation that he put the minimum of 5 cars on air based on his guess that they were holding onto 5000 tons.

[11] The Grievor states he had a "good sense" he was just under 5000 tons which is why he put a minimum of 5 cars on air as per the sign at the Tapscott derail. However, the sign at this location states if handling 3000 tons, it is required to have a minimum of 5 cars on air. Based on this rule, the Grievor did not have enough cars on air to help stop the train in time to avoid running through the switch.

[12] This is the Grievor's sixth Non-Major Offence and could have been subject to dismissal based on the Hybrid Discipline and Accountability Guidelines. Instead, the Company maintains that it practiced managerial leniency by assessing a 30-day suspension given that failure to stop short of a switch not lined are of a serious safety concern in the railway industry. For these reasons alone it argues that the discipline should remain untouched.

[13] In support of discipline, the Company submits CROA 4539, where a CP Conductor with 4 years of service was dismissed for failing to protect the point resulting in derailment. Arbitrator Hornung states:

While it was clear that the Grievor was experienced, his lack of attention and lapse of judgment - factors which he controlled - caused the incident which should reasonably have been avoided. In the circumstances, and in the absence of a satisfactory explanation negating his responsibility, his lack of care is culpable and warrants discipline

[14] The Company noted that in the JSI, the Union argued that this incident "involved no damage to track, switch mechanism, rolling stock nor injury to any person". CP says this does not change the fact that the very real potential was there and a rule violation occurred or the fact that the Grievor ought to receive discipline. Running through a switch not lined can result in derailment. However, this case did not result in a derailment/collision, extensive damage, serious injury/fatality.

[15] The Company maintains that it cannot put a price on safety and maintains that the violation must be viewed seriously. The Company submits in support, Arbitrator Hornung's findings in CROA 4636 and reiterated from CROA 4592 state that when "errors or mistakes flow from inattentiveness or extreme carelessness - factors which are in control of the employee – the Company may properly discipline the employee.

[16] The Company submits that the Union point to Yard Helper Ruzicka's statement in an attempt places blame and responsibility on Mr. Ruzicka. It is clear in Mr. Ruzicka's statement that he did not know which switch would be lined against them and the Grievor did not state the tonnage of cars. The Helper was judging the speed of the movement based on the belief that the Grievor had applied a sufficient number of cars on air. The Helper took responsibility for his speed.

[17] The Grievor shares in the responsibility for the run through switch.

- The Grievor did not put an adequate amount of cars on air;
- The Grievor was riding the point and had a better view of the switches;
- The Grievor did not advise the Helper of the tonnage;
- The Grievor did not look at his RCLS box to confirm speed requested; and, The Grievor did not advise his Helper of speed approaching switches.

[18] The Union submits that by "cutting in" the air on 5 cars of their block of approximately 40 cars plus the 2 locomotives equipped with air brakes, Mr. Lashley believed they had enough air brakes to control their movement. Mr. Lashley knew that they originally had 6300 tonnes but with another assignment removing 15 cars from their block he estimated the new tonnage to be under 5000 tonnes (Q&A 15-16).

[19] The Union argues that neither employee was Engineman qualified to fully understand the interplay of tonnage and brakes in this regard. Such concepts are developed in extensive Locomotive Engineer Training that takes place for those who will be promoted.

[20] The Union submits that there are critical facts in respect of this incident that have been overlooked by CP in its assessment of a 30-day suspension to the Grievor. At the time of the run-through switch:

- (a) Both employees were properly positioned on the leading movement at all times in their movement.
- (b) Mr. Lashley's crewmate YSH Ruzicka was operating the RCLS box. Mr. Lashley was not operating the box at any relevant time.

[21] The Union maintains that Mr. Lashley initiated the emergency brake which brought their movement to a stop, albeit not in time. Their movement proceeded through the switch. The record reflects that their movement had travelled a total distance of 202 feet. The photo tendered as Appendix B shows that one full engine and almost half of the second engine had gone by the switch. The switch that the crew had run through is a run through switch. This type of switch is designed to permit a crew to run through it without lining. However, the target on this switch had been changed, making it a switch that must be manually lined now. This has never been disputed

[22] Mr. Lashley attended the statement and answered all questions put to him. Mr. Lashley provided a straightforward account of the event:

Q9: Please give a brief description of the events that took place on January 20, 2020 while working as a Yard Service Employee.

A9: We were pulling 42 cars over to the North side from [track] F5. James was in control [and] we were both on the point. We had 5 cars of air. Before we started to pull I reminded James that a switch most likely will be against us because I had given a foreman permission to cross over from [track] L4 to the Havelock [track]. I did not ask the foreman to restore the switches for us.

Q10: Was a job briefing performed between yourself and Yard Service Employee (sic) Ruzicka prior to pulling out of F5?

A10: Yes it was.

Q11: What was discussed in your job briefing?

A11: The switch, 5 cars of air, I don't recall discussing the weight of the movement. We started to pull. We were both on the point. I was on the Conductor's side and James was on the Engineer's side so I had a better view of the switch.

Q12: Who was in control of the movement?

A12: James was.

[23] When asked a series of questions about the movement, Mr. Lashley repeatedly confirmed that he trusted his Conductor-qualified crewmate's operation of the box and never felt that they were travelling too fast. He also confirmed that he was not in control of the movement but was focused on the switches ahead. He didn't feel that the speed was an issue. He said it felt like 5 mph. When Mr. Lashley was asked about rule 9.1., he reaffirms that he could not verify the speed as he did not have the primary RCLS control box.

[24] The Union maintains that by any metric, in all of the circumstances, the discipline assessed—a 30-day suspension—is demonstrably excessive and well outside the range of normal for this type of violation. It argues that discipline is meant to be incremental for like instances. Here, the Grievor's prior record related to proper exercise of booking sick and an efficiency test involving a locomotive brake test are not aggravating factors that required a 30-day suspension to have been applied to serve the interests of educative discipline.

[25] CPKC asserts that Mr. Lashley can see the speed his Helper requested on his box. The Union maintains that nowhere in the investigation did CP ask any questions about this, in spite of having opportunity to do so in the statement. There is simply no evidence to support the brand-new assertion.

[26] The Union argues that there is simply no evidence to support the brand-new assertions. The TCRC notes that Mr. Ruzicka felt he was operating as he should. Mr. Ruzicka was subject to the same rules as Mr. Lashley in regard to stopping short of switch. Mr. Ruzicka states this in his statement. Mr. Ruzicka had just as much right to request the exact tonnage from the tower as Mr. Lashley

[27] The Union maintains that CP exaggerates its case in claiming that Mr. Lashley is alleged to have violated one (1) rule, not rules plural. CP neglects to state that there was no derailment that could occur as the switch was designed to be run through.

ANALYSIS AND DECISION

[28] I find that the Company established that it had cause to assess discipline against the Grievor. I make that finding on the following basis.

[29] The Grievor was Foreman in charge of the Remote Control Locomotive (RCLS) assignment while working on the 09:30 Extra on Monday January 20th, 2020. The Grievor had approximately 5 years of service at the time of the incident. He was assisted by a helper who had

approximately 1 year of service. Neither the Grievor or his helper were qualified Locomotive Engineers. Both had been trained to operate remote control locomotives.

[30] Prior to the incident the Grievor had given permission to a foreman on another movement to cross over from L4 over to the Havelock in front of the Grievor's movement. He did not ask the foreman to restore the switches. He knew or ought to have known, that the switch would probably be lined against his movement.

[31] The Grievor and his helper had pulled 42 cars from F5 and due to the grade would require the use of the cars air brakes in preparing to stop for the improperly lined switch. The Grievor chose to put only 5 of the 45 cars on air which he said he felt was the minimum required.

[32] In the Grievor's statement he stated that he felt the movement was proceeding at approximately 5 MPH when in fact his helper had selected a position for 10 MPH. The Helper had the primary control box. Although the helper had only a year of service he said he did not question his operation because he was a qualified conductor.

[33] The Grievor acknowledged that he had the better view approaching the improperly lined switch but left the Helper in control of the locomotive. The Grievor placed the brakes in emergency when it was too late and the movement went through the improperly lined switch. I find that the Grievor did not take the proper steps to ensure that the movement could stop short of the switch. The safe practise would have been for him, with his experience, to ensure that a sufficient number of cars had air brake operating. He knew of the grade requiring air brakes and the inexperience of his helper. However, he chose to leave the inexperienced helper in control of the movement with a limited view of the switch and insufficient number of cars with operating air brakes. As it was, it became impossible for the movement to stop short of the switch when he did take action.

[34] I agree with the comments of Arbitrator Clarke in *Ad Hoc 827* Mr. Clarke in reducing a 30-day suspension for a run-through switch to a 3-day suspension in view of the unique facts and timing in that matter when he noted:

The running of a switch merits discipline. But that discipline must reflect the facts of the case and the employee's specific situation. CP's case law did not justify a 30-day suspension.

[35] After careful consideration of the facts, I have some difficulty with the Union's submission that no discipline was warranted given the Helper was in control of the movement. I believe that the Grievor's 30-day suspension as a consequence of what occurred bears reconsideration.

[36] Firstly, it does not appear disputed that the helper was aware of the improperly lined switch, the need for air brakes on a number of cars and the downhill grade to the switch which would impact his ability to stop. I do not find that Mr. Ruzicka, the Helper exercised sufficient caution in observing the conditions and speed approaching the improperly lined switch. The evidence indicated that he gave no indication of uncertainty. He had the primary box for operation of the RCL was aware of the situation and, given the result, should have given control to the Grievor. He was a qualified Conductor and should have exercised more caution.

[37] I am therefore compelled to agree with the Union that the Helper's lack of action is a factor and given the fact that he received a 15 demerit, non-monetary penalty In contrast the Grievor received a 30 day suspension with a monetary loss of approximately \$9,000.00. As a result the issue in this grievance flows to the appropriate measure of discipline.

[38] In view of all of the foregoing, I am compelled to agree with the Union that the 30-day suspension of the Grievor is to some degree excessive. The mitigating factor of the Helpers inaction not having properly set the engine and car brakes while receiving 15 demerits is

considerable. The Company found the action of both employees warranted discipline, but of a significantly different kind and effect.

[39] In the result, the grievance is allowed, in part. I direct that the Grievor's 30-day suspension be reduced to 5 days and that he be compensated accordingly.

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

Dated at Niagara-on-the Lake, this 29th day of August, 2023.

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

Tom Hodges
Arbitrator