CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4744

Heard in Edmonton via Video Conferencing, June 11, 2020

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

-And-

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the ten day suspension (9-day suspension and 1-day rules) of Conductor D. Demaray.

JOINT STATEMENT OF ISSUE:

Following an investigation, on August 23, 2018 Conductor Demaray was assessed discipline as shown on his discipline letter as follows; *Please be advised that you have been assessed with a ten day suspension which you will serve 9 days suspension without pay from Company Service and a one day Rules Refresher with a Manager, for your failure to comply with T-11 Entraining and Detraining equipment and T-26 Switches at the Wolverton Yard while working as Trainman on Assignment T78 on July 31, 2018. Violation of the following rules:*

Summary of Rules Violated:

Book	*Section*	*Subsection*	*Description*
GOI	*T&E Safety Rule Book*	*T-11*	*Entraining and Detraining Equipment*
GOI	*T&E Safety Rule Book*	*T-26*	*Switches*

Your suspension date will start at 0001 hrs. on August 26, 2018 and end at 2359 hrs. on September 3rd 2018, inclusive.

Union's Position:

The Union contends that the assessment of a 9-day suspension is excessive in this matter. It is clear that the Company continues to suspend an employee to financially penalize them rather than concentrate on the education process.

The Company has unreasonably disciplined Mr. Demaray. The facts of the investigation do not warrant, nor justify this quantum.

It is time to put education first. If it is CP's response that sending an employee home without pay is the education process then it is clear they have missed why the parties originally agreed upon the Brown System of Discipline and not on a suspension to financially hurt their family.

The Union requests that the 9-day suspension be removed and Conductor Demaray be made whole for his lost earnings/benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position:

The Company disagrees and denies the Union's request.

The Grievor's culpability for violations of both Train & Engine Safety Rule Book Rule T-26 and rule T-11 was established through the fair and impartial investigation. The Company maintains when considering the appropriate disciplinary assessment, each case is considered individually on its own merits. This includes looking at all mitigating and aggravating factors.

The Union states: "It is time to put education first." Of note, the Grievor's suspension was mitigated with the one- day rules refresher. Additionally, the Company maintains its rights to utilize proficiency tests to identify rules violations and assess discipline when necessary and appropriate.

Accordingly, the Company maintains there was cause to assess discipline and that the assessment of suspension was just, appropriate and warranted. The Company maintains the discipline assessed should not be disturbed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) P. Sheemar**
GENERAL Chairperson	Labour Relations Officer

There appeared on behalf of the Company:

S. Oliver	– Manager Labour Relations, Calgary
D. McGrath	– Manager Labour Relations, Calgary
P. Sheemar	– Labour Relations Officer, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smiths Falls
D. Demaray	– Grievor, London

AWARD OF THE ARBITRATOR

1. On August 23, 2018, David Demaray, the Grievor, was assessed a 9 day suspension and a 1 day Rules Refresher for his failure to comply with:

> *... with T-11 Entraining and Detraining equipment and T-26 Switches at the Wolverton Yard while working as Trainman on Assignment T78 on July 31, 2018.*

2. The Union grieved the imposition of the suspension.

Preliminary Objection

3. At the outset of the hearing, the Company raised an objection to portions of the Union's Brief wherein reference is made to: unfair efficiency testing; the Grievor being unfairly targeted; or the discipline imposed constituting double jeopardy.

4. It argues that notwithstanding that it signed a JSI which makes no reference to the above issues, the Union raised the same in its Brief in an effort both to set aside the discipline imposed and/or to mitigate the penalty imposed.

5. The objection raised by the Company is one which this board faces with increasing frequency, and provides a further opportunity (see: **CROA 4739**) to discuss an aspect that is of ongoing concern to this board. As such, it merits analysis not only to resolve the immediate issue here but also to address the larger operational issues having regard to the terms of the ***Memorandum of Agreement Establishing the CROA & DR***. *(CROA MOA).* While the objection is germane to the determination of the instant case, the comments which follow also pertain to the larger, general concerns and should not be taken as directed solely at the parties here.

6. In a letter of May 30, 2018, the parties re-iterated the need to either sign a JSI or alternatively provide their *Ex Parte* Statements of Issue in advance and stipulated that:

> *"… The parties will only be able to raise and pursue the issues raised in the Statement of Issue or their Ex Party Statements of Issue as the case may be".*

7. The above agreement underscores the jurisdictional constraints contained in *Article 14* of the *CROA MOA*, which provides:

> ***The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be****, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefore, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.*

8. As well*, Article 10* of the *MOA* provides that:

> *The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated.* ***In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing****. The scheduled arbitrator shall have the sole authority to grant or refuse such application.*

9. As discussed in **CROA 4739,** it is vital to the efficient operation of the CROA process that the parties be compelled to abide by the laudable procedures they agreed to in the *CROA MOA,* to restrict their submissions and documentation to the specific facts and issues contained in the JSI or *Ex Parte* statements - where such *Ex Parte's* have been appropriately filed pursuant to *Article 10* of the *CROA MOA*.

10. That is not to say that in filing a JSI or *Ex Parte* (pursuant to Article 10) parties can throw in the proverbial "kitchen sink" so as to cover any issues that might arise or

that they prefer to leave open to argue before the CROA board. The required mutual agreement for a JSI - and the subsequent necessity to comply with *Article 10* in order to file an *Ex Parte* – are designed to provide checks and balances to prevent that from occurring. The provisions related to JSI's and *Ex Parte's* clearly demonstrate that the signatories to the *CROA MOA* intended the parties to narrow in, and focus, on the relevant **determinative facts, issues and arguments** as envisaged by the CROA process.

11. Strict compliance with the provisions of the *CROA MOA* and the terms of the Chief Adjudicator's directive of September 16, 2005 (both of which this board will require in the future), will ensure that the **facts, issues and arguments** are succinctly specified and agreed to in order that CROA boards are not inundated with a plethora of submissions, documents and case law which can be largely extraneous to the narrow, explicit and determinative issues at play.

12. In the present case, while the references may not be clear and succinct, as discussed above and expected in the future, the Union broadly mentions the issues of "concentrating on the education process" and "financially penalizing rather than educating an employee". In the circumstances, an informed person would fairly take these references as a challenge to the Company's imposition of discipline where the inappropriate conduct is discovered in the course of an efficiency test. Accordingly, the issue of "*unfair efficiency tests*" was sufficiently alluded to by the Union in the JSI to permit it to refer to it and argue it as part of its case.

13. The Company's objections to the remaining issues raised by the Union are well founded. The Union having failed – in the JSI – to identify the remaining issues, as objected to by the Company, is precluded from raising them at arbitration.

Switches

14. On July 31, 2018, Trainmaster Urbanoski contended that she saw the Grievor incorrectly operating Track GW03 switch. Specifically, the Grievor held the keeper in his left hand and operated the switch using only his right hand.

15. The evidence presented at his investigation, held on August 8, 2018, revealed that Ms. Urbanoski was behind the Grievor when she determined that he had improperly operated the switch. While she says that she was approximately 10 feet ("within talking distance") of him, he says that she was considerably further behind him and could not have fully observed what he was doing. She says that she subsequently coached the Grievor on throwing the switch and he stated that he "had been working on it".

16. For his part, the Grievor denies the discussion that he had with Ms. Urbanoski related to the switching matter but rather to his getting on and off moving equipment (the second ground for his discipline) which he did not dispute. While it is apparent from her notes (Company Tab 4) that she observed both incidents prior to having a discussion with him, the Trainmaster did not include in her notes the topic of their conversation.

17. The Grievor explained that the reason the Trainmaster and he did not get into a full discussion of the switching issue was because she: "*began yelling at the Conductor regarding the way he was applying the hand brake and they began arguing about that*."

18. Furthermore, in his investigative statement, the Grievor fully takes responsibility for getting off the train without informing the Engineer as ascribed to him in the Trainmaster's memo.

19. The onus of proving the existence of conduct deserving of discipline falls to the Company on a balance of probabilities. In this case, while I have my reservations regarding the Grievor's evidence, I am not convinced on a balance that the Company has met its burden.

Detraining Equipment

20. The second allegation is that the Grievor breached Safety Rule Book Rule T-11 by failing to notify the Engineer of his intention to detrain moving equipment.

21. There is no dispute that this occurred. In fact, the Grievor took full responsibility for it. He states at Q.15:

> *I freely admit I was wrong with the entraining equipment as previously stated it will not happen again. I will either give the proper communication or just walk the distance. I swear to God I used both hands on that switch. It was not my recollection that the Trainmaster was that close to me. I recall her being much further away. The next time I saw her I asked her about throwing the switch because I want to understand and comply with the rules. She said to me that she*

> *knew I was only using one hand because she saw the keeper in my hand, which I don't dispute. I continue to hold it while I threw the switch with both hands.*

22. Given my determination that the Company has failed to prove, on balance, the first breach, the only issue that remains is whether or not the discipline imposed for the detraining breach is appropriate in all of the circumstances.

Proficiency testing

23. The Company's use of proficiency/efficiency tests to establish the grounds for disciplinary action has been repeatedly discussed in the past.

24. The purpose of proficiency testing is set out in the "*CP Proficiency Test Codes and Descriptions*" which provides:

> *An efficiency test is a planned procedure to evaluate compliance with rules, instructions, and procedures, with or without the employees knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action. Efficiency 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.*

25. In reviewing the Company's Proficiency Test policy, Arbitrator Moreau concludes as follows **(AH 695):**

> *Proficiency testing of employees (or Efficiency tests) is rooted in Transport Canada's Safety Management System Industry Guideline. It is a tool used to evaluate an employee's compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action. From the Company's perspective, the corrective action can take the form of verbal counselling through to disciplinary action. The Company also notes that these proficiency*

> *tests are often conducted randomly without the employee's knowledge. (p.7)*
> …
> …I note Arbitrator Sims' recent comments on efficiency tests as a basis for discipline set out in CROA 4621:
>
> > *Third, arguments are repeatedly being advanced about the invocation of disciplinary sanctions as a result of efficiency testing. The Employer cites this arbitrator's ruling in CROA 4580:*
> >
> > *This policy [cited above], while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage.*
>
> *To the extent it might be assumed that this licenses formal discipline any time an efficiency test is failed, any such assumption would be wrong. The exception should not replace the rule, and not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline.* …

26. I adopt the comments with respect to proficiency testing contained in **AH 695**. To conclude otherwise would be to ignore both *SMS Guidelines* and the Company's own Policy which states:

> *Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action.*

27. That said, the *"… fact that the Grievor's breach of the rules was observed as part of an Efficiency Testing Process, does not preclude the Company applying a disciplinary approach"* ***(CROA 4728)*****.**

28. The problem for the Grievor here is that, although efficiency testing is not intended to be a disciplinary tool, the Policy makes it apparent that some corrective

action may be required depending on the "*frequency, severity and the employee's work history*."

29. The frequency and severity of Safety Violations in the Grievor's work history is a matter of concern. He appears to have a problem with following safety rules. Having regard to the same, the Company's determination to apply discipline is reasonable in the circumstances.

Reasonableness of penalty imposed

30. Nevertheless, the circumstances of the Grievor's detraining must be taken in context. He freely admitted doing so; acknowledged that he would not do so in the future; and explained that he believed - given his experience - that the train was at a speed of less than 4 MPH, making it safe for him to detrain without notifying the Engineer.

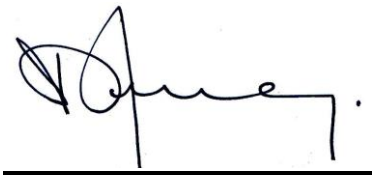
31. However, his explanation, although germane to mitigation, does not excuse the breach of the rule itself. This incident might well have presented the Trainmaster – who was standing right there and had a discussion with the Grievor following the incident – with an opportunity to end the matter by providing corrective advice; however, I suspect for that to happen the Grievor would have to have taken some responsibility. Perhaps a simple "I am sorry" might have gone a long way.

32. In any event, given the Grievor's abysmal record regarding safety violations, the Company's decision to embark on a disciplinary response, should not be interfered with.

33. However, notwithstanding his dubious disciplinary history, and taking into consideration the Company's failure to prove the first violation here, I am of the view that the appropriate discipline in this case would be a written warning to the Grievor.

34. The grievance is allowed in part. The Grievor's 9-day suspension shall be set aside and a written warning be substituted in its place.

35. The Grievor shall be made whole and I shall remain seized with respect to the interpretation, application and implementation of this award.



July 3, 2020

RICHARD I. HORNUNG, Q.C.
ARBITRATOR