

# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

## CASE NO. 4746

Heard in Edmonton via Video Conferencing, June 11, 2020

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

-And-

**TEAMSTERS CANADA RAIL CONFERENCE**

### **DISPUTE:**

Appeal of the dismissal of Conductor D. Demaray.

### **THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Following an Investigation, Conductor Demaray was dismissed as shown in his Employee Notification Letter as follows, *"Please be advised that you have been Dismissed from Company Service for the following reasons: Your failure to ensure the switch was lined for the correct track, which resulted in a collision when your movement entered Storage track 3, while working as the Trainperson on Assignment T78 on June 19, 2019. Violation of the following rules:*

*Summary of Rules violated:*

<b>Book</b>	<b>Section</b>	<b>Subsection</b>	<b>Description</b>
<i>Rule Book for T&amp;E Employees</i>	12	12.6(b)	<i>Shoving equipment</i>
<i>Rule Book for T&amp;E Employees</i>	14	14.3(b)	<i>Main track hand operated switches - general</i>

The Company did not respond to the Union's Step 2 grievance as provided by in Arbitrator Weatherill's Award and in violation of the CCA Article 40, Letter: Management of Grievances and The Scheduling of Cases at CROA.

The Union's Position:

The Union's position is that the dismissal of Mr. Demaray was excessive and does not promote any educational process.

Mr. Demaray believed he had lined the correct switch for the next move (track to enter into, Pretrip 3) but obviously he did not from the fact that he entered the wrong track. This was an unfortunate mistake and had he lined the switch correctly he would have in fact entered the clear track.

The Company within their dismissal letter show Mr. Demaray violating Rule 14.3(b), at no time did Mr. Demaray violate this rule and nor was it part of his investigation. How can this be "fair and impartial" process as per Article 39 when the employee is dismissed for something that did not take place.

The Union does not believe the quantum of discipline in this instance (dismissal) was warranted.

The Union requests that the dismissal of Conductor Demaray be expunged and he 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.

The Company disagrees and denies the Union's request.

### **THE COMPANY'S EXPARTE STATEMENT OF ISSUE:**

On June 25, 2019, Conductor Demaray attends an investigation in connection with "Your tour of duty on Assignment T78 on June 19, 2019." Conductor Demaray was dismissed on July 12, 2019 as follows: *"Please be advised that you have been Dismissed from Company Service for the following reasons: Your failure to ensure the switch was lined for the correct track, which resulted in a collision when your movement entered Storage track 3, while working as the Trainperson on Assignment T78 on June 19, 2019. Violation of the following rules:"*

#### Summary of Rules violated:

<b>Book</b>	<b>Section</b>	<b>Subsection</b>	<b>Description</b>
Rule Book for T&E Employees	12	12.6(b)	Shoving equipment
Rule Book for T&E Employees	14	14.3(b)	Main track hand operated switches - general

### **COMPANY POSITION:**

#### Preliminary Objection:

To begin with, the Company objects to the following reference in the Union's Ex Parte Statement: "The Company did not respond to the Union's Step 2 grievance as provided by in Arbitrator Weatherill's Award and in violation of the CCA Article 40, Letter: Management of Grievances & the Scheduling of Cases at CROA."

The Union was provided with the ability to review the Grievance response. Despite their assertion to the contrary, the Union's lack of appreciation in the way the response is delivered to them, does not equate to a lack of response.

Further, as the Union is well aware, any attempt to bring this issue in front of the Arbitrator in the context of this grievance would be inappropriate, an expansion of the Union's position, and only serve to delay the proceedings. The rules of the CROA office of arbitration do not permit parties to raise disputes not first processed through the grievance procedure.

Notwithstanding the aforementioned, the Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's past discipline record and his service. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union's contention of a violation of Article 39 is without merit. In fact, the reliance on this allegation regarding the Grievor's 104 highlights their acceptance that the Grievor was indeed in violation of rule 12.6 (b).

The Union readily concedes that the Grievor made a "mistake," and did not line the switch correctly. Further, it remains undisputed that this violation resulted in a collision of equipment and the injury of a fellow crewmember.

The Union has failed to put forth any factors that would give the Company reason to disturb the discipline assessed. The Company's position continues to be that the dismissal assessed was just, appropriate, and warranted in all the circumstances.

Union Position:

The Union has filed their own Exparte Statement of Issue.

**FOR THE UNION:**

**(SGD.) W. Apsey**

General Chairperson

**FOR THE COMPANY:**

**(SGD.) P. Sheemar**

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. As indicated in the *Ex Partes* above, the Grievor was dismissed from Company service for a violation of Sections 12.6(b) and 14.3(b) of the Rule Book for Train and Engine Employees in that he failed to:

*...ensure the switch was lined for the correct track, which resulted in a collision when your movement entered Storage track 3, while working as the Trainperson on Assignment T78 on June 19, 2019.*

2. There is no dispute that the collision occurred or that the Grievor was responsible. The Grievor did not line the switch for travel into the appropriate track and sent his movement into a stationary cut of cars at 12mph. The consequences of the collision were significant, causing an injury to his Engineer who broke his arm and as a result was absent from work for approximately 5 months.

3. Unlike the two previous investigations (**CROA 4744 / 4745**) the Grievor did not dispute his responsibility or attempt to explain/justify his conduct. He admits to making a mistake (Q. 20) and expresses sorrow and guilt, particularly to his crew members for involving them in the accident and for the injury to the Engineer.

4. The Union's submission that the Grievor's investigation was not fair and impartial is denied.

### **Preliminary Objection**

5. At the outset of the hearing, the Company objected to the Union's submissions with respect to:

- Unwarranted scrutiny and efficiency tests
- Unjustified level of scrutiny
- Disciplinary discrimination
- Targeting

On the basis that there is no reference to the facts or arguments regarding any of the above in the Union's *Ex Parte* Statement.

6. A review of the *Ex Parte* Statement makes it apparent that the Company's objection is well-founded. For the reasons set forth in **CROA 4739** and **4744**, the Union is precluded from raising the enumerated issues at this arbitration.

### **Reasonableness of Disciplinary Response**

7. The remaining issue to be determined is the appropriateness of the penalty.

8. The Grievor's admitted conduct was deserving of discipline. The Company imposed the discipline of discharge arguing that it is necessitated having regard to both the circumstances of the collision and the Grievor's entire disciplinary record.

9. The Grievor is 52 years old; married with children. He has 16 years of service with the Company having begun on September 8, 2003.

10. A review of his disciplinary record reflects that for the period September 2003 to 2017, the Grievor essentially operated discipline free. Since 2017, his record (Company Tab 3) is fraught with disciplinary suspensions and warnings relative to Safety Rule violations. They include:

- 05/31/2017 – 5-day suspension relative to failed efficiency test CRT20, CRT26.3
- 11/28/2017 – 5-day deferred suspension for failing to comply with T&E Employee Safety Rule Book T-0
- 11/12/2018 – 5-day suspension for failure to comply to Train and Engines Employee Safety Rule Book T-24
- 08/23/2018 – A letter of warning (CROA 4744) for failure to comply with T-11 (entraining and detrainning equipment)
- 10/11/2018 – 5-day suspension (CROA 4745) for failure to comply with CRT20/CRT27

11. The fact that his breaches of the Safety Rules were largely determined through proficiency tests does not detract from the fact that persistent breaches occurred. Both

of these aspects were considered in the assessment of the discipline imposed in **CROA 4744 / 4745**.

12. Irrespective of the basis on which the determination of safety breaches were arrived at, it is apparent that the Grievor has difficulty following prescribed rules. From the previous cases, his perspective appears to be that he had sufficient knowledge and experience of the operations in the yard to justify his application (or lack thereof) of the rules.

13. This case is different. Here, the Grievor, is once again violating the rules, made what he admits was a "*mistake*". Regardless of the rationale provided for the Grievor's conduct, his breach of Safety Rules on this occasion led to serious consequences which included a collision and a significant injury to the Engineer.

14. This repetitive failure of the Grievor to follow the rules is inexplicable both in terms of the fact that he failed to learn from his earlier disciplines, and also that it started in 2017 without any previous blemishes to his disciplinary record.

15. Notwithstanding the Grievor's admission of responsibility and his apparent genuine remorse, this is the circumstances where, in the words of Arbitrator Moreau in

**CROA 3655:**

Notwithstanding the grievor's immediate admission of responsibility, this is not a case where mitigation of penalty is appropriate. With more effort and attention, the grievor, in my view, could have avoided his precarious employment situation. Instead he chose to continue along the path of carelessness .... in the application of Company

safety rules. That attitude can have no place in a workplace of this kind where teamwork and safety concerns remain paramount. ...

### **Conclusion**

16. Considering all of the circumstances, including: his length of service; the discipline free period of his employment prior to 2017; the nature of his past disciplinable breaches; and, his remorse, I am satisfied that the Grievor ought to be provided a final opportunity to prove that he can be a productive and safety conscious team player.

17. Accordingly, I direct the grievance shall be allowed in part. The dismissal shall be set aside. The Grievor shall be reinstated without compensation and without loss of seniority.

18. In addition to, and as part of the above, the Grievor will be subject to the following terms and conditions:

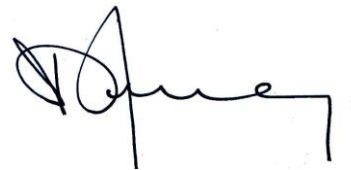
a) Prior to return to active service the Grievor will be required to successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the Grievor's return to work and to provide a full understanding and clarity regarding these expectations. If he so desires, an accredited representative may accompany the Grievor to this interview.

b) The Grievor will be reinstated at the last Step and, as such, his employment with the Company will be in jeopardy if he commits a future offense for which discipline is warranted within the next two (2) years.

- c) The Grievor's discipline standing will only regress one Step in the Progressive Discipline Steps following two (2) years of discipline free service and thereafter will regress one Step for each additional year of discipline free service.
  
- d) This determination should be understood by the Grievor to be a last-chance opportunity to show his employer that he can work in a compliant and safe manner as required by his position.

19. I shall retain jurisdiction with respect to the application, interpretation and implementation of this award.

July 3, 2020

A handwritten signature in black ink, appearing to read "R. Hornung", written over a horizontal line.

**RICHARD I. HORNUNG, Q.C.  
ARBITRATOR**