

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4603

Heard in Montreal, December 13, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the discipline and discharge of Conductor J. Shewchuk of Winnipeg, MB.

JOINT STATEMENT OF ISSUE:

The instant matter involves two separate assessments of discipline.

30 day suspension

Following an investigation Mr. Shewchuk was issued a 30 day suspension described as "For violating CROR General Notice, the Train & Engine Safety Rule Book, Section II, Safety Rules & Safe Work Procedures, Safety Rule T-24, The Rule Book for Train & Engine Employees, Section 2 - General, Item 2.2 (a), (c) (v), (vi), (vii), (viii) & (ix), Item 2.3 (b) and Operating Bulletin MBN0-098-15-REISSUE Subject: Trains Working/Traveling in Yards/Industry Tracks, while working as the YS on PI32-21 Assignment in Winnipeg, MB on January 22, 2016."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Shewchuk be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. In the alternative, the Union contends that Mr. Shewchuk's 30 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty is discriminatory, contrary to the arbitral principles of progressive discipline, and violates Company policy.

Accordingly, the Union requests the discipline be removed from Mr. Shewchuk's employment record, and he 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.

The Company disagrees and denies the Union's request.

Dismissal

Following an investigation, Mr. Shewchuk was dismissed which was described as "Please be advised that you have been DISMISSED from Company Service as you have breached the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline and culminating safety record, and from the results of an investigative statement held

with you on September 29th, 2016, as evidenced of your failure to work safely by not riding the right end of a box car on September 10th, 2016 while working as a Yard Foreman on the PS11 Assignment out of Winnipeg, Manitoba. The above referenced incident is a violation of General Notice, General Rule A (i), (iii) & (vi), and Train & Engine Safety Rule Book T-24.” The Company did not respond to all of the Union’s grievances.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to many of the allegations outlined above. The Union further contends that Mr. Shewchuk’s dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union’s contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

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

The Union requests that Mr. Shewchuk be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings 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.

FOR THE UNION:

(SGD.) D. Fulton
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) C. Clark
ASSISTANT DIRECTOR LABOUR RELATIONS

There appeared on behalf of the Company:

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| S. Oliver | – Labour Relations, Calgary |
| C. Clark | – Assistant Director Labour Relations, Calgary |
| D. Pezzaniti | – Labour Relations, Calgary |

And on behalf of the Union:

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|-------------|---------------------------------------|
| A. Stevens | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairman, Calgary |
| D. Edward | – Vice General Chairman, Medicine Hat |
| W. Apsey | – General Chairman, Smiths Falls |
| M. Yanchuk | – Local Chairman, Winnipeg |
| H. Makoski | – Vice General Chairman LE, Winnipeg |
| J. Shewchuk | – Grievor, Lockport |

AWARD OF THE ARBITRATOR

Nature of the Case

1. The TCRC grieves two separate disciplinary events for Mr. Jack Shewchuk, a Winnipeg conductor with 22 years of service. The first involves a 30-day suspension for allegedly failing to protect the point properly on January 22, 2016. The second concerns

Mr. Shewchuk improperly entraining a box car on the trailing end. CP terminated Mr. Shewchuk for this latter incident, on the basis that it constituted a culminating incident.

2. Both incidents arose initially from efficiency tests¹, a practice to which the TCRC objects. This Office has found that efficiency tests do not necessarily exclude discipline if proper grounds exist: [CROA&DR 4580](#) and [CROA&DR 4591](#), though this context may be taken into account when evaluating discipline.

3. The arbitrator has concluded that while CP proved certain grounds on which to impose discipline, the penalties imposed lacked proportion. Mr. Shewchuk will be reinstated in his employment with compensation.

30-Day Suspension

4. Conductor Shewchuk works in the Winnipeg yard. On January 22, 2016, he worked as Yard Foreman.

5. CP alleged that Mr. Shewchuk failed to work safely on three occasions when he exited the locomotive after it had already started moving and remained on the side of the nose rather than at its tip. On a fourth occasion, CP alleged that Mr. Shewchuk was properly located at the tip of the nose, but had failed to maintain 3-point contact during the movement.

¹ The parties also describe these tests as “proficiency tests”.

6. During one of the four incidents, CP suggested that the leading locomotive travelled over a pedestrian crossing.

7. For his part, Mr. Shewchuk denied not maintaining a 3-point contact. The TCRC contested CP's position that it was unacceptable to be on the side of the nose. The TCRC also objected to the fairness of the investigation. In the TCRC's view, Mr. Shewchuk protected the point when necessary, but due to the cold weather in Winnipeg in January, he remained inside the locomotive when it was not moving.

8. This Office has commented on the importance of an impartial Investigating Officer (IO) and investigation: [CROA&DR 4591](#). The arbitrator concludes that CP's investigation satisfied the requirement of being fair and impartial. A reading of the transcript demonstrates that the process allowed Mr. Shewchuk and his TCRC representative to know about and comment upon the evidence.

9. TCRC argued the Investigating Officer (IO) was not objective given "Note 12" in the transcript:

NOTE 12: Investigating Officer wants to note that this investigation is not to find out if Mr. Shewchuk did something wrong, he was observed to have done something wrong and was explained how to do it correctly, this investigation is to understand why Mr. Shewchuk did it wrong if that happened and to understand why he may have done it wrong.

10. In context, this note, which appears to say two contradictory things, does not support the TCRC's argument. The words "if that happened" and "may have done it wrong" clearly suggest that the IO would be considering the facts coming from the investigation. Mr. Shewchuk's comments about incorrect facts in Mr. Hill's memo further led to Mr. Hill being called to put his position on the record. The TCRC then received a proper opportunity to question him.

11. During that questioning, TCRC put forward its position that no rule or policy existed requiring that Mr. Shewchuk always be located at the very front of the nose of the locomotive. The rules to which Mr. Hill referred during the TCRC's questioning were not mentioned in the later letter imposing a 30-day suspension.

12. A full reading of the transcript shows that the parties endeavoured to create a proper record, something this Office requires to be able to hear and decide cases on an expedited basis. The arbitrator accordingly dismisses the TCRC's objection.

13. CP has the burden of proof for disciplinary matters. This involves demonstrating, on a balance of probabilities, that its evidence is to be preferred. There are two areas where CP did not meet this burden.

14. CP did not demonstrate on a balance of probabilities that Mr. Shewchuk failed to have a 3-point stance. CP said he did not; Mr. Shewchuk said he did. This contradiction

in the evidence required something further from CP, whether via supplementary investigation or evidence at the hearing, to meet its evidentiary burden.

15. CP also did not demonstrate that employees protecting the point had to be located at the very front of the locomotive. The arbitrator could speculate that protecting the point requires a person to be able to see not only what is out front of the locomotive, but also what is directly down on the tracks, especially if travelling across a pedestrian crossing. Indeed, Mr. Shewchuk himself went to the nose on one of the four occasions.

16. But an arbitrator cannot speculate; a decision must be based on the evidence presented. CP did not subsequently rely on the rules to which Mr. Hill referred during his testimony during the investigation. The bulletin to which CP referred (Bulletin MBNO-098-15) does not expressly say that protecting the point in a yard requires an employee to be at the front of the nose:

For train crews working or operating in yards or industry tracks, all employees other than the Locomotive Engineer must be positioned outside of the cab of the Locomotive when the Locomotive is leading in the direction of travel.

17. While CP might consider the employee's positioning to be obvious, the TCRC contested that position. This required further evidence to convince the arbitrator of the requirement to be on the front of the nose.

18. CP did satisfy the arbitrator that Mr. Shewchuk failed to be outside the cab before the locomotive started moving. His answer at QA 28 ("I can't say yes and I can't say no")

to CP's question about whether his crew member had advised him when the movement would start raises legitimate safety concerns. Communication about locomotive movements is evidently crucial in a yard for safety reasons.

19. The arbitrator accepts that CP had grounds to discipline, but it failed to prove all the elements of its case. Mr. Shewchuk's failure to be outside the cab when the movement started merited a written warning. The arbitrator agrees with TCRC that employees are not required to remain constantly outside the locomotive, particularly in January. But the crew must communicate, and employees must be outside to protect the point before the locomotive starts to move.

Termination

20. Almost ten months later, on September 10, 2016, CP observed Mr. Shewchuk entrain a box car on the trailing end. Mr. Shewchuk candidly admitted during the investigation (QA17) that this was an "oversight" and that he should have entrained at the leading end of the next boxcar. CP decided that this incident, based on the principle of a culminating incident, justified terminating Mr. Shewchuk's employment.

21. The TCRC noted that CP, which had been doing an efficiency test, advised Mr. Shewchuk at the time of the proper method of entraining. However, CP did not start any disciplinary proceedings until two weeks later on September 25, 2016. On October 13,

2016, CP terminated Mr. Shewchuk close to the completion that day of his 12-hour tour of duty.

22. CP has demonstrated that Mr. Shewchuk did not entrain properly. But that incident does not support a culminating incident argument justifying Mr. Shewchuk's termination. CP did not demonstrate how Mr. Shewchuk's candour in admitting his error and acknowledgement of how to entrain in the future breached the "bond of trust" to which CP referred in its termination letter.

23. Mr. Shewchuk is a long service employee. While his record is not without its blemishes, the previous discipline incident, which the arbitrator reduced from a 30-day suspension to a written warning, had occurred in January 2016.

24. Mr. Shewchuk's overall record as submitted by CP also indicated his conduct and performance resulted in demerit points being removed from his record on several occasions when CP followed the Brown System. Similarly, while efficiency tests do not exclude discipline, Mr. Shewchuk's records demonstrated that he regularly passed a multitude of such tests.

25. Progressive discipline allows an employer to terminate based on a discipline record which demonstrates that the employment relationship is no longer viable: [CROA&DR 4586](#). An employee who continually commits acts which warrant discipline

puts his/her employment in jeopardy. But the specific incidents and the record in this case did not justify the termination of a long service employee like Mr. Shewchuk.

Disposition

26. The arbitrator orders that CP reinstate Mr. Shewchuk with appropriate compensation. The 30-day suspension and the termination will be removed from his record and written warnings will be substituted in their place.

27. The arbitrator retains jurisdiction for any issues arising from this award.

January 8, 2018



**GRAHAM J. CLARKE
ARBITRATOR**