

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4722

Heard in Montreal, January 16, 2020

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 day suspension to Conductor A. Blossom of Roberts Bank, BC.

THE JOINT STATEMENT OF ISSUE:

Following an investigation, Mr. Blossom was issued the following 30-Day Suspension: "Please be advised that you have been assessed with a 30 Day Suspension for the following reason(s): For failing to properly detrain locomotive (sic) while working as the Conductor on assignment V94-19 on January 19, 2018. A violation of the Rule Book for Train and Engine Employees Section 2, Item 2.1(a)(b), 2.2(a)(b)(c), Section 2, Item 2.3, Train and Engine Safety Rule Book T-11 Entraining and Detraining Equipment, Section 6."

Union Position

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding all of the allegations outlined above. The Union further contends that Mr. Blossom'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 as well as the Company's discipline policy are 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 the discipline be removed in its entirety, and that Mr. Blossom is 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 Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and his past discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

In regards to the allegations concerning proficiency testing, the Company maintains that it is in no way restricted from conducting a formal investigation based on the result of a failed proficiency test.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:
(SGD.) D. Fulton
 General Chairperson

FOR THE COMPANY:
(SGD.) S. Oliver
 Manager, Labour Relations

There appeared on behalf of the Company:

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| D. Pezzaniti | – Assistant Director, Labour Relations, Calgary |
| D. Guerin | – Senior Director, Labour Relations, Calgary |

And on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairperson, Calgary |
| J. Hnatiuk | – Vice General Chairperson, Coquitlam |
| W. Apsey | – General Chairperson, Smiths Falls |
| A. Blossom | – Grievor, Port Moody |

AWARD OF THE ARBITRATOR

BACKGROUND

1. The Grievor was hired on with CP Maintenance of Way department in July of 1985. For the next 18 years, he remained with the Maintenance of Way department with progressing job responsibilities on various work crews throughout B.C. and Alberta.

2. In October 2003, the Grievor transferred to the running trades in Port Coquitlam, qualified as a Conductor and has worked in yard and freight service out of Port Coquitlam, Vancouver and Roberts Bank since.

FACTS GIVING RISE TO THE GRIEVANCE

3. On January 19, 2018, the Grievor was called for 19:00 as the Conductor on Road switcher V94-19 with Locomotive Engineer Barb Thomas. During switching operations in the Port Coquitlam Yard, the Grievor was in the cab of the locomotive speaking with

Locomotive Engineer Barb Thomas during a job briefing regarding the switching requirements.

4. Following the conversation and around the CT07 switch, the Grievor detrained incorrectly the stationary lead locomotive while facing forward as he stepped down the inclined stairs. When he reached the bottom of the stepwell, it is alleged that while still facing forward, he hopped off the lowest step and onto the trackside ballast.
5. General Superintendent Castellari was at approximately 50 feet away from the Grievor's train at the time.
6. At approximately 21:55 hours, the Grievor was approached by General Superintendent Castellari, who advised him that he had been observed detraining a stationary locomotive while facing outward, and that he had hopped down from the last step.
7. In his Memorandum to File dated January 19, 2018, Superintendent Jeff

Castellari states:

At approximately 21:55 I had a conversation with Conductor Al Blossom after observing him detraining face forward from his locomotive located at the west end of CT07. I was approximately 50 ft away from where Mr. Blossom climbed down the stairs and made a hop down all while facing forward. I immediately pulled up to him and asked if he climbed down face forward. He stated he wasn't for sure, but I asked again and he stated he may have.

With further discussion I explained to Mr. Blossom the reasoning why this cannot happen account the risk of falling face forward when coming down like this. He stated that he had worked 32 yrs. without an

injury and I explained taking a risk is not worth hurting himself and ruining his record.

I mentioned that this incident would be noted at an efficiency test failure.

8. The Grievor was not removed from service following the incident and was permitted to continue working his assignment.

9. The following day, on January 20, 2018, the Grievor received a *Notice of an Investigation* to take place on January 25, 2018, in connection with “Your tour of duty on January 19, 2018 while working as the conductor on V94-19 when you were observed detraining a locomotive facing the incorrect direction”.

10. The investigation took place on January 29, 2018.

11. During the investigation, the Grievor did not rebut the memorandum provided by Superintendent Jeff Castellari and he answered the following questions:
 25. Are you aware of and do you fully understand the Train and Engine Safety Rule Book, T11 wherein it states.
Face the locomotive when entraining or detraining a locomotive stairwell
A. Yes

 26. Can you provide this investigation a reason why you did not detrain in this manner?
A. I didn't leave the locomotive with the intention of breaking a rule. It was lapse of judgement and it will not happen again. I appreciate it was brought to my attention. It was big power with an inclined stairwell; I was looking where I was going and thought I turned around before I got off.

12. The Grievor was returned to service. On February 16, 2018, he received disciplinary notification (Form 104):

Please be advised that you have been assessed with a 30 Day Suspension for the following reason(s):

For failing to properly detrain locomotive (sic) while working as the Conductor on assignment V94-19 on January 19, 2018. A violation of the Rule Book for Train and Engine Employees Section 2, Item 2.1(a)(b), 2.2(a)(b)(c), Section 2, Item 2.3, Train and Engine Safety Rule Book T-11 Entraining and Detraining Equipment, Section 6.

13. The Grievor was never required to serve this suspension due to a subsequent Form 104 received on the same day dismissing him from Company service for another efficiency test failure that occurred on January 23, 2018.

DECISION

14. The Train and Engine Employees, Section 2, Item 2.1(a)(b), 2.2(a)(b)(c), Section 2, Item 2.3 are cited as grounds for discipline on Form 104 dated February 16, 2018. During the investigation, the Grievor was asked if he was familiar with these rules. He was not presented with any specific allegation of a violation of these rules at any time and the company did not specify which violation of any of these rules is considered to have occurred during the detraining incident of January 19, 2018.
15. The facts of the incident are not in dispute. During the investigation, The Grievor admitted that on January 19, 2018, he did not detrain a locomotive in accordance with Train and Engine Safety Rule Book, T11.

16. Train and Engine Safety Rule Book states:

T-11 Entraining and Detraining Equipment

1. When conditions are determined to be safe, employees are permitted to entrain or detrain moving equipment at a walking pace not exceeding 4 mph.
 2. Always communicate the intent to the locomotive engineer (includes RCLS operator) prior to entraining or detraining moving equipment. The locomotive engineer must acknowledge only the intention of entraining or detraining the movement and then ensure speed is 4 mph (or less if requested) at the entraining or detraining location.
 3. Always communicate to the locomotive engineer once you are safely entrained or detrained.
 4. Never entrain or detrain moving equipment while in possession of a grip/bag or any item that would prevent the full use of both hands (Eg. SBU's, tools, water, switch broom)
 5. Entrain and detrain clear of switch stands, bridge approaches, retaining walls, restricted/ close clearances, debris and other fixed objects.
 6. Face the locomotive when entraining or detraining a locomotive stairwell.
 7. Do not jump from any piece of equipment or structure to ground level or onto another adjacent equipment or structure except in an Emergency situation.
 8. Use 3 points of contact on steps, ladders, railings, or handrails when entraining or detraining any piece of equipment or structure, maintaining a firm grip.
 9. Entrain or Detrain moving equipment on the leading end of equipment.
- (Emphasis Added)**

17. On January, 19, 2018, when approached by Superintendent Castellari, the Grievor was coached on proper compliance and told there would be a note showing this was a failed proficiency test.

18. The "CP Proficiency Test Codes and Descriptions" states in its introduction :

A proficiency 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 proficiency (knowledge and experience) and to isolate areas of noncompliance for immediate corrective action. Proficiency 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.

19. The Union submits that the coaching and the further investigation ought to have sufficed to satisfy the Company's interests in this matter.

20. However, the Company opted to assess a punitive 30 day suspension. The Company asserts that on the day of the incident, the Grievor had only worked a "handful of shifts" after serving a 20 day suspension. For the Company, the Grievor should have been on his best behaviour and ensure complete compliance with the rules. Instead, he made what he described a "lapse of judgement" and put himself in a dangerous position.

21. In **CROA 4621**, Arbitrator Sims states that "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".

22. Otherwise, in **CROA 4456**, Arbitrator Silverman maintained a 3 day suspension assessed to a short service CP employee who improperly detoured at 7 mph and had "a significant disciplinary record".

23. In the present case, contrasted with this Case No. 4456, the Grievor's length of service (32 years) and long period without discipline should be considered as mitigating factors.

24. In **CROA 4622**, Arbitrator Sims refers to the grievor's discipline record and notes an assessment of, "5 demerits for failing to properly detrain from a standing locomotive resulting in a personal injury (1991)".
25. In the present case, the Company has not demonstrated any incident **after the event** or prejudice.
26. In **CROA 4098**, the grievor had been assessed 20 demerits for both throwing a switch with one hand as well as descending the stairs of a locomotive facing forward. In allowing the grievance, Arbitrator Picher held:

The second incident concerns two procedural errors committed by the grievor on February 10, 2011. Firstly, he was observed by Trainmaster Larry Karn of MacMillan Yard detraining a locomotive by descending the stairs in a forward facing position rather than facing the locomotive itself and descending the steps backwards. On the same tour of duty he was further observed throwing a switch with one hand rather than two, while he held his radio in the other hand. Following an investigation he was assessed twenty demerits for those infractions. It may be noted, as acknowledged by the Company's representative, that in the forty-seven years of this Office's existence there has never before been a case involving discipline for facing forward while descending locomotive stairs. The Arbitrator accepts that each of the errors identified by the Company were in fact committed. The real issue is the proper measure of discipline in all of the circumstances.

I am satisfied that the discharge of the grievor is excessive given the relatively minor nature of each of the infractions here examined. As has been previously recognized in this Office, in substance the grievor's actions do not involve flagrant violations of safety rules and procedures so much as a failure to follow best practices. In my view there were errors of judgement committed both by the grievor and by the Company.

27. As in this **CROA 4098**, the Grievor's action in the present case do not involve a flagrant violation of safety rules so much as a failure to follow best practice.

28. Finally, in his decision dated November 19, 2019, Arbitrator Moreau reviewed the matter of a 5 day suspension that had been assessed for six separate efficiency test failures. The Arbitrator notes that the grievor admitted to the incident indicating that "...he turned around on the last step, and stepped forward off the locomotive and did not detrain properly". The Grievor further added: "I temporarily forgot to use the proper method".

29. The Grievor's record in this case was more significant than the Grievor's in the present case.

30. Arbitrator Moreau writes on that subject:

Turning to the merits, I agree with the Employer that the grievor has an unenviable record of discipline, including a termination in December 2013 as a result of an accumulation of demerits under the Brown System of Discipline. The grievor was later reinstated with a record of 55 demerits on June 11, 2014 after having served a 203 Day Suspension. The grievor was also assessed a 5-day deferred suspension on May 11, 2015 for arriving 50 minutes late for his train-an offence the grievor has repeated on numerous occasions during the course of his 33 years of service. Given the previous record of suspensions and bearing in mind the principles of progressive discipline, I would normally be inclined to uphold the 5-day suspension. The incidents, however, all involve failed proficiency tests.

...

... Normally, I would agree with the Union that these types of individual rule breaches should attract counselling rather than a disciplinary response. On the other hand, I am compelled to agree with the Company that the series of five documented offences, spanning some 12 months, when viewed cumulatively, constitute sufficient grounds for discipline. Employees like the grievor working in safety sensitive positions must perform their duties in keeping with the established rules at all times while on duty. To find that the events that took place are collectively not worthy of discipline would send the wrong message on the importance of adhering to safety rules.

31. Finding that the 5 day suspension was excessive but that the six efficiency tests were collectively worthy of discipline, Arbitrator Moreau replaced the suspension with a written reprimand:

I do, however, find that a 5-day suspension is excessive given that we are dealing with a series of proficiency test failures for which the grievor was properly counselled on each occasion. I also consider the grievor's willingness to admit to each of the alleged breaches at his interview—some of which stretched back over a year—to be a mitigating factor in his favour in addressing the issue of penalty.

32. The grievance is upheld to the extent that the 5-day suspension is to be removed from the grievor's record and substituted with a written warning. He shall otherwise be made whole for his losses.

33. In the present case, the Company states that this was not the first time that the Grievor had been coached on this particular rule. The Grievor's record shows that, although not disciplined for them, he had six Efficiency Test Failures, in a twelve months period:

- **November 24, 2017**—CRT20—running to his locomotive so he didn't have to stop his movement—Verbal Coaching.
- **August 10, 2017**—CRT21—Not in possession of PPE lantern or was it accessible to him while PK'ing his train at Kamloops—Verbal Coaching
- **June 30, 2017—CRT11—detraining by hopping off from between the cars—Verbal Coaching**
- **June 18, 2017**—CR114C, Assisting the VW13 yard in K yard, Al cut off KT02 on the east end foul of KT03 on the lead without informing the on duty trainmaster. VW23 turned in the foul track and corrected the error—Verbal Coaching
- **March 12, 2017**—CRTJOB1, late for his job briefing on V42-12—Verbal Coaching
- **February 1, 2017**—CRTJOB1, Not dressed and ready—Verbal Coaching

34. The six efficiency test failures cited by the Company were only subject to verbal coaching. Yet, the June 30, 2017 Verbal Coaching was for a violation similar to the one in the present case.

35. Regarding all the circumstances in this case, I find that a 30 day suspension is excessive given that we are dealing with a proficiency test failure for which the grievor was properly counselled and considering the jurisprudence on this type of offense.

36. So, considering the Grievor's length of service (32 years) and long period without discipline, but considering also that he had just returned from a 20 day suspension, that he admitted it was a "lapse of judgment", that it was his second offence of the same kind, the 30 day suspension is replaced with a written warning.

37. The grievance is upheld to the extent that the 30 day suspension is to be removed from the grievor's record and substituted with a written warning. He shall otherwise be made whole for his losses.

March 16, 2020



**SOPHIE MIREAULT
ARBITRATOR**