

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

CASE NO. 4629

Heard in Montreal, April 12, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of two dismissals of Conductor D. Lang of Winnipeg, MB.

THE UNIONS'S EXPARTE STATEMENT OF ISSUE:

The instant matter involves two separate assessments of discipline, both recorded September 27, 2016.

The First Discharge

Following an investigation, the Company dismissed Mr. Lang which was described as "For operating your train in an unsafe matter which resulted in your train side swiping train I 13 and causing a derailment in Winnipeg Yard while working as a Yard Foreman on the 23:30 North Switcher Assignment on September 3rd, 2016, a violation of General Notice, General Rule A(i), (iii), (iv), (vi), (viii), General Rule C(i), CROR 105 & 106, Trains and Engines Field Safety Handbook, Job Briefings, GOI Section 1 Items 32.1, 32.2, 32.3, 32.4, & 40.1."

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.

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. Lang'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 requests that Mr. Lang 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 with the Union's contentions.

The Second Discharge

Following an investigation, the Company dismissed Mr. Lang which was described as "For not securing the standing portion of your train & by not applying any handbrakes to any of the rail cars left standing unattended" on September 14th, 2016 while working as a Yard Helper on the PR11 Assignment out of Winnipeg, Manitoba, a violation of General Notice, General Rule A (i), (iii) & (vi), General Rule C (i), CROR 106 & 112, GOI Section 4, items 2.0, 2.1 & 6.0 and Train & Engine Safety Rule Book T-14." The Company did not respond to all of the Union's grievances.

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. Lang be made whole.

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. Lang'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. Lang 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.)**

There appeared on behalf of the Company:

- C. Clark – Assistant Director, Labour Relations, Calgary
- D. E. Guerin – Senior Director, Labour Relations, Calgary

And on behalf of the Union:

- M. Church – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairman, Calgary
- D. Edward – Senior Vice General Chairman, Calgary
- M. Yancyuk – Local Chairman, Winnipeg
- W. Apsey – General Chairman, Smith Falls
- H. Makoski – Senior Vice General Chairman, Winnipeg
- G. Edwards – General Chairman, Revelstoke
- D. Lang – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

Nature of the Case

1. This award deals with two separate events. On September 27, 2016, CP terminated Conductor Dan Lang for each incident. For both dismissals, the TCRC contested the fairness of the investigation and the degree of discipline.

2. For the reasons which follow, the arbitrator upholds the TCRC's procedural objection for the second discharge which renders that discipline void *ab initio*. The arbitrator substitutes a 7-day suspension for the first discharge.

The second discharge (September 14, 2016 incident)

3. On September 14, 2016, Mr. Lang worked as a helper with yard foreman, Mr. Robert Gordon. They both had similar seniority. The discipline for this incident arose from a failure to apply handbrakes to rail cars. CP terminated Mr. Lang and later issued a 7-day deferred suspension to Mr. Gordon.

4. The TCRC raised procedural objections, *inter alia*, because Mr. Lang received no notice of, and was not invited to be present, when CP interviewed Mr. Gordon. Mr. Gordon's investigative interview occurred on the same day that CP terminated Mr. Lang's employment.

5. A few key dates provide context. CP conducted its investigation interview of Mr. Lang on September 21, 2016 (U-2; Union Exhibits; Tab 6). CP gave notice to Mr. Gordon of his investigation on September 22, 2016 and later interviewed him on September 27, 2016 (U-2; Union Exhibits; Tab 7). CP's two dismissals of Mr. Lang both occurred on September 27, 2016 (U-2; Union Exhibits; Tab 8).

6. The parties' collective agreement contains the following provision at article 70.03 (U-2; Union Exhibits; Tab 19):

70.3 If the employee is involved with responsibility in a disciplinary offence, **they shall be accorded the right on request for themselves or an accredited representative of the union, or both, to be present during the investigation of any witness whose evidence may have a bearing on the employee's responsibility,** to offer rebuttal thereto and to receive a copy of the statement of such witness...

(emphasis added)

7. CP drew the arbitrator's attention to an August 31, 1992 letter included at article 70 of the collective agreement and which is entitled "Letter Re: Examine witnesses during an investigation". That letter also refers to the right to be present during another employee's investigation:

In respect of a witness from whom a statement will be taken, the employee under investigation will be notified of the time and place in order that that employee or accredited representative may be in attendance if they so desire. Should they attend, they will be permitted to ask questions of the witness and/or offer rebuttal at the conclusion of the witness' statement...

8. At Mr. Gordon's September 27, 2016 investigation interview (U-2; Union Exhibits; Tab 7 QA 41 Note 19), the TCRC objected to Mr. Gordon not being invited to Mr. Lang's

interview and to the fact the interviews for both employees did not take place concurrently:

Note 19 Union Representative – The Local Chairmen objects that Mr. Gordon was not permitted to attend the statement of his crew member in order to see, hear, or rebut his evidence. The Union further objects that the investigations of Dan Lang & Robert Gordon were not held concurrently.

9. The TCRC also objected during Mr. Gordon's investigation regarding the right of a crew to receive all evidence (U-2; Union Exhibits; Tab 7 Note 15):

Note 15 Union Representative – The Local Chairman objects to this investigation as it is not fair and impartial. This investigation is regarding a crews tour of duty and they have the right to see, hear, and rebut all evidence.

10. CP also posed questions to Mr. Gordon about Mr. Lang (U-2; Union Exhibits; Tab 7 QA 21-23). Both investigations clearly arose from the same incident (Trainmaster's memorandum; U-2; Union Exhibits; Tab 7 Appendix 1).

11. In its November 14, 2016 grievance letter (U-2; Union Exhibits; Tab 14), the TCRC advised CP of its procedural objections to Mr. Lang's investigation:

This investigation, in the opinion of this representative was completely unfair, contrary to the collective agreement, and arranged in a way that constitutes a fatal injury to the investigative process. The specific allegation of this fatal injury surrounds the company scheduling two separate investigations of two members of a crew in connection with the very same incident on the same date and time.

12. In that same letter, the TCRC expanded on its concerns about procedural irregularities:

The statement of Dan Lang was held first, on September 21, 2016. His notice of investigation makes no mention that his crewmate, Robert Gordon is also being investigated in connection with the same incident which occurred on the same day at the same time by the same crew in the same place. At the time of Mr. Lang's September 21st statement no objections are lodged by the Union, because the Union has not yet been advised that an investigation of Robert Gordon will be taking place. It is during Mr. Gordon's investigation, held after the dismissal of Mr. Lang that the Union lodged several objections regarding the issue.

13. In its January 26, 2017 response, CP did not address the specifics of the TCRC's procedural objection, other than to say, "The Company disagrees." (U-2; Union Exhibits; Tab 15). CP did opine that it had conducted a "fair and impartial investigation" but did not specify the factors on which it relied to support this statement.

14. The TCRC reiterated its procedural objection in its March 23, 2017 letter (U-2; Union Exhibits; Tab 16):

The Union objects to the surreptitious manner in which the Company chose not to disclose the investigation of crew member Robert Gordon, thereby prohibiting Mr. Lang the opportunity to attend and protect the application of Article 70.01 and 70.03.

15. This Office has noted that investigations must remain informal: [CROA&DR 4608](#). However, as noted in [CROA&DR 3061](#), an arbitrator may declare discipline void *ab initio* where significant procedural irregularities affect the integrity of the record and the expedited arbitration regime to which the parties subscribe:

As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial

degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. **As a result, any significant flaw in the procedures which substantially compromise the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void ab initio.**

(emphasis added)

16. Mr. Lang's discipline for this second incident must be ruled void *ab initio* because of significant procedural flaws which CP, despite being put repeatedly on notice, decided not to remedy.

17. At the hearing, CP suggested in its defence that the TCRC had waived its rights by raising a late procedural objection: [CROA&DR 2911](#). But the facts do not support an application of that principle.

18. The TCRC advised CP continuously of its procedural objections. Clearly, the TCRC could not have known on September 21 that CP would advise Mr. Gordon on September 22 of its decision to interview him. Numerous cases come to this Office contesting the fact that an employer interviewed only one member of a crew. The lack of an objection in Mr. Lang's September 21 transcript reflects the situation as it existed as of that date.

19. The TCRC raised its procedural concerns starting at Mr. Gordon's interview on September 27, 2016 which occurred on the same date as Mr. Lang's termination. CP

had scheduled Mr. Gordon's interview five days earlier on September 22, 2016, but only after Mr. Lang's session. The dates chosen for interviews cannot override the procedural protections the parties have negotiated in their collective agreement.

20. The TCRC also highlighted its procedural concerns throughout the grievance correspondence. This is not a case of CP being prejudiced by a procedural objection long after losing its ability to remedy any alleged flaw.

21. Article 70.3 is clear about an employee's right to attend the investigative interview of another employee who was involved in the same incident. In its August 31, 1992 letter, which forms part of article 70, CP described its obligation to advise one employee of the time and place when it will be interviewing another employee involved in the incident, *supra*. The purpose of this notice requirement is to ensure the integrity of the record on which this Office relies to decide a case.

22. CP failed to respect the collective agreement's mandatory provisions in a way which substantially compromised the integrity of the record. The appropriate remedy for this breach is to declare the discipline void *ab initio*.

The first discharge (September 3, 2016 incident)

23. CP hired Mr. Lang in February 2007. He lives and works in Winnipeg. At the time of the incidents, he had only a "caution" and an "informal" on his disciplinary record (U-2; Union Exhibits; Tab 1).

24. On September 3, 2016, Mr. Lang was moving his train using his belt pack equipment. The record shows that Mr. Lang's train was moving too fast when attempting to couple with a single rail car. Despite Mr. Lang putting his train into emergency stop, it did not slow down sufficiently. The single car ended up side swiping Train 113 and a derailment occurred.

25. Mr. Lang continued to work after September 3, 2016. It was only following the later investigation that CP terminated his employment. The TCRC contested both the fairness of the investigation and what it considered an excessive penalty.

26. The arbitrator dismisses the TCRC's objection that CP's investigation rendered the discipline void *ab initio*. Unlike for Mr. Lang's second dismissal, *supra*, there existed none of the significant procedural irregularities which could be characterized as compromising the integrity of the record and this expedited arbitration process.

27. For example, it is not enough to argue that the CP's investigation letter appended no evidence. This Office needs to know what evidence the employer had and failed to produce. In [CROA&DR 3322](#), for example, an employer relied on a medical opinion, but had never produced it to the trade union.

28. By itself, the reference to "company records" during the formulation of questions similarly did not demonstrate that essential unproduced documents existed, particularly

when dealing with undisputed facts like a derailment (U-2; Union Exhibits; Tab 3 QA10 &18). The arbitrator is not persuaded that failing to provide written scheduling information is fatal to an investigation when an employee is simply asked to confirm his/her shift on the day in question.

29. Frequently, investigators refer to “company records” to confirm obvious information like an employee’s name: [CROA&DR 4625](#). Those conducting investigations are not experienced lawyers. Investigations are meant to be informal as noted above. An innocuous reference to “company records” for obvious information differs from a situation where medical or accident records were relied upon but not produced.

30. Neither is it necessarily a procedural irregularity to verify an employee’s awareness of various [Canadian Rail Operating Rules](#) (CROR) rules during the investigation stage. The basis on which discipline may be imposed, if any, comes later. Issues may arise, however, where an employer first raises specific CROR violations only at arbitration: [CROA&DR 4628](#). Arbitrators will generally treat a disciplinary incident as a whole, despite multiple allegations: [CROA&DR 4492](#).

31. The arbitrator dismisses the TCRC’s procedural objection for the September 3, 2016 incident.

32. CP satisfied the arbitrator that it had grounds to discipline Mr. Lang for the derailment on September 3, 2016. However, the penalty of dismissal was excessive for several reasons.

33. First, Mr. Lang had a very light disciplinary record during his almost ten years of service at CP. Second, Mr. Lang reported the incident immediately and indicated during his interview that he would learn from this incident (U-2; Union Exhibits; QA 43). Nothing in the record suggests that Mr. Lang cannot be a productive employee in the future.

34. This Office has previously noted that it would welcome the parties' submissions on progressive discipline if they will not be following the Brown System: [CROA&DR 4549](#). Progressive discipline is not a mechanical system with automatic penalties regardless of the seriousness of a particular incident. That may change somewhat in culminating incident cases where dismissal may follow even for a minor final violation if significant progressive discipline steps have already taken place: [CROA&DR 4625](#).

35. The arbitrator accepts the TCRC's argument regarding the excessiveness of CP's termination of Mr. Lang for the September 3, 2016 derailment incident. The arbitrator substitutes a 7-day suspension in place of the original dismissal.

Disposition

36. The arbitrator has found Mr. Lang's discipline void *ab initio* for the September 14, 2016 handbrakes incident due to significant procedural errors. The arbitrator has further

concluded that the dismissal for the September 3, 2016 derailment incident was excessive and shall be replaced by a 7-day suspension.

37. The arbitrator orders CP to reinstate Mr. Lang in his employment, with compensation and without loss of seniority, except for the period of the 7-day suspension and less any amounts earned in mitigation.

38. The arbitrator remains seized for any questions arising from this award.

May 9, 2018



GRAHAM J. CLARKE
ARBITRATOR