

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

AND

**TEAMSTERS CANADA RAIL CONFERENCE-
(CONDUCTORS, TRAINMEN & YARDMEN)**

(the "Union")

RE: GRIEVANCES OF TODD LAVIGNE

SOLE ARBITRATOR: John M. Moreau QC

Appearing For The Union:

Michael Church	-	Counsel
Dave Fulton	-	General Chairperson, CTY West-TCRC
Doug Edward	-	Senior Vice-General Chairperson, CTY West-TCRC
Brian McGiven	-	Local Chairperson, Revelstoke-TCRC/RCTC
Jason Hnatiuk	-	Vice-General Chairperson, Vancouver-TCRC/RCTC
Todd Lavigne	-	Grievor

Appearing For The Company:

Don McGrath	-	Manager, Labour Relations, Calgary
Diana Zurbuchen	-	Manager, Labour Relations, Calgary
Jason Shaw	-	Labour Relations Officer, Calgary
Ivette Suarez	-	Labour Relations Specialist, Calgary
James Rapinda	-	Trainmaster

A hearing in this matter was held in Calgary, Alberta on March 4, 2020

DISPUTE

Appeal of the 45-day suspension and subsequent Dismissal of Conductor Todd Lavigne of Coquitlam, BC.

THE 45-DAY SUSPENSION

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Lavigne was issued a 45 day suspension (30+15) described as “For failing to properly follow a Supervisor’s instructions as communicated during a Job Briefing resulting in signal 1269D dropping in front of your movement and your movement being unable to stop before passing the stop signal; while working as Conductor on V95-03 Assignment February 4, 2017. This is a violation of Train & Engine Safety Rule Book Core Safety Rules Item T-0 Job Briefing, CROR Rule 439(a), and item 2.3 of the Rule Book for Train and Engine Employees. In addition, the fifteen (15) day Deferred Suspension as outlined in Form 104 dated January 13, 2017 is henceforth activated resulting in a cumulative 45 Day Suspension effective February 20, 2017.”

UNION POSITION

The Union contends the Company has improperly applied the process of deferral in the instant matter, which the tests required to properly establish Company policy as it pertains to assessing discipline and is in violation of Article 70.09. Additionally, the Company has improperly activated a penalty of suspension, which was previously assessed.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding many of the allegations outlined above. The Union further contends that Mr. Lavigne’s 45-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 assessed is contrary to the arbitral principles of progressive discipline.

The Union contends that Mr. Lavigne was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union requests that the discipline be removed in its entirety, and that Mr. Lavigne 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 requests.

The Company maintains that the Grievor, while working as Conductor train V95-03 on February 3, 2017, was culpable of failing to follow Supervisor's instructions as communicated during a Job Briefing that resulted in a violation of CROR Rule 439 at Signal number 1269D indicating stop, being passed without authority.

The Job Briefing was conducted for the route to be taken; to depart via Pacific Lead, crossing over to L4A and back up to the light and wait for a signal. The Grievor departed contrary to the instructions discussed during the Job Briefing resulting in the violation of CROR Rule 439 at Signal number 1269D indicating stop.

Jurisprudence provides for the deferral of discipline and there is no nexus between Article 70.09 of the Collective Agreement references and the Company's ability to defer suspension days.

The violation of CROR 439 considered by many Arbitrators to be one of the most serious offences in the railway industry and a dismissal offence, as such a doubt on the continued employment of the Grievor existed. According there was no violation as suggested of Article 70.05 of the Collective Agreement.

The Company maintains the discipline assessed was appropriate and warranted in all circumstances, including the activation of previous suspension days deferred.

DISMISSAL

JOINT STATEMENT OF ISSUE

Following an investigation, Mr. Lavigne was dismissed "For failing to secure the tail end of your train while leaving it unattended and not being in proximity to safely apply hand brakes if an unintended movement occurred while working as the Conductor on 2-417-17 on February 19, 2018 at Mile 111.9 Cascade Subdivision. A violation of GOI Section 4, Item 6 C. Notwithstanding that the abovementioned incident warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal."

UNION POSITION

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. Lavigne be made whole.

The Union contends that Mr. Lavigne's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors

evident in this matter. The Union further contends the Company has failed to establish the above-mentioned incident warranted dismissal, or that it constitutes a culminating incident worthy of discharge. It is also the Union's contention that the penalty 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. Lavigne 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.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Company maintains that the Grievor, while working on February 19, 2018, as Conductor on his tour of duty on 2-401-17, was culpable for failing to properly secure the tail end of his train, while leaving it unattended and not being in proximity to safely apply hand brakes if an unattended movement occurred.

The Company maintains that after a fair and impartial investigation was conducted, culpability was established and that the incident in and of itself warrants dismissal. Fair and impartial questions were asked during the statement, allowing the Grievor to respond accordingly. Notwithstanding this, the Company also maintains the incident constituted a culminating incident, warranting dismissal.

The Grievor's ignorance of the rule, or lack of intent to violate the rules, or the fact there was no event does not negate the severity of not securing equipment. Further, when considering the appropriate disciplinary assessment, each case is considered individually on its own merits.

Failures of efficiency tests are evaluated on their own merit. The Company maintains that upon review and if deemed necessary and appropriate, the Company may decide to conduct an investigation into the matter as well. The Union alleges the Company is not conforming to the longstanding practice of discipline established under the Brown system. The Company maintains it has the management right to assess suspensions as a method of progressive discipline.

Accordingly, the Company maintains there was cause to assess discipline and that dismissal was just, considering all the circumstances. The Company maintains the dismissal assessed should not be disturbed.

AWARD

INTRODUCTION

Mr. Lavigne was hired by the Company on January 12, 2009 and has been working as a Conductor for the last seven years. The arbitrator heard two grievances: a 30-day suspension (with and additional 15 days deferred) for failing to follow instructions communicated to the grievor in a job briefing; and, the grievor's dismissal for failing to secure the tail end of his train while leaving it unattended.

THE 30-DAY SUSPENSION

On February 4, 2017, Conductor Lavigne was working train V95-03 Roadswitcher Assignment with Locomotive Engineer Elio Damin. This assignment begins in Port Coquitlam, B.C. at mile 111.9 and works westward towards the Williston Yard at mile 126.9, on the Vancouver Waterfront.

The crew reported for duty in Port Coquitlam and obtained their operating documents before performing a job briefing. After obtaining their locomotive, the crew departed Port Coquitlam heading towards the Williston Yard. The crew completed yarding the movement into the Williston Yard at track LT 27 followed by the headend of the train into track LT29 just east of the Williston Yard office. Mr. Lavigne then went in to the Williston Yard office to discuss with the Trainmaster, Mr. Rapinda, further instructions for

their return trip to Port Coquitlam. The Locomotive Engineer was not present at this job briefing.

According to Trainmaster Rapinda, he told the grievor at the job briefing to proceed westward with light power on the Pacific Lead and then crossover to track L4A. He was then to back up L4A eastward toward signal 1240B and wait for the appropriate signal indication.

The grievor, for his part, states that he told Trainmaster Rapinda at the job briefing that they would “zig-zag” in order to get from their location on LT29 to the Main Track L4A. The “zig-zag” route, according to the grievor, meant they would travel westward on LT29 and then reverse direction and head eastward on track LT28. They would next cross over onto track LT27 and then proceed westward toward drill signal 1269D. Trainmaster Rapinda, according to the grievor, agreed at the briefing with Mr. Lavigne’s route suggestion by indicating “*Sure*”.

Drill signal 1269D is located just west of the Victoria Drive Crossing and controls westward movements from track LT27 onto track LT4A. After Mr. Lavigne’s movement had crossed over onto track LT27, and the crossover switches were restored, they travelled westward toward the drill signal, which was displaying a restricting signal (single yellow) as they made their approach.

When the movement was 10 feet away from the signal, it dropped to Red (Stop) in front of their light power. Locomotive Engineer Damin took immediate action to stop the locomotive by placing the equipment into an emergency brake application. He had

travelled approximately 1 car length, or 60 feet past the drill signal, when the movement stopped.

Locomotive Engineer Damin immediately contacted Mr. Rapinda to find out whether Mr. Rapinda had requested the RTC to drop the westbound drill signal to “*Stop*”. According to Mr. Damin, Mr. Rapinda confirmed that he had called the RTC to make the request. Locomotive Engineer Damin subsequently contacted the RTC to obtain authority to pass the drill signal they had just passed through. After the authority was obtained from the RTC, the crew proceeded westward onto track LT4A, just west of signal 1270B. The crew subsequently received a signal to depart and proceeded eastward toward Port Coquitlam. The crew travelled approximately one quarter of a mile before they were informed by Trainmaster Rapinda to stop and await further instructions.

Mr. Rapinda submitted a memo into the investigation setting out his version of the events. A review of the memo indicates that Mr. Rapinda advised the grievor that the route to be used would be up the Pacific lead, cross over to the L4A, and then back to the light and wait for a signal there.

The Company argues that the grievor was given clear instructions from Trainmaster Rapinda, who is in charge of the yard, regarding the manner he wanted the crew to depart Williston Yard for Coquitlam. The Company further submits that the grievor evidently had another route in mind and assumed Mr. Rapinda agreed with his suggested route. Similar to the facts in **CROA 2949**, the grievor failed to clarify any uncertainties after he heard the directions from Mr. Rapinda to take a different route than the route he initially had in mind.

The Company further points out that the CROA jurisprudence is clear that proceeding through a stop sign, a violation of CROR 439, is one of the most serious rule violations and merits a severe disciplinary response. See: **CROA 4610, 4688**. The grievor's culpable behaviour in the Company's submission merits the discipline imposed. The Company also maintains that it properly activated the 15-day Deferred Suspension dated January 13, 2017 for a cumulative total of 45 days.

The Arbitrator notes that there is no dispute that the onus of proof lies with the Company to demonstrate that the incident of February 4, 2017 merits discipline. The difficulty with determining what exactly transpired during the conversation between the grievor and Trainmaster Rapinda is that there is no audible recording of the Job Briefing in Mr. Rapinda's office.

The Arbitrator is left with weighing the evidence against all the surrounding circumstances in order to ascertain the most plausible version of the events.

There are several factors which weigh in favour of the grievor's description of the events in this case.

First, immediately after the briefing with Mr. Rapinda, the grievor proceeded to hold another job briefing with his Locomotive Engineer and confirmed what he understood to be the agreed "zig-zag" path through the signal in order to travel from their location LT 29

to the main track. It would be unlikely that the grievor, with his experience in the area, would mix up the instructions that he just received a few minutes earlier from his Trainmaster. There is also no evidence that there was any animosity or ill-will between the two which might be a motive for the grievor to ignore his Trainmaster's instructions.

Second, the Locomotive Engineer's comment at the investigation, which is unrefuted, that the grievor's zig-zag path was "*the most common and efficient way to make that movement*" lends further credibility to the grievor's version of events. This was not only a route that he understood Mr. Rapinda had agreed for him to take during their job briefing but also one that was commonly used in the past.

Third, the evidence from Locomotive Engineer Damin in his incident report, which was handwritten only a few hours after the event, is that he called Mr. Rapinda immediately after he passed the red light and came to a stop. Mr. Damin asked Mr. Rapinda in that call if he had mistakenly instructed the RTC to drop the drill signal at Williston. Mr. Rapinda, according to Mr. Damin, acknowledged having done so and apologized for his mistake.

This same apology was overheard by Mr. Clark Cutter over the radio in his locomotive. Mr. Cutler indicated in that regard at the investigation that he understood Mr. Rapinda saying over the radio with respect to the dropping of the drill signal that he thought it had been "discussed inside" (during the job briefing) and that he took responsibility for it. Mr. Rapinda, when asked about the apology, said he initially

apologized because he thought the crew had *“got stuck in a controlled location or something like that, then I realized they had run through a red board and I asked them why they didn’t go in the direction I asked them to”*. His last comment about *“why they didn’t go in the direction he asked them to”* rings hollow when both Mr. Damin and Mr. Cutler, who were not part of the initial job briefing conversation, understood that Mr. Rapinda was apologizing for his initial job briefing instructions to the grievor.

Finally, Mr. Rapinda admitted that he contacted the RTC to restore the drill signal at Williston to *Stop* but failed to seek prior permission from Locomotive Engineer Damin before doing so, which is standard procedure. As the Union pointed out, the whole incident could possibly have been avoided had Mr. Rapinda called the Locomotive Engineer to warn him what he was about to tell the RTC to do.

For all the above reasons, I accept the grievor’s version of the events over Mr. Rapinda’s assertion that he properly briefed the grievor in his Williston office.

The grievance succeeds. The 30-day suspension, as well as the 15-day deferred suspension that was activated from previous discipline imposed on January 13, 2017, shall be removed from the grievor’s record and he shall be compensated accordingly.

THE DISMISSAL

The grievor and his Locomotive Engineer, Alex Golab, were the crew for Train 2401-27 with a straightaway assignment from Boston Bar to Coquitlam on February 19, 2018. They started the trip at 18:30 hours and arrived at 00:01 on February 20, 2018. The 2401-07 was set up as follows: the lead locomotive followed by a group of cars, then a mid-train remote locomotive followed by another large group of 77 cars and then a SBU end of train unit.

The crews' instructions upon arrival in Coquitlam was to yard their train into two separate tracks in C-Yard. At 02:00 the crew took the head end of their train into track CT04 leaving the tail end 77 cars and mid-train locomotive on the lead east of the CT03 switch. The crew then cut off their mid-train remote locomotive and pulled the head end of their train into track CT04, leaving the tail end cars on the C-Yard lead. After securing the head end of their train in CT04, they then reversed eastward through CT03 in order to tie in to the tail end portion of the train that was previously left in the C-yard. Once tied on, Conductor Lavigne, after requesting 3 Point Protection, cut in the air to the tail end portion of their train. He then released 3 Point Protection and began walking to the lead locomotive to complete the yarding of the train into CT03.

Assistant Superintendent Smith and Trainmaster Gavieres were conducting efficiency tests while the crew was performing these maneuvers. They observed that the

grievor had not removed any handbrakes after tying on to the tail end portion of the train that was left in the C-Yard.

The two efficiency supervisors then approached the grievor as he was walking towards the lead locomotive. They asked him whether the tail end portion of the train had been secured with handbrakes when the grievor made his cut. The grievor responded that he did not believe there was a requirement to secure the handbrakes. In his Memorandum to File of the incident, Mr. Smith indicated that he told the grievor that he could not “...*leave any equipment unsecured, and unprotected.*” The Superintendent and Trainmaster then requested that the grievor and the Locomotive Engineer report to the office after completing their yarding of the train. The Crew completed their work and reported to Mr. Smith’s office where they were advised that they would be written up for an efficiency test failure relating to the handbrakes.

Both the grievor and Mr. Golab, who had 10 years of experience as a Locomotive Engineer at the time of the incident, acknowledged at their investigation on March 9, 2018 that they were familiar with General Operating Instructions Section 4, Item 6.0C which reads:

6.0 Switching and Handling Equipment:

C. During switching, emergency air brake applications must not be relied upon to hold equipment stationary for short periods of time unless:

- (i) there are at least 15 cars which are sufficiently charged with Air; and
- (ii) a crew member is in close enough proximity to safely apply hand brakes if unintended movement occurs.

Both the grievor and Mr. Golab also stated at their investigations that they thought they were operating in a safe manner at the time. The grievor in particular felt that he was in compliance with the rule: *“We had the remote out and had left the 77 cars in emergency. We were coming right back to grab the cut within 10 mins. I felt that I was in compliance with the rule and that it was safe to do so”* (A 16). The grievor nevertheless concluded his interview by stating: *“At the time I felt that I was operating in a safe manner. I now fully understand the requirements”* (A 18). In a similar vein, Mr. Golab was also asked if he would comply with the above rule if faced with a similar situation. *He answered: “I will apply the full application of the rule”*.

The purpose of the efficiency testing process is meant to be, as Arbitrator Hornung stated in **CROA 4728**, “instructive rather than punitive”. To paraphrase Arbitrator Sims in **CROA 4580**, efficiency testing is not intended to be a discipline tool but rather an occasion for mentoring. There are nevertheless occasions, both arbitrators acknowledge, where discipline should not be precluded notwithstanding the context of an efficiency test. For example, in **CROA 4728**, Arbitrator Hornung saw fit to substitute a 20-day suspension with a 5-day suspension where the crew admitted to having failed to slow down for a yellow flag even though they had noticed the flag as they passed by.

I find that the grievor should have acted with more diligence and secured the handbrakes under the circumstances. As the Company pointed out, as a running trades employee, the grievor is responsible for the safe movement of his train and must ensure that all safety rules and regulations are followed. The fact is that the grievor left 77 cars

in emergency and unattended while he dealt with his other duties. There was certainly no guarantee that the cars would never move. Bearing in mind the seriousness of the grievor's inattention to an important GOI rule in place at the time, I find that a disciplinary response is appropriate notwithstanding the context of an efficiency test.

In terms of penalty, I do note that, aside from the discipline imposed for the February 4, 2017 incident described above which was successfully grieved in these proceedings, the grievor's related record indicates an incident that took place on December 28, 2016. The grievor was assessed a 30-day suspension (with 15 days deferred) for failing to properly line the switches connected to his movement. Bearing in mind the principle of progressive discipline, I am disposed to increase the disciplinary response. On the other hand, I do consider that the most recent rule change where conductors were relieved from tying handbrakes in these kinds of circumstances to be a significant mitigating factor.

Under the circumstances, I find that the appropriate discipline for this incident should be a further period of suspension. The dismissal penalty shall be removed from the grievor's record and substituted with a suspension of 45 days. The grievor shall be reinstated into his employment and made whole without loss of seniority.

SUMMARY:

- 1) The Suspension grievance succeeds. The 30-day suspension is set aside.

- 2) The Dismissal grievance also succeeds to the extent that a 45-day suspension is substituted for the grievor's dismissal.

I shall retain jurisdiction should any issues arise with respect to the implementation of this award.

Dated at Calgary, March 19, 2020



**JOHN M. MOREAU, Q.C.
ARBITRATOR**