

IN THE MATTER OF ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

DISPUTE

Appeal of the 30 day suspension to Conductor Aaron Korthuis of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Korthuis was issued a 30 day suspension (19 served, 11 deferred) described as “Please be advised that your discipline record has been assessed with a 30 Day Suspension (19 Days to Serve and 11 Days Deferred) which includes time HOS from March 11 to March 30, 2018 for the following reason(s): For knowing allowing cars to be shoved back with handbrakes applied and subsequent derailment and or damage to 18 cars while working the K27 Assignment as the Conductor on March 10, 2018 within Moose Jaw Yard. A violation of GOI Section 4, Item 7.2 and Train & Engine Safety Rule Book T14 - Hand Brakes.”

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. Korthuis be made whole.

The Union submits the Company has improperly applied the process of deferral in the instant matter, which fails the tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding all of the allegations outlined within the discipline assessment. The Union further contends that Mr. Korthuis’ 30 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. It is also the Union’s contention that the penalty and the Company’s discipline policy is contrary to the arbitral principles of progressive discipline.

The Union submits that Mr. Korthuis 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. Korthuis 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 Company maintains the Grievor’s culpability was established following the fair and impartial investigation into this matter and the discipline was properly assessed.

The Union argues that the Company has allegedly violated Article 70.05 of the CTY West Collective Agreement by issuing the Grievor a Deferred Suspension. The Company cannot agree with this assertion. As the Union is aware, CROA 4630 and 4638 are examples where the arbitrators substituted deferred suspensions with suspensions. In this situation, the Company maintains that its action of issuing the Grievor a deferred suspension was to promote correctness of behavior through deterrence, while reducing the immediate financial impact of a suspension.

The Company further maintains the Grievor was properly held from service in accordance with the Collective Agreement.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:



Dave Fulton
General Chairman
TCRC CTY West

FOR THE COMPANY:



Lauren McGinley
Assistant, Director
Labour Relations

January 6, 2022

Hearing: February 17, 2022 - By video conference

APPEARANCES

FOR THE UNION:

Ryan Finnson – VGC CTY West
Dave Fulton – GC CTY West
Doug Edward – Sr. VGC CTY West
John Kiengersky – VGC CTY West
Mr. D. Hariniuk – LC Moose Jaw
Aaron Korthuis – Grievor

FOR THE COMPANY:

Ivette Suarez, Labour Relations Officer
Mr. John Bairaktaris, Director Labour Relations
Lauren McGinley, Assistant Director Labour Relations

AWARD

JURISDICTION

[1] The parties agree I have jurisdiction to hear and resolve this dispute with all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*. This is an Informal Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. In accordance with their agreement, this award is without precedent to any other matter between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument.

[2] I have reviewed the parties written submissions, books of documents and the investigation conducted by the Company. During the investigation the Grievor acknowledged he did knowingly shove cars with hand brakes applied. Given all of the facts, while I find that discipline is warranted, I will consider the quantum of the discipline assessed.

DECISION

[3] On March 10, 2018, the Grievor, Aron Korthuis was working as Foreman in Moose Jaw yard. While performing switching of cars a derailment occurred during a 74 car shove.

[4] The Company maintains that a fair and impartial investigation was conducted on March 20, 2018. It says that the Grievor understood that in compliance with the rule, he could not move a car with handbrakes applied. He also understood that handbrakes have the ability to provide more brake shoe force than air brakes. Therefore, in order to avoid damage, handbrakes must be fully released before shoving equipment.

[5] The Company argues that the Grievor knew and understood the rules regarding handbrakes and acknowledged, that as the Conductor of the crew, he was ultimately responsible for the movement of the train as well as for his crew's actions. Given the severity of this incident and the consequences of the Grievor's inaction, the Company maintains the quantum of discipline was proper and warranted.

[6] The Union maintained that movement derailed somewhere in the middle of the equipment, on the curve of the track, which usually indicates that it was the result of excessive shoving force from the locomotives. In this regard, it relies on the investigation statement of the Locomotive Engineer regarding his use of the throttle. All 3 locomotives were providing tractive effort. The Union maintains it was excessive at 900 amps, three times the maximum allowed tractive effort on curves/turnouts (300 amps). It says that although CP alleged the handbrakes that had been applied caused the derailment, that fact is unsubstantiated. There is no nexus established, considering the throttle usage. Alternatively, if the handbrakes did contribute to the derailment, a 30 day suspension is clearly excessive.

[7] A review of the Locomotive Engineers investigation statement and answers regarding the shoving of the cars in question does indicate that excessive force was established. Excessive throttle induced force was the focus of questioning by the investigating officer. His handling of the locomotives during the switching was established as being in violation of the General Operating instructions. The investigation revealed that the Locomotive Engineer was using three

times the permitted force. Significantly, the Locomotive Engineer also claimed that he was advised that all handbrakes were off.

[8] I find the rule regarding the shoving of cars with handbrakes is clear in providing:

7.2 Hand Brake Release

A	Hand brakes have the ability to provide far more brake shoe force than the air brakes; therefore to avoid damage to wheels, hand brakes must be FULLY RELEASED before moving equipment.
B	When releasing a hand brake, it may be determined that it is properly released by ensuring that the bell crank has dropped and that the vertical rod and chain are slack. Note: Do not depend on brake shoes being clear of the wheels as on many cars the hand brake applies on the "B" end only.
C	To prevent unintended movement of equipment, hand brakes must not be released until the air brake system is sufficiently charged, unless movement can be prevented with locomotive brakes.

[9] The Union maintained that the investigation breached minimum standards of fairness as detailed in the Union's grievance correspondence. It says in correspondence that the Company supplied no evidence of damage or prejudice otherwise to the Company in this incident. It submits that the Company failed to consider all the relevant mitigating circumstances as set forth in the grievance correspondence.

[10] The Union maintains that the Company does not address which cars were involved, where in the track the cars derailed, or address the report cars jumped at the frog in track. In the Grievance process the Union submits that the Company has exposed bias and the predetermined nature of the investigation, prejudicing Mr. Korthuis' right to fairness and impartiality. Accordingly it argued the discipline is void ab initio.

[11] I cannot find that the investigation was conducted with bias or was unfair given the incident being investigated. However there are mitigating factors which were not sufficiently considered. The case law provided was not helpful given the distinguishable facts of this case.

[12] It is not disputed that the Grievor did release hand brakes which were noticed by him. There was no demonstration by his actions of lack of attention or that he deliberately disregarded hand brakes at the time of the derailment. There was no evidence that he had any previous incidents involving failure to release hand brakes. Notations in his Company Rides /Evaluations reports indicated that he "Worked safe and efficient". The Grievor's Performance Test record generally reflects the same.

[13] Given the Grievor's record it is of significant concern that the Grievor felt under pressure to get the assigned work done expeditiously by his supervisor as indicated in his investigation.

Q25 Can you indicate why you did not stop the movement?

A The Trainmaster came on the radio and said leave the cars in F7, because the switch was frozen. **I want to see you guys get something done today.** I have been investigated for non productivity in Nov. of 2017 so felt I was under duress to complete the moves in a timely fashion. **Emphasis Added**

[14] The answer to Question 25 was not challenged or denied by the Company. In my opinion the Company is properly entitled to require Safety and Productivity simultaneously with adherence to the rules. However, the work in this case was being performed by employee known to “Worked safe and efficient”. Advising him “I want to see you guys get something done today” is concerning. Employees may mistakes when comments like that above are made over the radio. Taking time to release hand brakes should not be overruled for a need to be seen to be moving. Notations in his overall record in the section of Company Rides / Evaluations reports by Company officers indicated that he “Worked safe and efficient”. The Grievor’s Performance Test record also generally reflects the same.

[15] In view of all of the foregoing I find the discipline assessed is excessive. It will be reduced to a five day suspension and the Grievor will be compensated accordingly.

Dated this 9th, day of April, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges", is enclosed in a thin black rectangular border.

Tom Hodges

Arbitrator