

IN THE MATTER OF AN ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE
(the Union”)
and
CANADIAN PACIFIC RAILWAY COMPANY
(the “Company”)

AH 798

DISPUTE

Appeal of the 30 Day Suspension issued to Conductor Azubike Igbelina of Calgary, AB.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Igbelina was assessed a 30 Day Suspension which was described as “In connection with the events that took place on October 3, 2020, specifically the side collision between assignments AO31 and CE31 in Calgary Terminal; a violation of Rule Book for Train & Engine Employees, Section 12.6(b) Shoving Equipment.”

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION’S POSITION:

The Union submits the Company failed to advise Mr. Igbelina in writing of the discipline assessed within the time limits allowed, contrary to Article 39.05 of the Collective Agreement.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement based on Q&A 49, 69, 73 and 91. The Union contends the Company has failed to meet the burden of proof or establish culpability regarding a violation of Rule Book for Train & Engine Employees, Section 12.4 Switching by Radio, Core Safety Rules – Rights and Responsibilities and T-11 Entraining and Detraining. In the alternative, the Union contends the discipline assessed is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors of Mr. Igbelina being forthcoming, ensuring the train was traveling at a safe speed to detrain, and no knowledge of the other assignment crossing over in front of their movement.

The Union requests that the discipline be removed in its entirety, and that Mr. Igbelina 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’S POSITION:

The Company disagrees with the Union’s contentions and denies the Union’s request. The Company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

Due to the Grievor's unavailability, Company records indicate Mr. Igbelina was informed of the discipline assessed to him via text message on October 23, 2020 and that he would sign the Form 104 upon his return.

The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances and in line with the principles of progressive discipline.

Failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:



For Dave Fulton
General Chairman
TCRC CTY West

FOR THE COMPANY:



Lauren McGinley
Assistant Director Labour Relations
CP Rail

October 14, 2022

Hearing by Videoconference: November 15, 2022

APPEARANCE

FOR THE UNION:

Erin Carr, Counsel, Caley Wray
Ken Stuebing, Counsel, Caley Wray
Dave Fulton, GC CTY West
Doug Edward, VGC CTY West
Ryan Finnon, VGC CTY West
Jason Hnatiuk, Vice General Chairman
Azubike Igbelina, Grievor

FOR THE COMPANY:

Allan Cake, Manager Labour Relations
Lauren McGinley, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

1. This is an Ad Hoc Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 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 briefly reviewed the extensive documentary evidence and made final argument within the agreed time limits set by them. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

2. The Grievor, Mr. Azubike Igbelina began his employment with the Company in August of 2018. Since that time he has worked in Calgary with the Company. He qualified as a Conductor in December of 2018.

3. There is no dispute that on October 3, 2020 at approximately 01:00, the Grievor was involved in a potentially catastrophic side collision resulting in a fuel tank leak. The side swipe type collision was between his assignment CE31, and the AO31, a local industrial assignment which was making its way through Ogden Yard in Calgary.

4. Although no evidence was led with respect to this, I take notice of the fact that I have heard more than one dispute recently involving side swipes and serious rule violations in this Calgary location. Preventing this type of collision requires an unwavering need for 100% compliance with the rules. Subject to mitigating facts and circumstances, dismissal may be an appropriate penalty for related violations. That said, the parties are not in agreement on fundamental facts related to the 30 day suspension which was assessed to the Grievor.

5. The Union maintains that the Grievor did not receive a fair and impartial investigation. The discipline assessed is unjustified, unwarranted, and excessive in all of the circumstances, including significant mitigating factors. The notice of discipline was not served within the required time limits.

ANALYSIS AND DECISION

6. In making my decision, I have carefully considered the detailed written briefs, together with the submissions and authorities reviewed at the hearing. I have made reference to it as I have needed to throughout this decision. The focus is on two central issues. First the requirement for notice of discipline. Second the requirement of a fair and impartial investigation in establishing the alleged culpability.

7. Article 39.05 sets out the provisions for assessing discipline:

Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the

date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

8. The evidence established that the Company was aware that the Grievor was in Nigeria attending his mother's funeral. On the Grievor's notice is a hand written notation that:

Advised 10/23/2020
Out of country for mother's funeral
Will sign when on return KN

9. The Company argues the Union failed to provide any evidence that would support the allegation that the Company never notified or communicated with Mr. Igbelina on October 23, 2020. The Union maintains that the Company knew the Grievor was in Nigeria and he was not notified within the time limits. It says that no extension of time limits was requested or granted.

10. I find the notification of discipline provisions of the collective agreement are a mandatory obligation of the Company which requires it to provide notice or receive an extension. It clearly provides that failure to notify the employee within the prescribed mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

11. The Union also noted that this issue was consistently addressed from the outset of the grievance. It says the Company did not respond to the Step one grievance and no extension of timelines were requested by the Company nor granted by the Union. The Company maintains that failure to respond to a Union grievance by the Company requires the Union to proceed to the next step which it did.

12. I find the Company knew that the Grievor was out of the country. There is no evidence that the Grievor was properly notified within the mandatory time limits. There is no evidence that the Union or Grievor were asked for or agreed to an extension of time limits to allow for notification when he returned from his mother's funeral. On that basis alone the grievance must be allowed.

13. I have carefully reviewed the submissions, evidence and caselaw provided by the parties. Considering the discipline assessed on its merits in the alternative, I find the grievance is also allowed on the following facts which were clearly established.

14. The Grievor has no previous history of major rule violations in his two years of service. Based on the evidence he appears to be the most junior of the three directly involved.

15. The evidence clearly established that the Givor and his co-worker, Conductor Jenna-Lee Anderson were required to attend investigations in connection with:

"Events that took place Oct 3rd 2020, in particular the side Collison between assignments A031 & CE31 Alyth Yard"

16. The investigation followed a memo dated Oct 3rd 2020 from Superintendent Shane regarding the Side Collison, A031 & CE31 Alyth Yard stating in part:

Yard Foreman Jenna-Lee Anderson advised me that she authorized lite engine A031 to travel through their zone from V Yard to the Class Yard

17. I find the incident reports and investigations are the foundation to allow employees the opportunity to be forthright and accountable. I find the Grievor was consistent and credible during the process. At the outset of his statement, he established and maintained his position that he understood and discharged his duties to protect the point as provide by stating in part:

....

Outgoing crew informed us that train 468 headend power was looking to go from P/V yard to the shops. Our pre job safety meeting included that I go to the headend of our movement, and to protect it against 50th crossover switches then line them reverse when needed for our intended route. We then pulled high for 468 powers to clear towards the shops.

As we were shoving back into P8, Conductor Anderson instructed that once we clear the BonnyBrooke bridge switch as well as the P2 crossover switches, line them reverse. BonnyBrooke - for 119 train going to N yard and P2 crossovers – for our movement going towards P2. I did as instructed and reported back to Conductor Anderson.

18. The Grievor's co-worker began her investigation earlier that day by stating:

....

Zubi did not count me down into the clear nor did he inform me he was off the movement, it wasn't until the terminal came onto our channel to tell us to stop that I realized we were in the clear. As it turned out we were already 20 cars clear of the fouling point in PT08. The terminal reiterated our instructions which I confirmed and then stopped and sent Zubi the pitch so that he could correct where we should have been positioned to tie it down.

19. John Ward Conductor on AO 31 provided an incident report after the collision. He indicated that he called the east end for permission to come out and Conductor Anderson responded. There is no evidence that Conductor Anderson said she was at the west end or that Conductor Ward new that fact.

20. The evidence established that she gave the permission to AO 31 to cross in front of her movement at the east end of the track, while she was at the west end of the track over 70 car lengths away. She acknowledged giving instructions to A031 that they were allowed to cross in front of their movement at the east end. She also acknowledged that there was chatter on the radio yet did not confirm that the Grievor heard the instructions. She had also changed the job plan and did not perform a new Job briefing with the Grievor. She acknowledged that she did not know where A031 was positioned at the time because she couldn't see the east end.

21. Given the quantum of discipline assessed to the Grievor in contrast to the co-worker I also find the following questions and answers from Conductor Anderson problematic:

Did your helper Mr. Igbelina confirm the instructions provided to the A031?

A. No

Did you confirm with your helper Mr. Igbelina that he understood the instructions you had provided to the A031?

A. No

If the work activities had changed since your original job briefing why didn't you and your crew perform another job briefing?

A. There was a lot going on with the radio. When I spoke to the A031 I assumed that Mr. Igbelina had heard the conversation with the A031. We had just had this conversation and I should have explained this to him afterwards, which I didn't.

Based upon your previous question and answers were you in compliance with the T&E Safety Rule Book CORE Safety Rules 1 Rights and Responsibilities?

A. No

Do you understand the requirements of the T&E Safety Rule Book T-0 Job Briefing

Read and discussed

A. Yes.

Referring to your previous question and answer, prior to initiating a movement are you required to communicate this with other crew members?

A. Yes

22. The investigating officer summarized her answers stating:

You have indicated in this investigation the following summary:

You were working on the CE31 with conductor Azubike Igeblina on the east end of PT08.

You pitched control of the movement to Mr. Igbelina and instructed him to spot the cars to the air box in PT08.

The head end of your movement was not in the east end Alyth RCLS Point Protection Zone.

You provided instructions over the radio to the A031 indicating that they could come out ahead of your movement from Victor yard on the east end of Alyth yard and proceed to the class yard.

You did not have a job briefing with your helper Azubike Igeblina once these instructions were provided.

Mr. Igbelina was in control of the movement when pulling out of PT08 in order to set the cars to the air box.

Mr. Igbelina was protecting the point during this move and in control of the movement.

Your movement came into contact and side swiped the A031 causing a derailment on the east end of Alyth Yard.

You were positioned on the west end of PT08 in a position to apply hand brakes while Mr. Igbelina was positioned on the east end of PT08 in order to spot the cars to air.

Is this correct?

A. Yes

23. The Grievor's investigation followed Conductor Anderson's later that day with the same investigating officer. The investigating officer focused on the Grievor's lack of his situational awareness for not turning around to see the other movement behind him, the speed at which he detrained and not protecting the point. Given the consistency of the Grievor's statement, I find the evidence established that he was focused on accurately spotting the 11th of 70 cars behind his engines at an air outlet. This while not knowing his co-worker had given another movement permission to cross behind him. I say this recognizing proper compliance with detraining rules or the need for situational awareness is not to be trivialized or condoned by the Company or Arbitrators. Observance of all rules and common-sense best practices are essential to ensuring safety in a safety critical operation. The Grievor's obligation or failure to protect the point was critically impacted by Conductor Anderson.

24. I find the investigating officer established that the collision was avoidable had Conductor Anderson fulfilled the obligations. I also note that Conductor Ward indicated in his incident report that he was specifically calling the east end, recognizing that such permission is safer when given by a crew member in the location where the move would occur.

25. For the foregoing reasons, I also find that CP's investigation was not fair or impartial as required by the collective agreement. The discipline is to be removed from the Grievor's record and he will be compensated for loss of earnings.

26. The arbitrator retains jurisdiction with respect to the interpretation, application, and implementation of this award.

Dated this, 16th, day of January, 2023.



Tom Hodges
Arbitrator