

# IN THE MATTER OF AN ARBITRATION

BETWEEN:

**TEAMSTERS CANADA RAIL CONFERENCE**

(the "Union")

- and -

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

(the "Company")

## DISPUTE

Appeal of the 30 Demerits and subsequent dismissal of Conductor William Ryan of Vancouver, BC.

## JOINT STATEMENT OF ISSUE

Following a formal investigation, Mr. Ryan was assessed 30 Demerits "For failing to ride the footboard as you were approaching within ten car lengths of a switch while working at the East end of the A-Yard in Port Coquitlam at Mile 110.9 Cascade Subdivision during your tour of duty on V84-30 on April 30th, 2021. A violation of Operating Bulletin NO: BCO-009/17." Mr. Ryan was subsequently dismissed "For an accumulation of demerits under the Hybrid Discipline Policy dated November 1, 2018."

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

## UNION POSITION

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above as Mr. Ryan remained outside the cab of the locomotive until it was confirmed that the last switch was lined for their route.

The Union contends the discipline assessed is unjustified, unwarranted, excessive and contrary to the principles of progressive discipline.

The Union contends the Company has failed to consider mitigating factors evident in this matter including:

- Mr. Ryan was on the end platform, outside the locomotive cab approaching the switch.
- Mr. Ryan observed his Brakeman line the switch for their movement, and confirmed the route was lined.
- Mr. Ryan then re-entered the cab of the locomotive to call the RTC.
- No incident occurred.

The Union submits the Company has engaged in the unreasonable application of the Efficiency Test policy and procedures, resulting in the excessive assessment of discipline. Furthermore, Mr. Ryan was not informed that the event would be recorded as an efficiency test failure, nor was he informed of a re-test or any results of a re-test.

The Union submits that Mr. Ryan was wrongfully held from service in connection with this matter, contrary to Article 39.06 of the Collective Agreement.

With respect to the Company's objections regarding:

- the bundling of disputes,
- the alleged vagueness of the Union's request that the grievor be made whole, the Union's position remains unchanged. The Union further considers this matter to be *res judicata*.

The Union requests that the discipline be removed in its entirety, and that Mr. Ryan be reinstated without loss of seniority and benefits and be 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 as outlined in the discipline letter was established following the fair and impartial investigation.

The Grievor was held from service in accordance with the provision of Consolidated Collective Agreement Article 39.06. The Union argues an unreasonable application of the Efficient Test Codes. Arbitrator Sims in CROA 4621 stated in this case that "The Union objects to the use of efficiency testing as a stepping stone to discipline. That is addressed above. I do not find this voids the discipline."

Regarding the Union's closing allegation that the discipline was unjustified, and unwarranted. The Company cannot agree with this allegation. Moreover, the Union supplied insufficient information in support of this allegation. It is not sufficient for the Union to simply state its position without supplying rationale, details or frankly any support for the allegations.

The Grievance handling procedure requires sufficient information to be included in the grievance to be able to properly identify the issue and basis for an allegation. The lack of pertinent information renders the Company unable to properly respond. The Company reserves the right to object should the Union attempt to supply any additional arguments in support of this unsubstantiated allegation.

Culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that Union describe. 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 foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:



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For: Dave Fulton

General Chairperson  
TCRC CTY West  
May 1, 2023

FOR THE COMPANY:



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Chris Clark

Manager Labour Relations  
CPKC Railway

**Hearing: By video conference. May 11, 2023**

**APPEARING FOR THE UNION:**

Ken Stuebing CaleyWray – Counsel  
Jason Hnatiuk TCRC – Vice General Chairman CTY West  
Doug Edward TCRC – Sr. Vice General Chairman CTY West  
Brad Wiszniak TCRC – Vice General Chairman CTY West  
Jeremy Quick TCRC – Local Chairman CT Division 320  
William Ryan – Grievor – Regina, SK

**APPEARING FOR THE COMPANY:**

Diana Zurbuchen, Manager Labour Relations  
Chris Clark, Manager Labour Relations

**AWARD OF THE ARBITRATOR**

**JURISDICTION**

[1] This is an Ad Hoc Expedited Arbitration pursuant 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 reviewed the documentary evidence and made final argument. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

**BACKGROUND**

[2] The Grievor, William Ryan, began his employment with Canadian Pacific Railway as a Conductor in the Regina Terminal on September 10, 2018. The Grievor had also worked in Moosejaw but was forced back to Regina. The Grievor was working as a Conductor based out of the home terminal of Port Coquitlam, BC at the time of his dismissal. The Grievor was working as Conductor for train V84-30 on April 30, 2021 at 14:00.

[3] On April 30, 2021, Mr. Ryan was working as the Conductor on the V84 Road Switcher. At approximately 15:00, Trainmaster Christopher Dalton was observing the crew traveling eastward out of the A-yard departing at Smith. Trainmaster Dalton provided a subsequent memo alleging that he observed Mr. Ryan inside the cab of the locomotive while the Brakeman walked ahead of the movement lining switches.

**POSITION OF THE PARTIES**

[4] The Company submits that while the Grievor began his movement properly positioned on the footboard of the Locomotive, he did not stay positioned on the point as required by operating rule. Instead, he chose to return inside the Locomotive cab when he was 2-3 car lengths from encountering his first switch. The Company maintains that the rules are to be followed to the letter.

They do not allow for every employee to decide how they are applied or for any deviation to the instruction. When asked if there was any reasons that would have prevented the Grievor from being on the footboard and in compliance with the rule, the Grievor admitted there was none.

[5] The Company submits that the Grievor is a short service employee working as a Conductor based out of the home terminal of Port Coquitlam, BC at the time of his dismissal. It says there is no dispute regarding the Grievor's familiarity with rules, regulations, and policies. The Grievor is conversant with all applicable Canadian Railway Operating Rules (CROR), Special Instructions, and General Operating Instructions. The Grievor's job was to perform the job safely and effectively. It is incumbent on the Conductor to know and understand the rules and regulations that govern safe railway operations. The Grievor's safety record demonstrates he failed at several aspects of his job, which lead to the safety infractions and resulting discipline.

[6] At the time of the assessment of 30 demerits, the Grievor had five active assessments of discipline on file. The Company maintains that if anything, the Grievor ought to have known his employment status was in jeopardy. The Company submits that it applied the principles of progressive discipline but he was also given multiple opportunities to change his behavior. The October 2020 "Warning Letter" reminding him that his employment was in jeopardy and the 30 demerits deferred in March 2021, for a previous operating rule violation meant nothing. The Company maintains that his conduct and approach to the rules, regulations and policies governing safe train operations were expected to be nothing less than impeccable. The Company maintains that while traveling in the yard and more specifically, the east end of A-Yard, the Grievor was positioned on the point, as required, where he was approximately within 10 car lengths from the first switch he was to encounter.

[7] The Company maintains that the Grievor attempted to explain that his reasoning for leaving his position on the footboard was to call the Rail Traffic Controller (RTC). CPKC says this of course was unnecessary. His options included using the handheld radio he was equipped with, have his locomotive Engineer call the RTC or better yet, wait for his movement to be stopped. He chose neither. Trainmaster Dalton provided a memo to confirm the Grievor was inside the locomotive cab when travelling over switches in the yard.

[8] The Company submits that it introduced the requirement for employees to remain on the footboard of the locomotive while travelling in yards and industry tracks to reduce the run through switch incidents. The bulletin that it does not say employees "should" be positioned on the footboard, it states they "must". CPKC says that in an effort to dismiss and diminish his failure to follow the rule, the Grievor explained that he waited to observe his brakeman line and confirm the switch prior to leaving the footboard and head into the cab of the locomotive. The Company maintains that not only is there no exception in the rule which allows you to leave the locomotive footboard prior to occupying a switch, it would also not be the first time a brakeman lined a switch incorrectly. The rule is designed to eliminate any chance of an error or incident.

[9] The Company maintains that it can see no mitigating factors which prevented the Company from assessing discipline for the Grievor's actions. An alleged rule violation observed through the course of an efficiency test remains a rule violation. The manner in which an alleged rule violation is observed does not change the fact that the rule was alleged to have been violated. Arbitral jurisprudence has clearly held that the assessment of discipline for a rule violation identified through the efficiency testing procedure does not void the discipline assessed.

[10] In this case the Grievor was aware that his job was in jeopardy for previous rule violations when he committed this violation. The threshold for dismissal is 60 demerits, the Grievor's employment was in jeopardy with 70 demerits on record, 30 of which were deferred. The Company maintains that the Grievor's actions vaulted him well past the threshold for dismissal.

The Grievor could have easily been dismissed as a result of his March 2021 incident yet it chose to defer the demerits, giving the Grievor an opportunity to salvage his employment.

[11] The Union maintains that the bulk of all assessments of discipline on the Grievor's file to this point were each for relatively minor operational infractions. The instant dispute is rooted in an efficiency test and has been previously deemed worthy of much lesser penalties.

[12] On April 30, 2021, Mr. Ryan was working as the Conductor on the V84 Road Switcher. At approximately 15:00, Trainmaster Christopher Dalton was observing the crew traveling eastward out of the A-yard departing at Smith. Trainmaster Dalton provided a subsequent memo alleging that he observed Mr. Ryan inside the cab of the locomotive while the Brakeman walked ahead of the movement lining switches. The Union argues that Trainmaster Dalton did not speak to Mr. Ryan at the time of his purported observation. Instead, Mr. Dalton delayed his contact until the end of Mr. Ryan's shift, approximately 22:25, more than 7 hours later. Trainmaster Dalton did not advise Mr. Ryan of a re-test.

[13] The Union submits that Mr. Ryan was subjected to a re-test at 22:12 that same day by Trainmaster Harapiak, and passed. Mr. Harapiak notes that Mr. Ryan was, observed riding footboard into the yard while working V84. Given this pass on a re-test, which was performed prior to Mr. Ryan even being advised of the alleged exception, the Union argues that it is difficult to conceive on what basis formal discipline could be warranted for an efficiency test exception.

[14] Conductor Ryan received a Notice to Appear for a formal investigation, in connection with allegedly not riding the footboard in accordance with Bulletin BCO-009/17 during his tour of duty on the V84-30 on April 30, 2021. In addition the Union submits that locomotives don't have footboards. The Union argues that it is telling that the Company's notice to appear based an efficiency test, is founded on a fundamental inaccuracy. I agree with the Company that at CPKC, the platform on which employees stand on the front of the locomotive is generally recognised and referred to as a footboard. Like the Company, I am unaware of this terminology ever being an issue previously.

[15] The Company agrees with the Union's statement that the bulk of all assessments were a result of operational infractions. However, while the Union calls them minor, CPKC maintains that they warrant discipline nonetheless. It maintains that viewed against the backdrop of the Grievor's short career with the Company he has demonstrates an inability to do the job safely. The Company argues that following the incident the Grievor was withheld from service because there is no question the Grievor's employment was in jeopardy as a result of his active discipline record. The Union argues that this is not the applicable threshold. It says Article 39.06 only permits an employee to be held from service if the nature of the alleged offence is of itself such that it places doubt on his continued employment. The Union argues that the circumstances of this efficiency test could be considered in and of itself dismissible. On this issue I find the Company's position troubling given the facts and circumstances.

[16] The Company recognizes that the Grievor is a short service Employee. To maintain employment with he has relocated and worked in Regina, Moosejaw and Vancouver. I agree that rules in a safety critical workplace such as the railway are not optional. However, moving from terminal to terminal in a short period can put pressure on an employee in a new location while performing multiple tasks during a movement. While this does not relieve responsibility it should be considered with other factors. In this case the Company says the Grievor demonstrated an inability to do the job safely.

[17] The Union argues that in this case the Grievor violated the rule on April 30, 2019. The Grievor was not removed from service until May 14. It was not brought to his attention to ensure he did not repeat it during his shift. He continued to work for 7 hours. In that time he was retested

and passed. Trainmaster Dalton did not speak to Mr. Ryan at the time of his observation. These facts were known to the Company at the time of the investigation and when a decision to assess discipline was made.

[18] The Company argues that these facts are only becoming important now that the dispute is in its final stage. The Grievor nor his Union representative never raised this issue or any objection at all. The only time it was referenced by the Union was in their Step 1 grievance when they mention as part of the “facts of the case” that the Grievor was addressed at the end of his shift.

[19] The Company maintains that not speaking to the employee at the end of his tour of duty is not a mitigating factor in these circumstances. The Grievor violated a rule and simply because he was addressed later in his tour of duty does not negate the rule violation. I agree that it does not negate a rule violation and that the expectation is that employees follow all the rules, all the time, in order to maintain a safe working environment. I also agree with the importance of rule compliance and e-testing to enhance, educate, coach and in some cases discipline employees. However, ensuring the integrity of e-testing, investigations and the grievance process is also necessary. The Company cannot allow an employee to continue working after it knew he violated a rule and did not bring the violation to his attention and then say the violation was so serious that he was properly removed from service, disciplined and dismissed.

[20] Arbitrator Moreau addressed the importance of e-testing in Ad Hoc 695 which is rooted in Transport Canada’s Safety Management System Industry Guidelines stating:

Proficiency testing of employees (or Efficiency tests) is rooted in Transport Canada’s Safety Management System Industry Guideline. It is a tool used to evaluate an employee’s compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action. From the Company’s perspective, the corrective action can take the form of verbal counselling through to disciplinary action.

[21] I also find the comments of Arbitrator Sims in CROA Case No. 4621 worth noting:

To the extent it might be assumed that this licenses formal discipline any time an efficiency test is failed, any such assumption would be wrong. The exception should not replace the rule, and 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] In this case the Company chose to discipline and dismiss the Grievor while failing to:

- Bring the violation to the attention of the Grievor in a reasonable time
- Take immediate corrective action or provide verbal counselling or coaching
- Consider issues raised or apparent during the investigation and grievance process
- Consider obvious mitigating factors

[23] In addition, I find no evidence that this Grievor intended to violate the rule.

[24] I believe Unions, employees and arbitrators can accept reasonable good faith errors in the enforcement and investigations of rule violations. Companies that sanction their own errors or unfairness may create harm for the system and safety. Procedural oversight is also necessary to deter Company officers as well as employees from making errors and to maintain the integrity of the system.

[25] I find this is a case in which coaching or a warning may have had a positive impact on the entire workforce if the error had been brought to the attention of the short service Grievor immediately.

[26] In view of the foregoing the grievance is allowed in part. The Grievor's discipline will be changed to that of a warning.

[27] I remain seized with respect to the application and interpretation of this award.

Dated at Niagara-on-the Lake, this 29<sup>th</sup> day of August, 2023.

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

Tom Hodges

Arbitrator