CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4317

Heard in Edmonton June 11, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of discipline and discharge to Conductor Murray Douglas.

UNION'S EXPARTESTATEMENT OF ISSUE:

On August 7, 2013, following an investigation, Conductor Douglas was assessed 45 demerit points for "Conduct Unbecoming an employee as evidenced by your actions contributing to the delay of train 201-21 at Boston Bar and for your failure to take necessary measures to mitigate the delay resulting in significant and considerable disruption to the Company's operation, the operation of a foreign railway, and disruption to the expeditious transportation of customer traffic, while employed as a Conductor at Boston Bar on July 24th, 2013." He was subsequently terminated for accumulation of demerits.

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 Conductor Douglas be made whole.

It is further the Union's position that there is no just cause for the assessment of demerits and discharge to Conductor Douglas and that the discipline is excessive and unwarranted in all of the circumstances. The Union considers the assessment of discipline and discharge particularly egregious given the context of Mr. Douglas' goodfaith efforts to ensure that the train was able to proceed safely in accordance with operating rules and regulations.

The Union requests that the discipline be removed in its entirety and that the Grievor be made whole for all lost earnings with interest and reinstated with full seniority and benefits. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions and denies the Union's request

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. Fulton	(SGD.)
Vice General Chairman	

There appeared on behalf of the Company:

D. Burke	– Manager Labour Relations, Calgary
D. Guerin	– Director Labour Relations, Calgary
M. Jackson	– Superintendent Mountain Region

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
D. Fulton	– Vice General Chairman CTY, Calgary
J. Hwatiuk	– Local Chairman, Coquitlam
D. Able	– General Chairman LE, Calgary
G. Edwards	– Vice General Chairman LE, Calgary
H. Makoski	– Vice General Chairman LE, Winnipeg
M. Douglas	– Grievor, Coquitlam

AWARD OF THE ARBITRATOR

At issue is the Company's assessment of 45 demerit marks against Conductor Murray Douglas ("the grievor") and his discharge on August 7, 2013 for an accumulation of demerits as set out in the JSI reproduced above.

The Incident

On July 24, 2013, the grievor and Locomotive Engineer Hanson ("LE Hanson") taxied across the Fraser River from the away-from-home terminal of North Bend to Boston Bar. They had been on duty just over 40 minutes and were in position at Boston Bar upon the arrival of their train - Train 201-21 - at 11:58 hours. After performing a personal transfer with the incoming crew, the train pulled westward. Before the train had progressed more than the distance of 10 car lengths, the grievor noticed what he believed was incomplete information on the Crew-to-Crew form ("the form"). The grievorinstructed LE Hanson to stop the train before leaving Boston Bar.

The information – or rather, the lack of information - on the form about which the grievor was concerned pertained to a 37 car lift at Golden.

The problem with the form, as perceived by the grievor, was as follows. Conductor Maltais,the conductor on the train four stations before Boston Bar, had completed the form with respect to the lift at Golden. Under the section “Equipment Lifted/Set off enroute “Brake Test Results”/ Number of cars “cut-out” or all “OK” (Run Through)”, Conductor Maltaishad indicated that 9 cars had been set off and that 37 were lifted. He also makes reference to the names of two carmenhe understood had performed the brake test and writes “100%” and “all OK”. Worth noting, however, is that the only two other lifts referenced on the form – both made before the lift at Golden - at Keith and Exshaw, also indicate the time, date and type of brake test performed in the same section of the form.

In these circumstances the grievor decided to contact the RTC because he thought the form was incomplete. He did so at 12:20 hours. The grievor conveyed that the date, time,and type of brake test werenot indicated on the form, as he then thought was required. The RTC told the grievor that he would get back to him.

Several calls ensued: the Trainmaster in Kamloops (Trainmaster McCutchon) received a call from the Vancouver Chief of Train Dispatching, who then followed up with Conductor Critchon from the incoming crew to Boston Bar, who in turn called the grievor. Conductor Critchontold the grievor that the information from the Golden lift was

sufficient but the grievor disagreed. The grievor told Conductor Crichton that perhaps he should consult the GOI for lifts enroute.

The grievor did not consult the GOI, even though the three previous crews had been satisfied with the information pertaining to the lift at Golden as set out on the form.

The relevant portions of the applicable GOI are as follows:

> **Section 13 Item 17.2 Updating the Train Brake Status**
>
> Prior to arriving at each crew change point or terminal enroute, the conductor must update part 5 of the Crew-to-Crew Form, (see example) indicating the date, conductor's name, train ID, name of the crew change point or terminal, number of cars on the train, "OK" or any exceptions noted.
>
> The originating crew who has recorded the results of the No1 or No1A brake test, in the Grey Box, is also required to record brake status when the train arrives at the next crew change point or terminal. All other crews must ensure break status is updated and recorded, as per example below, prior to delivery at the next crew change point or terminal, regardless if any changes have occurred.
> ….
>
> Q: If the Train Brake Status information in the Grey Box is missing, however the previous crew(s) have entered the break status information in the non-shaded area of part 5, is it permissible to depart with this information?
>
> A: Yes, it is permissible to depart. In this case you would contact the RTC or the Central Locomotive Specialist and confirm that the initial brake test information is available and make a notation in the Grey Box. As stated above the CLS will not provide the information of the initial test, as they cannot account for the cars that may have been lifted or set off enroute, but they can confirm that the information is available.

Summary Bulletin BCO-002/13 ("SO") explains that when working on a train that is required to make a lift or a set off enroute, the lifts and set off and brake information are to be indicated on the form as set out in the example provided. The example is challenging to reproduce in this award. However, no date is required as the lift date is

already indicated to the left of the portion of the form at issue, nor is the time for the brake test indicated on the example. The type of brake test is indicated as either a No.1A or No.1 for the two stations in the SO example where lifts were performed. Notwithstanding the example, where 2 carmen perform a brake test, it is commonly known that the test performed is a No.1 brake test.

In any event, at 13:00 hours, the RTC got back to the grievor with brake information. Within minutes, the grievor realized that the information the RTC hadjust relayed to himcould not have been for Train 201-21. He called the RTC back. The RTC said that he did not have time to deal with the grievor since the RTC did not know where the information had come from. The RTC suggested to the grievor that if he wanted to follow up he should do so with the Vancouver Chief or the Trainmaster.

The grievor then made his way back to the North Bend terminal. It was not until approximately 13:51 hours that the grievorcalled the Vancouver Chief andexplained the apparent mistake. By the time Trainmaster McCutcheon was able to follow up and get back to him it was just after 14:00 hours. The information relayed by Trainmaster McCutcheon to the grievor was that the brake test performed at Golden was for 55 + cars when only 37 were lifted. The grievor then made his way back to Train 201-21 at Boston Bar. Train201-21 left Boston Bar at 14:45 hours, delayed approximately 2 hours and 15 minutes.

On the second day of the grievor's formal investigative statement, August 3, 2013, the grievor gave a detailed explanation about why he had not reviewed the GOIprior to his initial contact with the RTC on July 24, 2013. By this point in the investigation the grievor had already acknowledged that neither the date nor time of the brake test performed were requirements under the GOI. Neither is the brake test type, according to the GOI.

The grievormaintained, however,that the type of brake test was missing by referencing the SO example.

The grievor's explanation for not reviewing the GOI was that he had just experienced an "identical situation" on Train 101-14 on July 18, 2013. The grievor went on in great detail about the circumstances concerning the delay of that train, including specifics ofthe praise he says he received from persons who met him at that train's end terminal in Coquitlam.

A review of the form for Train 101-14 reveals the circumstances pertaining to that train were markedly different than Train 201-21. In that case, at the initial terminal, Vaughan, the Grey Box was not completed and the crew had also failed to record the brake status prior to delivery at the next crew change point or terminal through to Boston Bar. The train effectively ran coast to coast without any brake information until the grievor identified the issue and shared the concern with the Chief in Calgary. There

is no question that Train 101-14 could not depart as provided for in the GOIwithout the information pertaining to a No.1 test at Vaughan having been performed.

A transcript from a conversation between the Chief and the grievor from Train 101-14 does reveal that in addition to raising the fact that there was no brake information from Vaughan through to Boston Bar, the grievor had also asked the Chief about the brake type information from the Shepherd lift enroute. The grievor departed from Boston Bar, however,without that information once he had the No.1 brake test information from Vaughan.

The grievor also recounted that upon arrival at Coquitlam, he received praise from Superintendent Sewell including “good catch good job” and that Superintendent Sewell had said, with respect to the Shepherd Yard lift that: “even that information is questionable.”Also, according to the grievor, a company representative, Mr. Bonanno told the grievor that the Chief in Calgary told him that he [the grievor] “is 100% correct until he has the required information he cannot leave Boston Bar and to get Conductor Douglas what is required and requested.”

Once the grievor had provided his lengthy explanation to the investigating officerand after an almost two hour lunch break, the investigation resumed at 14:38 hours. At 15:00 hour the investigating officer noticed the grievor texting. He asked him about the identity of the person with whom the grievor was texting. The grievor became infuriated, stood up and said "you knew I was having marital problems, I was texting my

wife, I am done." He then left the building. The investigation was adjourned and the grievor returned at 18:00 hours so that the investigation could be completed.

Shortly after the resumption of the investigation, the investigating officer presented an email from Superintendent Sewell, which indicated that the grievor was commended for having picked up that Train 101-14 had run from coast to coast with no brake status information. The investigating officer then stated:

> Mr. Sewell would like it entered by the investigating officer into the investigation that he refutes Mr. Douglas's answer to question 61. On a phone conversation with the investigating officer and Mr. Sewell, he stated that he saw Mr. Douglas and discussed 101 – 14 missing brake test information and his comments were strictly about the initial terminal at Vaughan. Murray indicated Shepherd yard lift was questionable not him and that Murray indicated the information out of Shepherd yard was sufficient and departed Boston Bar.

At that point, it was 20:30 hours. The grievor informed the investigating officer that he was "done" and that he was going home. The investigating officer instructed the grievor to stay as the investigation was almost complete. He told the grievor that if he left, he would be considered to have abandoned the investigation. The grievor's union representative called Superintendent Sewell and told him that the grievor was unable to continue with the investigation due to medical reasons.

After providing the grievor one additional opportunity to complete the investigation, and the grievor declined, the investigator closed the investigation. The Union made the objection the grievor had not abandoned the investigation but was unable to continue due to medical reasons.

By letter dated August 4, 2013, the grievor's psychologist wrote to the Company. He had spoken to the grievor by telephone on August 3,2013 and met with him on August 4, 2013. The psychologist's opinion was that the grievor was "medically unfit" to continue with the investigation on August 3, 2013 and remained unfit as of August 4, 2013.

Decision

I turn first to consider the preliminary issue of whether the grievor received a fair and impartial investigation.

The Union argues that that by refusing to stop the investigation and adjourn, which would not have prejudiced the Company, it failed to provide a fair and impartial investigation contrary to articles 70.03 and 70.04 of the collective agreement. The investigator had been told that the grievor was not able to continue with the investigation due to "medical reasons." In considering the grievor to have abandonedthe investigation, the Union asserts bias, and it points out that the grievor had been in attendance since 09:30 hours when the investigative officer knew the grievor to be undergoing marital difficulties.

The Union also raises the concern that the memoranda from managers used by the Company in the investigation were unsigned and that certain questions asked of the grievor during the investigation, specifically those which asked him to explain what he understood Conductor Maltais' brake information to mean and those about his sharing

information about conversations he allegedly had upon arrival at Coquitlam on Train 104-14,to be aggressive and badgering.

Articles 70.03 and 70.04provide as follows:

> 70.03If the employee is involved with responsibility in a disciplinary offense, 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.
>
> 70.04 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…

I have reviewed the cases provided to me in support of the Union's submission. **CROA 3102** addresses the denial of an adjournment request when several requests had been made in the last hours of an 11-hour process. Though Arbitrator Picher expressed that a long process could taint the process from the standpoint of fairness, he did not find that to be the case on the facts before him.

In **AH 595**, Arbitrator Picher declared one of the five instances of discipline against the grievor void *ad initio*, when the grievor had no union representation during the investigation. The Company denied the Union's request for an adjournment when a representative would have been available three days later.

In **SHP 371**, where Arbitrator Picher explained the two-fold purpose of rule 82:

> ... The procedures under that rule have a two-fold purpose which involves a balancing of the interests of the Company and of the employee. On the one hand, the Company is to have an opportunity to question the employee who is the subject of the investigation, prior to making a decision with respect to the possible assessment of discipline. On the other hand, it provides to the

> employee, and his union, a minimum degree of due process, whereby the employee has at least one day's notice of the investigation and the matter to be investigated, the assistance of an authorized representative of the Union and, if requested, copies of all pertinent statements, reports and other evidence in the possession of the investigation officer which may be used against the employee. The right to a fair and impartial investigation implies that the employee be afforded the opportunity to respond to the statements or evidence in the possession of the Company, and be given the opportunity to make a full answer and explanation.
>
> The process so contemplated is not a trial nor a hearing which must conform in all respects with judicial or quasi-judicial standards. It is, rather, an information gathering process fashioned, in accordance with the requirements of the collective agreement, to give the employee the opportunity to know the information gathered, and to add to that information before any decision is taken with respect to the assessment of discipline.

In CROA 2934, among several violations found by Arbitrator Picher in that case, the investigator had repeatedly called the grievor a liar during the course of his investigation, and at one point threatened to continue until midnight to obtain the answers he wanted.

Finally, in **CROA 4139** in the context of an investigation about the grievor's reporting of an alleged injury, the investigationextended over some 14 days and involved 420 questions. In that caseArbitrator Picher characterized the case as an exceptional one where the nature of the questions put to the grievor were "patently irrelevant" and infused with a tone of accusation and disbelief.

Each case must be assessed on its own unique circumstances. Having carefully reviewed the record of the investigation before me, I am of the view that in deciding to consider the grievor to have abandoned the investigation, and in closing it in the

circumstances described above, the grievor was still provided with a fair and impartial investigation contemplated by article 70.04 reproduced above.

The investigation was almost complete at 20:30 hours on August 3, 2013. Most significantly the grievor had been afforded an opportunity to respond to the statements and evidence in the possession of the Company. He was provided with a full opportunity to provide all the information he thought relevant to circumstances related to Train 201-21's delay. The grievor availed himself of that opportunity.

The 11-hour investigation commencing at 15:00 hours and ending at 02:00 hours in **CROA 3102,** where three adjournment requests were denied, was characterized as "relatively long." In that case there had been several adjournments and other witnesses involved. In the case before me,while the investigation started at 09:30 hours, by 20:30 hours, when the grievor was "done" for the second time, the investigation had in fact only been in session for approximately 5 hours. For the remaining time, the investigation had been stood down.

The three-hour adjournment just after the almost two hour lunch break, combined with the investigator permitting the grievor to have his cell phone on suggests that the investigating officergave due consideration to the grievor's challenging personal circumstances.

I am not persuaded that the investigator was biased in coming to the conclusion that the grievor had abandoned the investigation. The transcript of the whole of the grievor's explanation reveals a pattern of conduct, whereby the grievor essentially sought to avoidand deflect,to the extent that he could, proper questions, which he had difficulty answering. While the grievor was permitted to go on in detail and at length without interruption, close scrutiny of the information the grievor provided during the course of the investigation suggests it wassuspect, and appropriately probed by the investigating officer, with numerous interruptions by way of objections by the Union.

After the grievor had an almost two hour lunch break before resuming the investigation at 14:38 hours,he walked out of the investigation at 15:00 hours. He did so when he was being asked difficult – not improper – questions that naturally arose from the very detailed – what I would describe as a "scripted" - account of what transpired with respect to Train 101-14 on July 18, 2013.

At 20:30 hours the grievor refused to continue with the investigation for a second time when the Company showed to him Superintendent Sewell's email confirming that the issue with Train 101-14 was that the train had gone from coast to coast without any brake information.

Throughout the investigative process, the grievor had competent representation. I am of the view that the grievor left the investigation – abandoned it – because it was becoming increasingly difficult for him to maintain a position that would have him

entirely justify his conduct in connection with Train 201-21's delay. He may also have been too psychologically fragile to continue, and that may well have contributed to his decision to cease participating in the investigation but, regardless of the grievor's psychological state, he had been given every opportunity to answer the Company's information, and he provided a full answer and explanation for this conduct, albeit an answer and explanation that was far from convincing. In making its decision with respect to its assessment of discipline on the information before it at that point I am therefore unable to sustain the Union's allegation that the grievor was denied a fair and impartial investigation.

I now turn to consider whether there was any cause for discipline in the circumstances and if so, whether it was excessive.

Merits

The Company defends its assessment of 45 demerits against the grievorbecause it asserts that in choosing to stop the train and contact the RTC – which resulted in the unfolding of events as described above – he engaged in deliberate conductthat resulted in a significant delay to Train 201-2-21. The Company further characterizes the grievor's conduct as his having "refused" to depart Boston Bar.

The grievor maintained throughout the investigation and at the hearing that he was legitimately concerned about the incomplete form pertaining to the lift at Golden on Train 201-21. The Union asserts that in conducting himself as he did, the grievor was

trying to comply with the rules and operate safely. I am unable to find that that was the case. Had the grievor been truly conscientioushe would have taken care to consult the GOI, and to make himself familiar with the rules he professes he was trying to uphold. His deliberate and wrong-headed actions led to a significant and entirely avoidable train delay.

Even if the grievor's articulated concerns at the time were honestly held and reasonable – and they were most certainly not the latter – Train 201-21 should have departed without delay, in any event.There is no question that according to the GOI, the train couldhave departed notwithstanding the missing information on the form. The circumstances of Train 201-21 on July 24, 2013, were markedly different from those pertaining to Train 101-14, on July 18, 2013.

The grievor's articulated view that the situation on Train 101-14 was "almost identical" to Train-201 is untenable. Even on the grievor's account of what transpired with respect to Train 101-14, the grievor left the station on July 18, 2013 without the information he maintained he required on July 24, 2013, before leaving on Train 201-21.

The grievor's investigative interview reveals a less than believable attempt to defend a course of action that was unjustifiable.

The whole of the record leads me to conclude that the grievor was well aware, by the time he attended for his formal investigation, that he had made a mistake – from

which significant consequences flowed - when he took the course of action he did on July 24, 2013. Rather than acknowledge that to have been the case, he attempted to undermine the investigation providing less than candid explanations for his misguided conduct.

One such example was that the grievor said that he had shared with LE Hanson his experience on train 101-14 and that for that reason he would need to speak with the RTC. LE Hanson's statement did not corroborate the grievor's having told him that that was the reason the grievor needed to contact the RTC.

Another example, was when the Company asked the grievor to acknowledge that according to the information on the form as recorded by Conductor Maltais at the Golden lift, the brake test results was "100%." The grievor would not acknowledge that which was clearly in front of him. Instead, the grievor attempted to avoid the question and said that the use of "100%" said nothing about the brakes. When the investigating officer quite appropriately followed up in an attempt to get a straight answer, and over the objection of the Union that the investigative officer was badgering the grievor, he then provided the following response:

> Although section 5 of the Crew-to-Crew form does not reference "100%" as an acceptable way to record the results of the brake test, it has been used on occasion to indicate all brakes are working. I feel this is slang terminology and is not used in the GOI, SOB or on the Crew-to-Crew form when referencing recording the results of the applicable brake test.

The above was less than convincing. Moreover, the record demonstrated that the grievor himself had repeatedly used similar "slang terminology." To suggest that

“100%”is used “on occasion” to indicate all brakes are working is more than an understatement. Then, when the Company put to the grievor that he had very recently assessed “100% ok” as sufficient to depart, which he agreed was essentially the same as Conductor Maltias had done, the grievor said that he was unable to understand how he had missed picking up that it was insufficient.

The grievor was unwilling to concede that he had made a significant error, relying instead on the example from the SO, in an attempt to leverage a substantively meaningless difference between the form and the SO to justify his actions.

On this latter point, throughout the investigation and at the hearing, the grievor continued to assert that somehow the form required the type of brake test performed. Had the grievor given due consideration to all of the information referenced onthe form itself – he would have realized that he had the information about the brake type test he sought – since he knew that two carmen had performed it. Instead, the grievor chose torely on the two other lifts referenced on the form for Train 201-21 for guidance as to what was sufficient. He then made the further mistake of proceeding to contact the RTC as he had in the markedly different circumstances of Train 101-14.

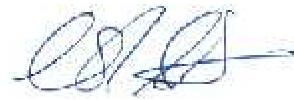
Notwithstanding the above, I am unable to come to the conclusion that the grievor’s conduct can properly characterized as “refusing to depart.” His conduct was, however, deliberate, in that he chose consciously to proceed in the misguided manner that he did. In the face of three other crews who deemed the information pertaining to

the Golden lift to be sufficient, the grievor obnoxiously told Conductor Crichtonthat he should have consulted the GOI. Had the grievor considered taking his own advice, the entire situation could have been avoided. In these circumstances, the grievor's actions warranted a significant disciplinary response by the Company.

At the time of the incident the grievor's record stood at 50 demerit marks. The grievor had 26 years of service. His disciplinary record is properly characterized as abysmal. The Company has twice before dismissed (and reinstated) the grievor: once in 2000 for an accumulation of demerits and more recently in 2010 following two incidents of insubordination.

I am inclined to view the Company's assessment of 45 demerit marks as excessive in all the circumstances. However, I would have to reduce the penalty to less than 10 demerit marks in order to reinstate the grievor under the Browne system of discipline. It would be entirely inappropriate for me to consider such a significant reduction in this case.

For the foregoing reasons, the grievance is dismissed.



June 27, 2014

CHRISTINE SCHMIDT

ARBITRATOR