

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4471**

Heard in Calgary, June 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of discharge of Locomotive Engineer J. Harris of Smiths Falls, ON.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on June 26, 2015, Locomotive Engineer Harris was dismissed for "Failing to properly secure your train at the Expressway Terminal, mile 26.5 Galt Subdivision, causing unattended movement a violation of GOI Section 4 item 1, CROR Rule 106,112, CROR General Notice, CROR General Rule A (i), (iii), (vi), (viii) and (x), CROR General Rule C (i), while working as Locomotive Engineer on train 133-22 on June 22, 2015."

The Union contends that Locomotive Engineer Harris' dismissal is unwarranted and excessive in all of the circumstances.

The Union requests that Locomotive Engineer Harris 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.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) J. Campbell
Vice General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

L. Smeltzer	– Labour Relations Officer, Calgary
C. Clark	– Labour Relations Manager, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Campbell	– General Chairman, Peterborough
J. Harris	– Grievor, Perth

AWARD OF THE ARBITRATOR

This arbitration concerns the discharge of Locomotive Engineer John Harris, on July 6th, 2015, for failing to properly secure his train, causing unintended movement in a terminal.

At the time of dismissal, the Grievor had been with the Company for twenty-eight years and had no active demerits. During this time, he accumulated a total of 115 demerits because of various violations. The grievor violated safety rules during the course of his career, including: failure to report an incident in a timely manner and failing to protect a dangerous situation (2013), failed to advise the RTC that his train would be left on the main track (2003), failed to secure equipment causing a derailment (1992), failed to properly display his headlight while working as an engineman trainee (1991) and failure to wear the proper safety footwear while on duty (1990). The Grievor also received demerits for aggressive behavior on three different occasions and for two instances of absenteeism.

The day of the incident, June 22, 2015, Mr. Harris was working as a Locomotive Engineer on train 133-22 from Smith Falls, ON to the Expressway Terminal Mile 26.5 on the Galt Subdivision. Accompanying him was Conductor Brian Mitchell.

After reaching the Expressway Terminal at around five in the morning, the two men were required to spot cars at specific locations. The terminal consists of two private tracks

which are used for the loading and unloading of cars. Mr. Harris and his colleague were to spot cars leaving these roadways for travel.

Upon reaching the Terminal, they received a restricting signal which regulated their speed and manoeuvres in the Terminal. Amongst others, these Expressway Terminal-specific restrictions state that equipment must be secured by two handbrakes. This is to ensure the safety of the CP and Expressway employees as well as the public.

Conductor Mitchell and the Grievor, after receiving their yarding instructions from an Expressway employee, proceeded with their task: Mr. Mitchell provided instructions to Mr. Harris by counting down to spot the cars. To prevent the train from overshooting the spot location, the Grievor applied the automatic brake. Every time, Conductor Mitchell requested and obtained three points protection, applied hand brakes and asked the Grievor to test their effectiveness by asking him to slack back. On each occasion, Mr. Mitchell communicated “good brakes” to Mr. Harris, who uncoupled the train from the cars he had just spotted, leaving both emergency and hand brakes applied.

Upon the completion of the train’s yarding, the two men concluded their shift and went off. Subsequently, Mechanical Services employees performed an inbound inspection of the cars spotted by the Grievor and his co-worker during which they applied air to cars 2001, 2008 and 2040. This effectively releases the air brakes that were left applied during the uncoupling.

The Mechanical employees then left the cars and went to the East end of Track 1 to complete a locomotive brake and SBU test. When they returned to the above-mentioned cars, they had moved approximately forty feet of their initial position. Upon inspection, they found out that only one hand brake had been applied, as opposed to the mandated two handbrakes specified in Time Table instruction.

The investigation of the incident showed that the automatic minimum brake had been applied throughout the yarding process, including during the testing of the handbrakes. That, along with the fact that he did not check the veracity of Conductor Mitchell's claims that the brakes were good, was later confirmed by the Grievor during questioning following the incident. Both employees were dismissed after the incident.

CRO Rule 112 mandates that equipment left unattended must be secured with a sufficient number of hand brakes to ensure that they alone can hold the equipment in place. It is a rule of the utmost importance, as trains moving autonomously can cause catastrophic damage to employees, the public and/or the environment. Furthermore, CRO Rule 112 (g) requires that an employee who secured equipment must confirm with another employee the manner in which it was secured.

General Operating Instructions, section 4 (Hand Brakes – Leaving Equipment) provides that when employees test for the handbrakes effectiveness, they must release all air brakes and allow or cause the slack to adjust. Failing to release airbrakes can give the false impression that the handbrakes alone will be able to hold the equipment in place.

Furthermore, the Galt Subdivision Time Table, which the Grievor had to consult, also specified that two handbrakes were mandatory in order to ensure equipment would not move on its own volition.

CRO General Rule C (i), bullet 3, stipulates that employees must be vigilant to avoid risks of injuries for themselves or others. As such, they are responsible to make verbal communication with their coworkers to ensure, that handbrakes are properly applied. CRO Rule 106 – Crew Responsibilities – states that *all* crew members are responsible for the safe operation of movement and equipment under their charge.

It is not disputed that the Grievor violated several rules by failing to properly communicate with his co-worker regarding the number of handbrakes applied and by testing handbrake effectiveness while still having the air brakes applied. He also should have made sure that Conductor Mitchell's work was in order and safe.

While, fortunately, no one was injured during the incident and no damage was caused, the importance of properly securing equipment remains of utmost importance. The potential consequences are high, as was highlighted in the tragic Lac Megantic disaster, where the improper testing of handbrakes – with air brakes still applied – was one cause of the event.

The Grievor's position, a Locomotive Engineer, is classified as safety critical, because of the grave consequences that can result from potential errors or negligence. In these circumstances, it is critical that the Company encourages a culture of safety which includes deterring other employees from committing the same kind of faults. Brown and Beatty note that:

"With others, such as safety violations, misuse of alcohol and drugs, sabotage, theft, and other acts of dishonesty where the probability of apprehension is low, arbitrators have accepted the employer's legitimate interest in deterring such behavior as a legitimate basis on which to uphold more severe sanctions."¹

In **CROA&DR 3900**, Arbitrator Picher illustrated the complexity and danger of the railway system, where trains pass through environmentally sensitive countryside and densely populated areas. He underlined the importance of the risks associated with such an intricate system where an innumerable number of rules exist.

In a similar case of miscommunication, Arbitrator Picher explained that:

"[...] the carelessness of Conductor Stockford in making no real attempt to secure the flat car with a hand brake, was compounded by the grievor's obvious failure to verify that he had done so, [...] The Arbitrator is not impressed by the grievor's account that he assumed his Conductor had secured the car with the hand brake."²

I agree with the Company's assessment of the importance of safety rules for the train industry, especially in regards to proper brake testing of equipment left unattended; it is a laudable objective and should be encouraged. However, one must examine the jurisprudence to determine whether or not the Grievor's dismissal was appropriate.

¹ Section 7:4500

² CROA&DR 4171

In **CROA&DR 4341**, October 2014, Arbitrator Schmidt reduced the grievor's penalty to twenty demerits from forty. The Grievor's failing to secure cars while switching (violation of CROR rules 112, 106, among others) resulted in a side collision and derailment in the Kamloops yard. His disciplinary record showed ten demerits at the time of the incident and had received thirty more in August 2011. He had been with the company for twenty-five years. The Arbitrator's decision was mainly based on the disparity of responsibility between the grievor and his co-worker:

Having regard to what I see as a significant disparity in culpability for the rules violations between Conductor Clow and the grievor in the factual circumstances of this case, and considering the entirety of the grievor's record, I direct that the 40 demerits imposed by the Company be substituted with 20 demerits.

In **CROA&DR 4384**, March 2015, the grievor, which had been with the Company for thirty years, had failed to test the effectiveness of the hand brake while switching cars in the yard, resulting in a contact between two cars. The termination was replaced by a seven day suspension. Similar to the present case, the Company invoked the doctrine of the culminating incident: the grievor stood at fifteen active demerits and served a suspension after being reinstated following a discharge the year before. Arbitrator Silverman took into account the relatively light discipline record of the grievor over his career and stated, more emphatically, that "the discharge of a thirty-year employee in these circumstances was not warranted".

The Union also submitted four other cases of similar rules violation where the penalty range was between twenty and thirty demerits or a suspension of twenty days. While these decisions shine light on mitigating and aggravating factors for similar offences, they do not represent the case at bar as well as the two previous cases cited that involved the very same rules violations. It is worth briefly summarizing them nonetheless.

In **CROA&DR 3166**, November 2000, a long service employee had failed to secure standing equipment, which caused the derailment of a car, causing minor damage. Arbitrator Picher reduced the forty day suspension to twenty days, considering the relatively good record of the grievor regarding safety rules. The grievor had forty-five standing demerits, due to time keeping and non-availability for duty - the reduction was conditional on his acceptance of keeping a better record.

In **CROA&DR 3253**, May 2002, the grievor, a thirty-year experience Locomotive Engineer, was involved in a head collision and a derailment. Arbitrator Picher reduced the forty-five day suspension to twenty days because the cause of the accident was shared and the grievor had committed no violations of this type in the past. There were also mitigating factors that reduced the employees' responsibility for the accident since he was not directly responsible and it was only the second discipline of his career.

The Union further submitted two decisions, **CROA&DR 2588** and **CROA&DR 2915**, which both involve similar violations. The former concerns the entrance in limits of

a coworker, in which the grievor was distracted by activity in the cabin while maneuvering in a difficult section, factors that the arbitrator considered mitigating in the circumstances. The grievor's discipline was reduced to twenty demerits and a suspension of two weeks from thirty demerits and a suspension of thirty-two days. The latter case involved a thirty-one years of service Conductor who failed to immediately inspect a faulty locomotive wheel, the penalty was reduced to twenty demerits from thirty-five, given the employee's long quality service. The grievor had only four infractions on his record, none of which were of importance.

While none of the decisions presented perfectly represent the case at bar, they do provide a framework that, taken as whole, allows an accurate assessment of the appropriate corrective measure.

Mr. Harris's actions were highly irresponsible. He failed to properly check the effectiveness of the handbrakes by forgetting to release air brakes during testing. In addition to his faults, the Grievor did not verify with Mr. Mitchell if he had applied the mandatory two handbrakes for the Expressway Terminal. There were no mitigating factors that occurred during the incident, which was purely the result of the two men's failure to properly follow safety rules. Conductor Mitchell was also dismissed for the incident.

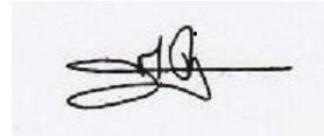
The Union made the case that the Grievor has a normal disciplinary record for a long-time employee. While the complexity of the train industry's regulation makes mistakes and rule violations extremely probable, I must point out to the Grievor's past safety violations mentioned in the first paragraphs of this award. Most importantly, Mr. Harris's failure to properly secure equipment had caused a derailment in 1992, which should have made the Grievor aware of the importance of proper brake testing. In almost all the cases submitted by the Union, the grievor's had better disciplinary records than Mr. Harris.

As for mitigating factors, they include the long service of Mr. Harris, with several periods during which he had a clean record and had no active demerits at the time of the incident since August 2011. It must also be pointed out that his violations caused no consequences, the train cars having only moved some forty feet without causing any damage. The Grievor admitted fault and recognized the seriousness of his mistake.

To conclude, I commend the Company's efforts to encourage a strong safety culture amongst their employees and I recognize the gravity of such infractions. However, no jurisprudence where a similar offense resulted in the discharge of the employee was submitted. This being Mr. Harris's second failure to properly secure equipment and with his relatively poor safety record, the proper punishment falls just short of discharge.

Therefore, the grievance is allowed in part. The discharge of the grievor in these circumstances was not warranted. A suspension of forty days is in order to deter any further rule violations from the Grievor. The Grievor shall be reinstated into his employment forthwith without loss of seniority and with compensation for all wages and benefits lost, save for the forty day period of suspension.

September 21, 2016

A handwritten signature in black ink, appearing to read 'M. Flynn', is centered within a light gray rectangular box. The signature is stylized and cursive.

MAUREEN FLYNN
ARBITRATOR