CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4473

Heard in Calgary, June 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer Ken Zmaeff of Revelstoke, BC.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Zmaeff was issued a letter from the Company on June 28, 2015 informing him that he was dismissed from Company service for the following reasons:
"[…]For your failure to comply with the requirements of CROR General Rule A (i) (iii), (vi), (x), CROR Rule 106, CROR Rule 157(c), and T&E Safety Rule T-0, as demonstrated by Your movement of train 400-14 without proper train designation as indicated on TGBO No 6101-5061 To 304-14 Engine 9631 at Kamloops, B. C., April 14, 2015."

The Union contends the discipline imposed is unwarranted, unjustified and excessive in the circumstances. Based on the evidence presented, the Union contends the Company has failed to meet the burden of proof required to impose the ultimate penalty of dismissal.

The Union further contends that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. The excessive level of discipline assessed to Engineer Zmaeff is considered discriminatory when compared to other cases similar in nature and in particular in comparison to the discipline his fellow crew member received. The Union also contends the Company did not fairly assess the discipline equally or consider the mitigating circumstances surrounding the incident.

The Union contends that the Company, over the objections of his Union representative conducted an investigation that clearly did not afford Engineer Zmaeff a fair and impartial investigation as per Article 23.

The Union requests that Engineer Zmaeff be reinstated to active service and that he be made whole for all wages with interest and benefits lost in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has not responded to any the Union's requests.

FOR THE UNION:
(SGD.) G. Edwards
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
S. Cadden	– Vice Local Chair, Revelstoke
H. Makoski	– Senior Vice General Chari, Winnipeg
K. Zmaeff	– Grievor, Revelstoke

AWARD OF THE ARBITRATOR

This arbitration concerns the dismissal of locomotive engineer Mr. Ken Zmaeff on June 28, 2015 for having moved a train without proper designation.

At the time of dismissal, Mr. Zmaeff had been at the Company's service for thirty years. Over the time of his employment, the grievor has accumulated a total of 215 Career Demerits from twenty-five separate incidents, he had been dismissed two times prior to this event and was suspended for a period of seven days and ten weeks before the incident. However, on June 28, 2015, Mr. Zmaeff had no active demerits on his record.

In the past, Mr. Zmaeff had been disciplined for failures to comply with maximum allowed speed, improper train handling, use of profanity, and failing to mentor a junior crew member, among others. In June 2009, he was disciplined for failing to ensure he was in possession of the proper operating authority before departing Kamloops station, an incident similar to the present case.

Also, he was dismissed in April 2005 for having consumed marijuana while subject to duty at the Field, BC Bunkhouse. Mr. Zmaeff was reinstated by the Company eleven months later. In September 2012, the grievor was dismissed for failing to exercise vigilance and attentiveness resulting in the operation of his train within unauthorized limits, a cardinal rule violation, and for allowing and failing to report a co-worker's use of a cellular phone while on duty. After careful deliberation, Arbitrator Schmidtinstead substituted a penalty of a yearlong, time served, suspensionin **CROA&DR 4250**.

The current incident happened on April 14, 2015, Mr. Zmaeff and Conductor Kevin Grimm were called for grain train 304-14. Upon arrival, they reviewed the Tabular General Bulletin Order (TGBO) and the train consist information detailing its load, empties, length and weight profiles. However, after a change off with the outbound crew, the two men unknowingly boarded the wrong train and proceeded to pull east towards Revelstoke, BC. Conductor Grimm did notice and inform Mr. Zmaeff of a difference in the locomotive number, and said he would notify the RTC as soon as possible.

While setting the brake in preparation for their stop at Kamloops East, they called to inform the Shuswap Sub RTC of the lead locomotive number difference and pertinent train information. It is then that Mr. Grimm was informed of his mistake and the train was brought to a stop.

Mr. Zmaeff and Grimm were then taxied over to the correct train but were subsequently removed from service by Superintendent Templeton. They were transported for substance testing, which came outnegative for both men.

When asked by investigator S.N. Morrone why he failed to board the correct train, Mr. Zmaeff explained that he relied on Conductor Grimm's assessment of the paperwork, having inquired numerous times if the TGBO and other documentation were in order. The Grievor admittedly never made any verifications himself throughout the process, before boarding the train and even when he suspected an irregularity with regards to the train's length.

The facts are not contested by either party, only the appropriate punishment is. The Union contends that the penalty of discharge is unwarranted, unjustified and excessive in the circumstances. It claims that it was discriminatory when compared to cases of similar gravity, particularly considering the lesser discipline that Mr. Grimm received. It also asserts that the investigation conducted by the Employer was not fair and impartial, as required per Article 23. The Union requests that Mr. Zmaeff be reinstated or, alternatively, that the penalty be mitigated as the Arbitrator sees fit.

The Employer claims that Mr. Zmaeff's thirty years of experience with the Company cannot be considered a mitigating factor when one considers the poor quality of his service: having been disciplined on twenty-five occasions. This is Mr. Zmaeff's

tenthunsafe operating practice and/or serious operating rules infraction since the beginning of his employment.

Brown and Beatty state that "A consistently bad employment record shows that an employee has been unable or unwilling to learn from his or her mistakes."[1] Furthermore, they state that:

> "[…] discharge is normally reserved for those cases which the seriousness of the employee's offense in and itself justifies the termination, or where the employee's disciplinary record shows that he or she is unlikely to change his or her behavior and become a satisfactory employee."[2]

The principle of the "culminating incident" is explained by Arbitrator Picher in SHP 480:

> "The preponderant jurisprudence in Canadian labour arbitration recognizes that where an employer determines that the conduct of an employee merits discipline, it may treat that conduct as a culminating incident which, in light of the employee's prior discipline, justifies the termination of his employment."
>
> "Certainly within the railway industry, […] parties generally rely upon the prior service and disciplinary record of employees, both good and bad, to advance their positions in relation to the appropriateness of discipline assessed for a particular incident. That is a process arguably essential to the administration of progressive discipline."

Indeed, the Grievor's disciplinary record is quite clearly stained. While not all of Mr. Zmaeff's infractions are safety related, several are, including a Cardinal Rule violation and two dismissals. The Grievor's history seems to indicate a certain tendency towards rule violation.

[1]Brown and Beatty, section 7:4310.
[2]*Ibid*, section 7:4422

However, I cannot agree with the Employer that Mr. Zmaeff's thirty years of experience should not be considered as a mitigating factor. A careful review of this Office's jurisprudence regarding the violation of safety rules by long-time employees shows that terminations were only upheld in very severe cases. Ones, where, for example, the Grievor violated a Cardinal Rule more than once, or where a single violation was accompanied by aggravating factors made retaining an employee unsustainable for the employer.

Mr. Zmaeff may be in a position very close to such cases, but I consider that some mitigating factors demand a different form of punishment, albeit a very severe one.

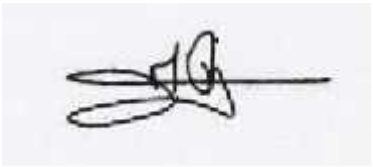
The Grievor and his co-worker did not exit the yard, thus diminishing the potential for dire consequences. They made a mistake, but noticed it and the Grievor, although not in a completely satisfying manner, showed remorse and recognized his shortcomings.

Also, I take into account the difference in the treatment of Mr. Zmaeff compared to his co-worker Mr. Grimm, who received fifteen days' suspension.

In **CROA&DR 4231**, the Grievor did a similar mistake of boarding and operating the wrong train, but with damage incurred to Company property and with a higher

degree of negligence than what Mr. Zmaeff displayed. The Grievor also had a heavy discipline record and had just recently came back from a dismissal from the Company. Arbitrator Picher upheld the Company's assessment of twenty demerits, which is lower than what was imposed on Mr. Zmaeff.

For all the abovementioned reasons, the grievance is allowed in part.The time between his termination and reinstatement shall be recorded as a suspension for the violation.In addition, the Arbitrator directs that Mr. Zmaeff be reinstated into his employment forthwith, subject to a demotion from the position of Locomotive Engineer. The Company shall be at liberty to assign the Grievor to such position as it deems appropriate, for such a period of time as the Company in its discretion considers to be appropriate. Such an arrangement must be understood by the Grievor as a last chance opportunity for him to show his employer he can work safely in a manner consistent with the applicable rules.



September 26, 2016

MAUREEN FLYNN
ARBITRATOR