

CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4481

Heard in Calgary, June 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Yard Helper S. Giscombe of Hamilton, ON.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on December 8, 2015, Yard Helper Giscombe was dismissed as shown in his Form 104 as follows "For runaway cars WRWK4295 and NRLX528109 on track DKE05 at Kinnear Yard, while working as a Yard Helper on Assignment TH31 on November 16, 2015. Violation of the following rules: Significant safety infractions, including failed proficiency failures, in a one year period.

Summary of Rules violated:

- CROR General Notice, General Rule A and A.I
- Rule BK for T&E, Section 12, A, B, C, D and E
- GOI Section 4, General Information Definition, Testing Handbrake Effectiveness, Item 1.0, 1.0. A and 1.0. B"

The Union's position is that the facts of this investigation do not warrant, nor justify the quantum of discipline imposed by the Company, dismissal. The Union requests that the Mr. Giscombe be reinstated forthwith and be made whole for his lost earnings/benefits 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.) W. Apsey
General Chairperson

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

C. Clark – Labour Relations Manager, Calgary

There appeared on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto
W. Apsey – General Chairman, Smiths Falls
S. Giscombe – Grievor, Hamilton

AWARD OF THE ARBITRATOR

The issue at bar is the dismissal of Yard Helper Shomari Giscombe for significant safety infractions, including proficiency test failures over a one-year period.

A former Trainman for the Company, Mr. Giscombe was hired on January 31, 2011. In the following years, he has accumulated a total of twenty demerits and was suspended three times, totalling twenty-eight days. In 2011, the Grievor received twenty demerits for shoving through the end of a track resulting in a derailment. In 2015, he had a seven days deferred suspension for absenteeism, a seven day suspension for failing a proficiency test and a fourteen day suspension for failing to check switch points twice. At the time of the incident, however, the Grievor did not have any active demerits.

On November 15, 2015, Mr. Giscombe's assignment was starting at 18:00 as Yard Helper at Hamilton, Ontario. Around 19:15, he and his team shoved two railcars into track DE05. Mr. Giscombe then proceeded to protect the point and make the coupling to the railcar that was already in the track. He observed the pin drop on the coupler, the slack roll in and out and verified if the abovementioned railcar had an effective handbrake applied. However, the Grievor admittedly did not stretch the coupling nor did he test the effectiveness of the handbrakes to ensure it was sufficient so as to safely leave the railcars on the track. After uncoupling from the track, the emergency brakes were applied as is the norm upon uncoupling of railcars that have air brakes applied.

However, the air brakes pressure went down during the following hours, which is always a possibility and hence why it is required to also apply manual brakes. As a result, when the crewmen came back to the yard the two railcars that they added earlier were fool of track. It was later found that the two additional railcars had not coupled properly to the standing one, and rolled off the track, into the lead – both were unsecured and no handbrakes had been applied.

The Grievor later stated that he observed the pins drop and the slack roll in and out; this was insufficient to guarantee the railcars could not stay independently. Had Mr. Giscoombe followed the proper safety rules, he would have uncovered that the railcars were uncoupled and were not secured with the handbrakes. It is necessary that a handbrake test be always performed to prevent railcars from moving from their own momentum.

This is indicated in General Operating Instruction (hereinafter: "GOI"), section 4, which states that equipment left unattended must be secured with a sufficient amount of handbrakes to ensure the equipment may not roll/move on their own. This is a very important safety measure to protect the CP employees and the public.

Section 12 of the Rule Book for Train and Engine Employees requires that couplings be stretched to make sure the cars are well connected.

The Grievor's failure to follow the above-mentioned rules could have had grave consequences. Fortunately, it was not the case, as the train cars stopped due to the grade within the yard.

A trainman's position is classified as Safety Critical because of the dire outcomes that can result from poor judgement or lack of thereof, as illustrated by the Lac-Mégantic disaster. Shortcuts are not acceptable when it comes to safety measures in the train industry.

In those circumstances, it is important 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

Arbitrator Picher, in **CROA&DR 4039**, regarding a similar situation where the company was trying to promote a culture of safety, wrote that:

“[...] in the summer of 2010 the Company was faced with a rising number of serious incidents involving the use of personal communication devices by employees on duty. Because of that situation, and in part for purposes of deterrence, it was resolved that the Company must communicate a strong rule to all employees to bring home the importance of respecting the Company's policy on the use of personal communication devices. In my view that was a legitimate business objective which the Company was entitled to pursue [...]”

¹ Section 7:4500

The Company's will to instigate a strong culture of safety is a commendable objective. However, one must look at the usual discipline imposed for violations such as the one committed by Mr. Giscombe. The Union submitted several cases where violations of CROR Rules and General Operating Instructions did not result in a discharge.

In **CROA&DR 4341**, October 2014, Arbitrator Schmidt reduced the penalty to twenty demerits from forty. The Grievor's failing to secure cars while switching resulted in a side collision and derailment in the Kamloops yard. His disciplinary record showed ten demerits at the time of the incident and 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 handbrake 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".

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 employee's responsibility for the accident since he was not directly responsible for the incident and was only the second discipline of his career.

The Union further submitted two decisions, **CROA&DR 2588** and **CROA&DR 2915**, which involve similar violations. The former involved the entrance in limits of a co-worker, in which the grievor was distracted by activity in the cabin while maneuvering in a difficult section, all factors that the arbitrator considered mitigating factors. 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.

In all cases cited by the Union, the employees were either with the Company for a very long time or had mitigating factors at play during the incident. It is not the case with Mr. Giscombe: he has been employed by CP since 2011, and has had prior CRO Rules violations, including one that caused a derailment shortly after he was hired. His most recent CROR violation occurred a few months before the incident at bar.

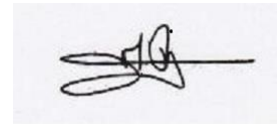
On the other hand, it must be noted that the Grievor has had a four year period free of discipline before his recent streak. Also, the Company did not provide any decisions of this Office in which an employee in a similar situation has had his termination upheld.

Furthermore, I take into account the punishment given to the Grievor's coworkers, which were lighter than what was assessed to Mr. Giscombe. Another mitigating factor is the lack of consequences of the Grievor's mistake, no damages or injuries were reported.

To conclude, whilst the Grievor has previously violated CROR rules and has a less than enviable discipline record for an employee that has been with the Company for only a short period of time, Mr. Giscombe has showed he can work safely for sustained period of time as mentioned above. As such, the termination of the Grievor is excessive in the circumstances.

The grievance is therefore allowed in part. The discharge of the Grievor in these circumstances was not warranted. A suspension of forty-five 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-five day period of suspension.

September 27, 2016

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

MAUREEN FLYNN
ARBITRATOR