

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4483

Heard in Edmonton, July 14, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor G. McKone of Vancouver, B.C.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. McKone was dismissed from Company service which was described as "For Lack of due diligence and unsafe work practices by placing yourself in a position where to potentially cause harm, incident or injury, as demonstrated by your actions while working the 07:59 Yard at Coquitlam, a violation of CROR General Notice, CROR General Rules A, Items (i)(iii)(iv)(vi) and (viii), CROR Rule 106, The Train and Engine Safety Rule Book, section T-6 Coupling/Uncoupling item 3, Section T-20 On or about Tracks, items 3 and 4 on June 28, 2015".

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 Mr. McKone be made whole.

The Union contends that Mr. McKone's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. The Union also contends the penalty imposed is discriminatory and contrary to the arbitral principles of progressive discipline.

In addition, the Union contends that Mr. McKone was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union requests that Mr. McKone be reinstated without loss of seniority and benefits, and that be made whole for all associated loss. 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.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

C. Clark – Assistant Director Labour Relations, Calgary

There appeared on behalf of the Union:

M. Church – Counsel, Caley Wray, Toronto

D. Fulton – General Chairman, Calgary

W. Apsey – General Chairman, Smiths Falls

C. Esposito – Local Chairman, Vancouver

G. McKone – Grievor, Vancouver

AWARD OF THE ARBITRATOR

This arbitration concerns the dismissal of the Grievor for having violated safety rules and operating rules on June 28, 2015.

At the time of his termination on July 14, 2015, Mr. McKone had nearly twenty-nine years of service, had no demerits on his record and had not received any demerits in nine years prior.

On June 28, 2015 the Grievor was working his usual yard assignment as Yard Foreman in the Coquitlam Yard. At approximately 10:55 the crew kicked a cut of cars which subsequently stalled. After a movement had stopped, Yard Forman McKone crossed between the cuts of cars with less than 15 feet between the 2 cuts of cars. While, the Grievor walked between the cars, the slack ran out of the cars just West of where he crossed and began to roll East. Superintendent Wolack who was observing the Grievor advised him immediately of the dangers and possibilities that can occur when walking between equipment without the proper distance or protection (50 feet).

The Grievor responded that he had made a “calculated risk”. Following the investigation, the Grievor was dismissed.

It is not disputed that the Grievor violated Train and Engine Safety Rule, T-20. Such rules require that there be a minimum of 50 feet of separation when walking between cars. During the investigation, the Grievor explained that he was paying attention to the task to be done and felt that there was enough space to cross the tracks without any fear of being injured. The Grievor also acknowledge that he failed an efficiency test in January 2015 for not having 50 feet of separation and that he had then committed to comply with the safety rule.

The evidence shows that the Grievor took an unacceptable risk and did so just a few months after being observed to have broken the same rule (T-20).

In a very similar case, Arbitrator Picher decided that fifteen demerits points was an appropriate sanction for violating rule T-20¹. In a recent award, I substituted a suspension of 30 days for a suspension of 15 days for a similar violation².

Given the jurisprudence, the record of the Grievor and the nature of the violation, the last offer of the Company to substitute the dismissal with a 90 day suspension appears clearly excessive and inappropriate. Furthermore, it does not stand when

¹ See AH593.

² See **CROA&DR 4466 & CROA&DR 3846**.

compared to recent suspensions assessed for similar violations by the Company (3 and 5 day suspensions).

It is also important to note that the decision taken by the Company to hold off the Grievor during the investigation does not meet the requirements stipulated in article 70.05 of the Collective Agreement and the Grievor should therefore be reimbursed for time lost accordingly.

Otherwise, the Union sustained that the investigation was unfair and partial. The Union argued essentially that the investigator was partial since he was involved in some of the allegations raised during the investigation. While it is true that the investigator questioned the Grievor about the efficiency test held in January 2015, that question was in line with the other questions concerning the knowledge the Grievor had of rule T-20. The investigating officer was not the person that witnessed the violation that led to the investigation and therefore, he could without any prejudice to the Grievor confirm his knowledge of the rule. I am therefore, not convinced that the investigation was unfair nor partial.

For all the foregoing reasons, the grievance is allowed in part. A suspension of 15 days is substituted to the dismissal. The Grievor is to be reinstated to his employment forthwith, with compensation for all wages and benefits lost and without loss of seniority.

I retain jurisdiction in the event of any dispute between parties respecting the interpretation or implementation of this award.

July 20, 2016

A handwritten signature in black ink, appearing to read 'Maureen Flynn', is centered within a light gray rectangular box. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

MAUREEN FLYNN
ARBITRATOR