CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4486

Heard in Edmonton, September 13, 2016

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The discharge of Benoit Charles effective November 5, 2015.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Charles was involved in a sideswipe incident at RDP Yard on October 28, 2015 and as a result of this incident he was required to attend a formal investigation on October 30, 2015.

Mr. Charles had a clear disciplinary record at the time and was outright discharged. When he was issued a Form 780's on or about November 5, 2015 assessing "Congédiement", an outright discharge, as discipline.

The Union submits the Company is in violation of Articles 82, 85, 85.5 along with Addendum 124 of the 4.16 Collective Agreement and that the discipline assessed was unwarranted but in any event too severe. The Union further submits that the Company is in violation of arbitral jurisprudence.

The Union seeks to have the Conductor Benoit Charles reinstated and made whole, the Company has violated Addendum 124 concerning the Brown System of Discipline by assessing an outright discharge to Conductor Charles, whom had a clear discipline history and has never been investigated nor discipline for any rule violation as shown by his discipline history.

The Union further contends that given the circumstances and mitigating factors the Company cannot sustain the ultimate penalty of discharge as assessed to Conductor Charles.

The Union further submits that Mr. Charles fulfilled all his employment duties consistent with normal and acceptable standards.

The Union further submits that an outright discharge for this type of an incident is highly improper and in violation of the Brown System of Discipline.

For all the foregoing it is the Union's position that Mr. Charles be reinstated and that he be made whole, compensated for all lost wages and benefits and without the loss of seniority.

Additionally, given the violations of the Collective Agreement, that a remedy, under the provisions of Addendum 123, be applied.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

It is the Company's position that the grievor failed to work in compliance with the CROR, namely Rules 115 and 106. His actions on October 28, 2015 resulted in a side collision which could have had tragic consequences and which could have been avoided had he listened to his experienced co-worker.

Mr. Charles was a very short-service employee who showed complete disregard for his safety and that of his colleagues when he chose to ignore his foreman's instructions. No mitigating factors apply in this case. Under the circumstances, discharge was the only appropriate penalty.

Considering all the facts, the Company's decision to terminate the grievor was not in violation of Addendum 124. Therefore, this case does not warrant the application of Addendum 123. In any event, the Union have not put forward any argument to support their request for a Remedy under Addendum 123.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.) A. Daigle**
General Chairman	**Labour Relations Manager**

There appeared on behalf of the Company:

C. Michelucci	– Director Labour Relations, Toronto
D. Larouche	– Senior Manager Labour Relations, Montreal
A. Daigle	– Manager Labour Relations, Montreal
O. Lavoie	– Manager Labour Relations, Montreal

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, CTY, Central
R. Hackl	– National Vice President, Saskatoon
J. Lennie	– Vice General Chairman, CTY, Sarnia
R. Donegan	– General Chairman, CTY, West
J. Holliday	– General Chairman, BC Rail
R. Caldwell	– General Chairman, LE, Central
P. Boucher	– Vice General Chairman, LE, Central

AWARD OF THE ARBITRATOR

Mr. Benoit Charles began with CN on August 18, 2014 and was discharged on November 5, 2015. He was twenty-six years old and had no prior record. He began work in the 11th seniority district, just outside Montreal but on September 14, 2015 transferred to the 12th district. The significance is that there are no belt-pack operations in the 11th district.

Normally, new employees would receive training and qualify as a belt-pack operator prior to qualifying as a conductor (see Article 65A) which did not happen here. At the time of this incident he had qualified as a conductor, but had not undergone the customary belt-pack training, except for four days once in the 12th district. At the time of the incident he was working as a conductor and operating a locomotive in the yard using a belt-pack. The Employer objects that this training issue was not raised until the CROA hearing and should not be considered part of the dispute nor should it be considered a mitigating factor. Nothing has been raised that suggests lack of belt pack training was in any significant way responsible for this incident. Mr. Charles admits knowing the relevant Rules. He was however inexperienced, particularly in this yard.

On the night in question, Mr. Charles was working at Riviéres des Prairies along with his foreman Mr. André Beaucage, an employee with thirty-two years of service and an excellent safety record. It was dark but the yard was well lit. Mr. Charles was on the ground operating the locomotive. Mr. Beaucage was standing in the locomotive protecting their movement. The task at hand involved pulling traffic from track RU 21, then to double over cars on track RU 24, coupling to 22 cars. Once this was done he was to shove the cars back onto RU 21. The grievor pulled 9 cars from RU 21, believing, incorrectly, that the balance of track RU 21, to which the cars were later to return, was otherwise empty. It was not; in fact it held six additional cars. His 31 car block met up with the 6 cars already on the track and pushed through a switch at the south end of the track, causing the derailment and side swipe.

The Union argues that Mr. Charles' inexperience left him dependent on the direction and guidance of his foreman Andre Beaucage. However, the Employer's major concern is that, given that inexperience, he failed to listen to, or follow advice from Mr. Beaucage. Whether that is so is a significant issue for this case. In their job briefing, Mr. Beaucage told the grievor of the chance of extra cars being on track RU 21. Mr. Beaucage says, of the briefing:

> I asked him if he had seen extra cars on the track and to confirm the accuracy of the list. He confirmed the accuracy of the list, it did not contain any extras. It was agreed during the briefing to shove on RU21 and to do the hoses. This portion of the train was supposed to stay on that track to do a second trip that morning. I told him at the briefing to watch out for extra cars or missing numbers because we often have extra cars on the tracks. (*emphasis added*)

Mr. Beaucage later asked the grievor if he had seen extra cars on RU 21 and to confirm the accuracy of the switch lists. Mr. Charles looked up the track and confirmed, in his mind, that they had room for the 31 cars on his list. However, all he did to check the track was look up the track but the track had a curve. He could not and did not see the 6 cars at the end of the track, which were not on his list. It is very doubtful he could see 30 car lengths from where he stood.

He said during his investigation:

> I was looking at the lists and after looking at them and checking track RU21 in the distance, I could see there was room for 30 cars on track RU21 because the track was well-lit with the lights at the south end of RDP. While leaving track RU21 to double onto track RU24, I noticed that track RU21 was clear. The number of cars on the list matched the number of cars I had pulled from track RU21, i.e. 9 cars. After coupling

> the 9 cars from RU21 onto the 22 cars on RU24, I pulled all 31 cars from track RU24 to shove them back onto track RU21. Before shoving them back onto track RU21, I double-checked to make sure the track was clear. Before shoving them, I was further away than the switch on RU21. I said on the radio that there was enough room for 30 cars on track RU21 (clear track). Mr. Beaucage repeated, and I started shoving the cars onto track RU21.

When pressed to provide further explanation, or to indicate insight into what happened, the grievor simply repeated that, "I saw there was room for 30 cars, I shoved 30 cars" as if it explained Rule 115 non-compliance. He appears to have missed the point, both at the time and later in his somewhat dismissive explanations.

The Employer asserts that this operation involved the most basic Rules of yard switching work, the subject of a poster headed "7 Critical Switching Activities" and reading, in part:

> SWITCH SAFELY AT ALL TIMES!
>
> Protect your point and observe the track
>
> | | |
> |---|---|
> | • On the leading end of the movement | Have another crew member or qualified employee check that the track is clear and remains clear |
> | • On the ground | Check that there is sufficient room for movement |

It is common ground that CROR Rule 115 applied. Mr. Charles says he understood the Rule which provides:

> 115.(a) When equipment is shoved by an engine or is headed by an unmanned remotely controlled engine, a crew member must be on

> the leading piece of equipment or on the ground, in a position to observe the track to be used and to give signals or instructions necessary to control the move.
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> EXCEPTION: A crew member need not be so positioned when the portion of the track to be used is known to be clear. However, equipment not headed by an engine must not approach to within 100 feet of any public, private or farm crossing unless such crossings are protected as described in Rule 103 paragraph (b) and (g).
>
> (b) Known to be clear is defined as seeing the portion of the track to be used as being clear and remaining clear of equipment and as having sufficient room to contain equipment being shoved. This determination must be made by a qualified employee who can observe the track and has radio contact with the employee controlling the movement.

This Rule provided Mr. Charles with a required procedure, subject to an exception. He could have ridden on the first rail car being pushed back into RU 21. Had he done so he would have seen the additional six cars, of which he was unaware, and been able to stop before pushing them. The exception was only available "if the portion of the track to be used is known [not thought] to be clear". Known to be clear is defined. He had to be able to see the portion of the track to be used and it had to be sufficient to contain the equipment being shoved. He could also have walked to the point where he could have seen the entire track.

The arbitrator is satisfied that the incident was caused by Mr. Charles' negligence in not following Rule 115, and in not following Mr. Beaucage's advice from the engine. The accident was serious, costly and potentially dangerous. When the grievor shoved the train into track RU 21 a switch was damaged and 2 cars derailed. As they pulled the

train back, the 2 derailed cars sideswiped about 10 other cars on an adjacent track. Damage to the track and cars totalled about $60,000.

The Brown System is clearly focused on a corrective approach. However, it also provides:

> 6) Discharge – Discharge is a recognition of the employee's inability or unwillingness to bring his/her performance to an acceptable level. Discharge will most frequently be the culmination of a number of progressive corrective disciplinary actions, but may be the consequence of a single act.

The Union argues this incident does not trigger the "single act" exception, particularly given the Addendum 124 commitment:

> The Company will utilize the Brown discipline system and standards in accordance with past practices and jurisprudence.

The "single act" exception, the Union argues, only applies when there are aggravating circumstances. It says the case law shows that a penalty in the range of fifteen demerit points is appropriate for a sideswipe incident like this one. It refers to **CROA&DR 4251** and five other cases referred to in that case. Arbitrator Picher said then:

> The Union submits that the assessment of the thirty day suspension was excessive. In that regard its counsel draws to the Arbitrator's attention a substantial number of awards of this Office dealing with similar violations of CROR 115. He submits that a review of those cases confirms that the assessment of demerits, generally in the order of fifteen demerits, is the more appropriate measure of discipline. In that regard reference is made to CROA&DR 2990 and 3237, where fifteen demerits were assessed by the employer for violations of CROR 115 and were sustained by this Office.

> Additionally, similar infractions were reviewed in CROA&DR 3752, 3773, 3936 in which cases higher awards of demerits were all reduced to fifteen demerits.
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> Having reviewed the cases in question, and the facts of the instant case, the Arbitrator is compelled to agree with counsel for the Union. The assessment of a thirty day suspension for the facts of the instant case is in my view excessive.

The grievor in **CROA&DR 4251** had twenty-two years of service. In **CROA&DR 3752** the grievor had fifteen years of service, with similar facts but less damage than occurred here. The grievor in **CROA&DR 3773** had twenty-two years of service. In the other cases, seniority is not disclosed.

The Union cites three cases involving short term employees that I find of more assistance. In **CROA&DR 4454** termination was replaced with reinstatement, but with the Arbitrator saying:

> The incident was a serious one and the Grievor is a short service employee. However in that service he has no prior discipline. Neither at the time of the incident nor at the investigation meeting did he try to minimize or deflect what occurred. He was sorry and remorseful. Given these factors and the circumstances of this incident, I am prepared to mitigate the penalty of discharge and reinstate the Grievor to employment.

In **CROA&DR 3845** a two year employee was initially discharged for a side swipe violation of Rule 115, but before arbitration that was reduced to a 2 week suspension. The arbitrator said, of the “15 points for a Rule 115 violation” argument:

> The Union submits that a two week suspension is excessive in the circumstances. Its counsel submits that prior awards of this Office would indicate that violations of CROR 115, which governs vigilance of

> operating employees in charge of switching operations, typically results in the assessment of fifteen demerits.
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> The Arbitrator does not dispute the Union's characterization of the general course of the jurisprudence. However, it is trite to say that each case must be determined in its own particular facts.
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> …
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> In the Arbitrator's view it is appropriate for the Company to take into account its efforts at dealing with a particular problem involving the repeated violation of a specific rule within its operations at a given location when assessing the appropriate level of discipline in certain cases. As prior decisions of this Office have noted, deterrence is a legitimate consideration, albeit not the only one, in assessing the measure of discipline.

A similar two week suspension was upheld for a two year employee for a Rule 115 violation in **CROA&DR 3846**.

The Employer suggests the cases referred to by the Union are simply a reflection of the approach referred to in the following extract from Brown and Beatty, *Canadian Labour Arbitration* at 7:4428:

> It is unlikely that there is any factor about which arbitrators will inquire with more consistency and regularity than the existence of a long and unblemished employment record, in deciding whether to modify a disciplinary penalty. Except for very serious misconduct, and perhaps in cases involving a relatively mild disciplinary sanction, or unless there is a "sunset clause" restricting full access to employees' disciplinary records, arbitrators have allowed employees with a strong record of service to draw upon it, much like a bank account, when they have misbehaved in some manner. Isolated and infrequent transgressions must be balanced against a person's years of positive and productive employment.

The grievor has no such record of service to draw upon. The Union argues and the Company disputes, that the grievor has been remorseful. I agree with the Employer that the grievor's response was less insightful than it might have been and tended to blame Mr. Beaucage, rather than examine his own conduct.

The only significant mitigating factors in this case are the grievor's inexperience in this yard and his essentially discipline free, although short, record. The cases do suggest, however, that immediate termination is outside the parameters set by precedent for this type of offence. The grievor's termination will be replaced with a three week suspension with the grievor otherwise being made whole for his losses.

October 27, 2016

ANDREW C.L. SIMS
ARBITRATOR