

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4523

Heard in Montreal, December 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor I. Lougheed of Kenora, Ontario.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Lougheed was dismissed from Company service, which was described as "For failing T-21 Safety Proficiency Test, for not wearing your Safety Glasses in the Locomotive while in Winnipeg Yard, while working as a Locomotive Engineer Trainee on train 119-17 on November 18, 2015 out of Kenora, Ontario, a violation of General Notice, General Rule A (i), (iii), & (vi), CROR 106, and Train & Engine Safety Rule Book; Rule T-21 & T-22."

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. Lougheed be made whole.

The Union submits that Mr. Lougheed's dismissal is contrary to Company policy, unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline, and has been assessed in a discriminatory manner.

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

GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

D. Pezzaniti – Manager, Labour Relations, Calgary
D. E. Guerin – Senior Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto

D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Calgary
M. Wallace	– Local Chairman, Kenora
I. Lougheed	– Greivor, Kenora

AWARD OF THE ARBITRATOR

Nature of the Case

1. On December 7, 2015, CP terminated conductor Ian Lougheed for failing a CRT21 E-Test by not wearing safety glasses in his locomotive. CP relied on its history of progressive discipline in support of the termination.
2. The TCRC contested the termination on the basis that Mr. Lougheed had removed his glasses only briefly to rub his eyes.
3. For the reasons below, the arbitrator concludes that Mr. Lougheed's actions warranted a written warning rather than termination.

Facts

4. The facts are not disputed that Mr. Lougheed was not wearing his safety glasses when he should have been. The evidence is not uniform, however, in how long he did not wear his glasses. Mr. Lougheed suggested it was just for a matter of moments because he had to rub his eyes. CP, on the other hand, suggested it occurred for a longer period of time.
5. The arbitrator is satisfied after reviewing the evidence that Mr. Lougheed had his glasses off for longer than it would take simply to rub one's eyes. Mr. Lougheed had

advised Trainmaster Rioux that he had had them off when cleaning the garbage. However, the evidence also confirms that his lapse was nonetheless of a short duration.

Analysis and Decision

6. No one disputes the importance of employees wearing their Personal Protective Equipment (PPE) including safety glasses. Mr. Lougheed himself acknowledged that safety glasses needed to be worn at all times when in a locomotive. Numerous CROA decisions confirm an employer may discipline a railway employee who fails to wear his/her PPE.

7. CP filed Mr. Lougheed's disciplinary record (Company Submissions (Ex-1); Tab 5). CP also referred to its December 9, 2015 letter advising that it would no longer be using (effective August, 2015) the Brown System of demerit points for discipline (Company Submissions (Ex-1); Tab 10). Mr. Lougheed's record indicates that he was previously terminated on December 19, 2014 for an accumulation of demerit points, mainly for attendance related matters.

8. On March 16, 2015, the parties signed a reinstatement agreement (Company Submissions (Ex-1); Tab 5). The parties' agreement described Mr. Lougheed's disciplinary record:

Mr. Lougheed's discipline record shall be administratively set at Fifteen (15) demerits and a suspension shall be substituted for time out of service effective the date of Mr. Lougheed's return to active service. It is understood that Mr. Lougheed's discipline record may only be reduced should he remain discipline free for a period of one year of CCS from the date of his return to active service.

9. The next disciplinary event was the November 18, 2015 incident involving the safety glasses.

10. An event which, by itself, would not justify dismissal could nonetheless constitute a culminating incident. As Arbitrator Picher has noted, it would have to be clear that an employee was on the verge of being terminated when the culminating event occurred: [CROA&DR 4320](#).

11. CP did not persuade the arbitrator that this principle applied in Mr. Lougheed's case for the following reasons.

12. This case is not one where a party seeks to enforce a "last chance" agreement. Moreover, a failure to respect critical safety issues is found nowhere in the parties' March 16, 2015 reinstatement agreement. Rather, the parties' agreement focuses on "attendance/availability at work".

13. While this point was disputed at the hearing, the evidence also demonstrates that the parties agreed that Mr. Lougheed's disciplinary record going forward would contain 15 demerit points and a suspension. This stipulated record pales somewhat in comparison to the type of record to which Arbitrator Picher applied the progressive discipline principle in [CROA&DR 4320](#).

14. Similarly, the concept of progressive discipline requires that the previous discipline be unequivocal. Matters which were not originally disciplinary cannot later change their character to support a progressive discipline argument: [CROA&DR 3361](#).

15. CP referred to previous E-Tests and Mr. Lougheed's alleged failures. Mr. Lougheed commented during his interview that he had never been told of some of these failures. In any event, there does not appear to be any discipline resulting from these matters in Mr. Lougheed's disciplinary record, as "administratively set" by the parties.

16. For a termination resulting from progressive discipline, the existing disciplinary record and the culminating incident must be clear. The arbitrator then considers the penalty of termination.

17. CP has not established that Mr. Lougheed's most recent incident, when read together with his past record, justified the ultimate penalty of dismissal.

18. The arbitrator accepts CP's position that it can impose discipline for an employee's failure to wear safety glasses. Based on Mr. Lougheed's momentary lapse, the arbitrator is satisfied that a written warning suffices to indicate the seriousness of the matter.

19. The arbitrator orders CP to reinstate Mr. Lougheed with full compensation and to replace his dismissal with a written warning.

20. The arbitrator remains seized for any issues which may arise from this award, including the compensation owing to Mr. Lougheed.

January 16, 2017

GRAHAM J. CLARKE
ARBITRATOR