

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

CASE NO. 4533

Heard in Montreal, January 12, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Frank Curtis of Edmonton, Alberta.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Curtis was dismissed from Company service which was described as "For an instruction you gave to your movement to reverse over public crossing at Grade at Scotford Yard on August 19, 2015. This is a violation of Canadian Pacific rules: CROR 103 (A), CROR 103 (G), CROR General Notice, CROR General Rule A (I) (lii) (vi) and (viii)."

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. The Union also contends Mr. Curtis' dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter in addition to being contrary to the arbitral principles of progressive discipline.

The Union requests that Mr. Curtis be reinstated without loss of seniority benefits, and 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

And on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
M. Biggar – Counsel, Caley Wray, Toronto
D. Fulton – General Chairperson, Calgary
D. Edward – Senior Vice General Chair, Calgary
W. McCotter – Local Chairman, Edmonton

J. Hnatiuk
F. Curtis

– Local Chairman, Port Coquitlam
– Grievor, Edmonton

AWARD OF THE ARBITRATOR

The present arbitration concerns the discharge of Conductor Frank Curtis for having given an instruction to his movement to reverse over a public crossing at Grade at Scotford Yard on August 19, 2015, in violation of CROR 103.

The Grievor is fifty-five years of age and has been working with the Company since 1990, for a total of twenty-five years of service at the time of dismissal. Over the course of his career, the Grievor has accumulated 200 demerits. In March, 2013, Mr. Curtis was dismissed from Company service for accumulation of demerits, but was reinstated on February 9, 2015, as per an agreement with the Employer. Since his reintegration, Mr. Curtis has been suspended once for five days.

On the day of the incident, the Grievor was working as a Brakeman at Scotford Yard, Alberta, along with Locomotive Engineer Don Brockway, Locomotive Engineer Trainee Paul Lamoureux and Conductor Wes Payne. The men, communicating over radio, were switching cars over a public crossing that splits the two yards at Scotford.

The Company and the Union give two generally similar accounts of the events giving rise to the discipline, but particularly deviate on a key element. The Union's version will be presented first, followed with the Company's point of disagreement.

The Union's version is the following. Mr. Curtis, during the switching moves, observed stopped traffic that was blocked because of cars obstructing the crossing. He then instructed Locomotive Engineer Trainee Lamoureux to clear the crossing and hold to let traffic proceed. When all vehicles had crossed, the Grievor, having allegedly observed no incoming traffic on any side of the crossing, ordered Mr. Lamoureux to back up one car length to the crossing. Prior to the movement, Conductor Payne came on the radio concerned that Mr. Curtis was too far from the crossing to properly protect it. Mr. Curtis deemed that he was close enough and proceeded with the movement nonetheless. At this moment, Trainmaster Mantler had come out of the office to observe the movement. He requested the Grievor to meet him at the crossing and, after a conversation on the procedure, informed him that he failed a proficiency test, but instructed Mr. Curtis to continue working. Until his investigation on August 24, 2015, the Grievor was not removed from service. On September 11, 2015, Mr. Curtis was dismissed from Company service.

The Company, essentially, asserts that the Grievor was too far away to properly protect the crossing and so he could not assess whether there was incoming traffic or not. It argues that Mr. Curtis cannot shield his actions under the exception (underlined below) of CROR 103, which states in part:

"103. Public Crossings at Grade

(a) Where a railway track and a public road share the same roadbed and there is no fence or other barrier between them, moving rail cars not headed by an engine or when headed by a remotely controlled engine must be protected by a crew member on the leading car or on the ground, in a position to warn persons standing on, or crossing, or about to cross the track.

[...]

(g) When providing manual protection of a crossing, a crew member or other qualified employee must be on the ground ahead of the movement, in a position to stop vehicular and pedestrian traffic before entering the crossing. A hand signal by day and a light or a lighted fusee by night will be used to give a signal to stop vehicular and pedestrian traffic over such crossing. The movement must not enter the crossing until a signal to enter the crossing has been received from the employee providing the manual protection.

When the crossing is known to be clear of traffic, and will remain clear until occupied, manual protection need not be provided.”

It is not disputed that the Grievor was not in a position to stop oncoming traffic. Rather, Mr. Curtis claims that he was close enough to the crossing to ensure that it was clear of traffic and that it would remain so until occupied and thus respected the exception of CROR 103 (g). Trainmaster Mantler gives an opposing version and asserts the Grievor could not properly assess oncoming traffic from the position he was standing at.

In **CROA&DR 4445**, Arbitrator Silverman, on the issue of the credibility of a Trainmaster’s version of events, stated that:

“In assessing just cause for discipline, I turn first to the credibility issue. Having considered the material presented, the information from the investigation and what is simply most probable and likely in the circumstances, I find the Grievor’s version of events to be lacking in credibility. Trainmaster Bruno was specific and detailed in what he saw; a video being played, an image seen on that video, earplugs on and a quick movement by the Grievor upon being discovered to hide the activity being engaged in. I do not find plausible the Grievor’s version of what occurred, that he was at that moment reaching in his bag to take out his operating instructions material. If I were to accept that version of events, I would have to find that Trainmaster Bruno essentially fabricated details of what occurred in order to implicate the Grievor and no evidence before me suggests any reason why that would have occurred.”

In light of the evidence, Trainmaster Mantler's version of events must be retained, as it is more credible than the Grievor's. Indeed, contrary to Mr. Mantler, the Grievor has motives to protect his disciplinary record, especially in light of his recent reintegration. Trainmaster Mantler's detailed account is credible and, moreover, is corroborated by Conductor Payne, adding more weight to Trainmaster's version of events.

As such, I am satisfied that the Company has made the demonstration, on the balance of probabilities, that the Grievor has violated CROR 103.

I now turn to the assessment of discipline. The Union claims that the dismissal was an excessive response given the mitigating factors in the present case.

A review of this Office's jurisprudence shows that CROR 103 infractions do not warrant the outright discharge of an employee.

In **CROA&DR 4248**, Arbitrator Schmidt reinstated a Grievor who had been assessed 30 demerits and discharged for having failed to protect two crossings.

In **CROA 4005**, a Locomotive Engineer's 6 months' suspension was upheld. The Grievor had passed through a crossing at high speed instead of manually protecting it, a more serious violation than the one in the present case.

The Union also submitted two Form 104s for employees who had committed CROR 103 violations. One was assessed 25 demerits and the other a 20-day suspension. Both had committed other infractions along with the CROR 103 violation.

The Employer has not submitted any decision where the violation of CROR 103 has resulted in the discharge of an employee. Instead, the Company argues that this should be treated as a culminating incident, since progressive discipline has been applied, thus warranting the penalty of discharge.

As for mitigating factors, it must be underlined that the Grievor is a long service employee and has enjoyed many periods free of discipline in the past.

Considering the usual discipline that is assessed for the violation committed by Mr. Curtis and the length of his service, it is appropriate to reduce the penalty of discharge. The jurisprudence of this Office holds that, for long service employees with similar disciplinary records and comparable violations, dismissal is not mandated. In the present case, considering Mr. Curtis' previous five days' suspension, a lengthy suspension is in order.

However, the Grievor must understand that, given his past record and this last violation, he cannot continue to adopt a careless approach, especially with regards to safety, and that he must exercise greater care in his work in the future.

For the above-mentioned reasons, the grievance is allowed in part. The discharge shall be recorded as a three months' suspension. The Grievor is to be reinstated forthwith without loss of seniority and with compensation for all wages and benefits lost, save for the three months' period of suspension.

January 31, 2017

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

**MAUREEN FLYNN
ARBITRATOR**