

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4539

Heard in Calgary, February 8, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor M. Toelly of Edmonton, AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation of Mr. Toelly was dismissed from Company service, which was described as "Please be advised that you have been dismissed from Company service as you have breached the bond of trust necessary for continue employment with the Company as evidence by your prior discipline record and the culminating incident of your failure to properly protect the point and ensure the derail was removed a the Suncor Facility in Edmonton prior to entering their track resulting in the derailment of AC05-30 on October 30th 2015, while employed as a Conductor in the Edmonton Terminal; a violation of Rule Book for Train and Engine Employees Section 2 – item 2.2. While on duty A, C, (v) (vi) (xii), Section 9 – Methods of Control and Authority, Item 9.1 A (i) Non-Main Track, Section 12 – Switching, Item 12.6 shoving equipment (a), Section 11 – Operation of Movements, Item 11.8 Derails ABC, Section 4 - Communication, Item 4.2 Communication Requirements (d), Core Safety Rules I. Rights and Responsibilities (bullet points 1, 4, 5).

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. Toelly be made whole.

The Union submits that Mr. Toelly was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union contends that the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. In the alternative, the Union contends that Mr. Toelly's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating facts. 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. Toelly 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:

C. Tsoi	– Labour Relations, Officer, Calgary
L. Smeltzer	– Manager, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
D. Edward	– Senior Vice General Chairman, Medicine Hat
W. McCotter	– Local Chairman, Edmonton
M. Toelly	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

On October 30, 2015, Michael Toelly (the “Grievor”) was working as a Conductor on assignment AC05 - along with Yard Helper Helm and Locomotive Engineer Bergun - at the Suncor site in Edmonton. The Grievor was responsible for protecting the point and directing Bergun in the movement of the train. At approximately 2:15 AM, the Grievor radioed that the derails on tracks 1 and 2 were all in non-derailing positions. He instructed Bergun to move 4 cars to a joint. Shortly after, the Grievor radioed Bergun to stop the movement because CP3084 had derailed. The locomotive consist was traveling in a reverse direction with a back-to-back configuration. Bergun was operating the locomotive which did not face the direction of travel. The Grievor was riding the point on the second unit - as required by CROR Rule 115 - protecting the movement at the time of the derailment.

After the locomotive derailed the Grievor, with Helm and Bergun, inspected the damage and noted that the engine (CP3084) was missing a gland hand and its fuel tank had been ruptured.

Following the incident, the Grievor and his crew mates were required to attend a formal investigation in connection with the derailment. Each of them provided a relatively consistent description of the derailment in the course of their statements. In his statement, the Grievor unequivocally stated that while he was riding the point he:

“...was able to observe that the derails in tracks 1 and 2 were all in the non-derailing position.”

As a consequence, he radioed confirming the same and directed that 4 more cars move to a joint. Shortly after he felt a “*weird vibration*” and directed Bergun to stop the locomotive. When the movement stopped, he stepped off the locomotive and realized that it had derailed and noticed that the “*gland hand was missing from the hose*”. The Grievor’s explanation for how the locomotive might have derailed if, in fact, the derailleurs were in the non-derail position was that:

“I am not exactly sure, the derails were confirmed in the non-derailing position by both myself and Yard Helper Helm. At the time, all we saw was that we were derailed, the gland hand was missing from the hose, and we had fuel leaking”. (Q.51)

The Union, in its argument, suggests that:

“...the logical conclusion for what happened is the lead locomotive’s air hose caught the derail and flipped it into the derailing position. This is the only cogent explanation for this derailment in all of the circumstances.”

Subsequent to the incident, and prior to the formal investigation conducted on November 13, 2015, the Company staged a re-enactment of the derailment with particular reference as to whether or not the gland hand could cause the derail to switch from the non-derail to the derail position and thereby cause the derailment in question.

The Company's re-enactment, complete with photographs and explanations, is contained in its Ex. 7. The Company asserts - as it suggests the photographic evidence reflects - that the gland hand, even when the hose was pulled down to its maximum length (see Ex. 7(f)) could not have come into contact with the derailer and therefore cause it to flip into the derail position. It also points out that its photographic evidence reflects wheel marks on the derailer which corroborates that it was in the derail position and run over by the locomotive.

The Union argued that the Company's failure to include either the Grievor or the Union as part of the re-enactment represents a breach of its duty to conduct a fair and impartial investigation. In that respect, it quotes several cases where that principle is supported by Arbitrators. It argued that the Company's re-enactment can be given no weight in the circumstances in that there is no justification for not involving the Union or the Health and Safety Committee in the same. It asserts that:

"By controlling the environment on a "re-enactment" and excluding the input the oversight of the Union as well as the Health and Safety Committee, fatally compromised the objectivity of this "re-enactment".

I accept that the Company has a duty to conduct a fair and impartial investigation. While it would have been preferred to have the Grievor, or Union

Representatives, present at the investigation the failure to do so does not, in and of itself, constitute an unfair and impartial investigation in the circumstances here. There was no reasonable explanation given as to why the Company's representatives who conducted the re-enactment, would be less than honest and forthcoming regarding their conclusions. Short of making the broad statement it did, the Union did not provide evidence of any disparity, discrepancies or logical inferences to be drawn which would suggest the absence of an accurate and fair representation of the locomotive and derailer before and after the incident.

As indicated, while it would have been preferable (and in my view shown good judgement) to include the Union or the Grievor in the actual re-enactment, the failure to do so in the circumstances here does not impugn the veracity of the investigation nor lead to the adverse inference urged by the Union. As stated earlier, other than making the broad statements it did, the Union offered no evidence to suggest that the Company's investigation was unfair or unreasonable or disclosed a biased motivation to provide documents or photographs which were inconsistent with the facts and reality.

Finally, The Union's suggestion that the re-enactment was biased due the absence of an objective observer must be weighed in light of its failure to question or object to the re-enactment at the time the formal investigation. As reflected in **AH521 and CROA&DR 2911**, it is incumbent on the Union to raise procedural objections at the time of the disciplinary investigation rather than to wait and make those objections at the arbitration months after the discipline has been assessed.

The documents and photographs in Ex. 7 reflect that the gland hand would not have reached down to cause the derailment. It would have been practically impossible for that to occur. While there were suggestions in the evidence that gland hands had caused derailleurs to flip over in the past, there was no evidence of any reports being filed with the Company to that effect or any reference to them other than by the members of this crew when providing their explanation of the likelihood of what the cause of the derailment could have been. As pointed out in **CROA&DR 778**:

“Those in a position to have seen the derailment – Conductor Pardy and Brakeman Abbott (although Conductor Pardy, who was inside the shop, did not observe the actual derailment) – say they do not know how it occurred. The very probable explanation, having regard to the location of the derail and the fact that both trucks went off the track at the same point and that the derail and the ball of the rail show wheel marks (there being no evidence of any other derailment to have marked the track), is that the derail was in fact on as the wheels of the unit went over it, and that the wheels accordingly went up and off the track. There is no other reasonable conclusion.”

Given the evidence I conclude that the locomotive ran over the derailer and that gland hand could not have been responsible for the derailment as suggested by the Union. Rather the inescapable inference to be drawn (and the conclusion to be reached on a balance) is that the Grievor failed to appropriately carry-out his obligations, as the individual riding the point, to ensure that the continuation of the locomotive down the track was safe and that the derailleurs were in fact in the non-derail position when the locomotive reached them.

The onus to prove, on a balance of probabilities, that just cause existed to discipline the Grievor falls to the Company.

As pointed out in *Brown and Beatty at 7:3520*:

“... As in any discipline case, the employer must prove some culpable behaviour on the part of an employee. Where, for example, an employer’s property was damaged purely accidentally, **and there was no evidence to support a finding of lack of care**, it would not be proper to impose discipline. ...” (emphasis added)

While it cannot be expected that employees will reach a standard of perfection on a daily basis, when “...errors or mistakes flow from inattentiveness or extreme carelessness - factors which are in control of the employee - the employer may properly discipline the employee.” (RE: Air Canada v. C.A.L.E.A. [1981] 4 L.A.C. (3d) 68; para. 24).

While it was clear that the Grievor was experienced, his lack of attention and lapse of judgment - factors which he controlled - caused the incident which should reasonably have been avoided. In the circumstances, and in the absence of a satisfactory explanation negating his responsibility, his lack of care is culpable and warrants discipline.

The Company dismissed the Grievor. Was it reasonable in all the circumstances?

In assessing whether or not the discipline was excessive, I am mindful that the Grievor had a short career with the Company - approximately 4 years at the time of the incident. The present dismissal was the Grievor’s second dismissal from service in

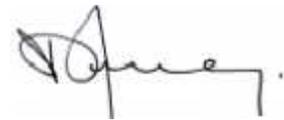
addition to having accumulated 80 career demerits (See Company's Ex. 1). The records show that the Grievor was dismissed in 2014 (Tab 13) for:

"The unattended movement of equipment during your shift of April 10, 2014... This unattended movement which while shoved into track 10 at Lambton Park came apart as a result of an improper stretch resulting in damage to the Lambton Park 50th street main track switch and cars which went through an unprotected crossing and grade."

The Grievor took no responsibility for the incident here which occurred only 4 months after the Grievor returned to service following his initial suspension. Although the Grievor was given ample opportunity to show that he was capable of living up to the Company's expectations, he has been unable to do so. The circumstances which led to his initial discipline/dismissal are similarly culpable to this one. I am satisfied that, in the circumstances, it is reasonable for the Company to conclude that it can no longer trust the Grievor to perform to the high standards that are required of his job.

On that basis, and for the reasons above, I find that the discipline imposed was reasonable in all the circumstances. The grievance is dismissed.

April 11, 2017



RICHARD I. HORNING, Q.C.
ARBITRATOR