

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4546

Heard in Edmonton, March 15, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor P. Weusten

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an Investigation, on May 5, 2016 Conductor Weusten was dismissed from Company Service as shown on his Form 104 as follows,

“Please be advised that you have been dismissed from Company Service for the following reason(s): for failed efficiency test CR123 .2 - failure to use initials of the foreign lead unit UP 5504 on your train 241-27 when switching in Toronto Yard, while working as a Conductor on March 27, 2016. Significant safety infractions, including prior failed efficiency failures, in a one year period. Violation of the following rules:

Summary of Rules violated:

| Book | Section | Subsection | Description |
|-------------------|-----------------------|-------------------|-------------------------------|
| CROR | Operation of movement | 106 | Crew responsibilities |
| CROR | Radio | 121.a | The person initiating a radio |
| CROR | Radio | 123.2 | Switching by radio |
| GOI | T&E safety rule book | T-0 | Job briefing |
| Rule book for T&E | Section 4 | 4.3.a | Crew members must carry out |
| Rule book for T&E | Section 4 | 4.4.a.iii | Engines will be identified by |
| Rule book for T&E | Section 4 | 4.4.a.iv | Trains and transfers will be |
| Rule book for T&E | Section 12 | 12.4 | Switching by radio |
| Rule book for T&E | Section 12 | 12.4.a.iii | The controlling locomotive |

The Union's position is that an outright dismissal in this matter is excessive in all circumstances. The Company is convinced that an employee who did not use the foreign engine's initials should be dismissed as shown in their grievance decline. This investigation was not held in a fair and impartial manner as shown within the grievances submitted. Further as

noted the Company tosses a number of alleged rules violations at an attempt to justify their assessment of a dismissal to Mr. Weusten.

The Union believes that the Company performing proficiency test do so with the objective of testing its 'employees and when failure happens to educate them and retest to see if education has worked, Mr. Weusten was retested and passed. Again Mr. Weusten was called in for an investigation for the failed E-Test for not using the foreign engine's initials while he made a double over, as soon as he was corrected on this he complied; he was not called in for any other reason. The unnecessary "padding" of rules that either did not have anything to do with this investigation or were never proven to have been violated as clearly shown in the memo of Trainmaster Aidan Finucane where he stated the only failure was "Mr. Weusten failed to use the initials of the foreign lead unit on his train (UP 5504) – *identifying his movements only by "5504". I asked him to correct his radio procedures and continued monitoring his switching activities. For the remainder of his time in the yard, he did identify the foreign unit correctly.*"

The Union further states Mr. Weusten's failed E-Test happens March 27th but an investigation is not called until April 19th, over 3 weeks later, surely if the Company was worried about Mr. Weusten they would not have waited this long to conduct an investigation. The Company has clearly abused its' managerial rights in all aspects of this investigation and the discipline assessed to Mr. Weusten.

The Union requests that Mr. Paul Weusten be reinstated forthwith and compensated all loss of wages with interest, without loss of benefits, and seniority. 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.) W. Apsey
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:

D. Ellickson – Counsel, Caley Wray, Toronto
W. Apsey – General Chairperson, Smiths' Falls

AWARD OF THE ARBITRATOR

A train's yard movements are a result of radio communications between several individuals, each responsible for ensuring its safe and efficient movement in an area where other equipment is also deployed. Accuracy and clarity in communication are essential. Each locomotive is identified by a number. CP locomotives are known by that number alone. Locomotives from other railways are often present in a yard and they are identified not only by a number, but also a prefix indicating the railroad to which

they belong. This case involves communication over a Union Pacific locomotive properly identified as UP5504.

CP uses a supervisory process called “Efficiency Testing” which provides for supervisory staff monitoring employees as they work, and with their knowledge, for compliance with the various rules and regulations they must follow. Often, observed breaches of the rules are met with coaching. However, at times disciplinary action can follow. The efficiency testing process is set out in a written document, but it is not something that was negotiated with or agreed upon by the Union. While it is not written as a disciplinary process, nothing within it restricts management’s ability to discipline for events thus discovered. **CROA&DR 4344** decision does not say otherwise.

The events giving rise to this case took place on March 27, 2016 in the Toronto yard. Mr. Weusten was assigned to switching duties and Mr. Chuck Dowswell was the locomotive engineer on UP5504. Assistant Trainmaster Aidan Finucane was efficiency testing Mr. Weusten. Over the radio he heard Mr. Weusten refer to UP5504 simply as 5504. He cautioned him about it, also over the radio and, thereafter, Mr. Weusten was heard using the number with its correct prefix. Mr. Finucane’s memo reads:

On March 27, 2016, at 20:30, I was monitoring Mr. Weusten switching at the West-end of Toronto Yard.

While doubling the train (241-27), Mr. Weusten failed to use the initials of the foreign lead unit on his train (UP 5504) – identifying his movements only by “5504”.

I asked him to correct his radio procedures and continued monitoring his switching activities. For the remainder of his time in the yard, he did identify the foreign unit correctly.

On April 8, 2016 Mr. Weusten was told he must appear for “an investigation regarding failed efficiency test on March 27, 2016 while working as a Conductor on Train 241-27”. Mr. Finucane’s memo was attached. The investigation took place in London, Ontario on April 19, 2016. That investigation discloses that Mr. Weusten has been with CP since January 13, 2013. He was promoted to Conductor/Yard Foreman in June 2013 and at the time of these events worked as a Conductor in the east pool out of the London, Ontario terminal, although the events in question occurred in Toronto. His record is described below.

Questions during the investigation addressed which, if any, of the breaches alleged applied to the facts. At the end of the investigation the Employer called Assistant Trainman Finucane, and the following exchange occurred:

Questions for Witness by Investigator:

W1: You state in your memo and I quote: “While doubling the train (241-27), Mr. Weusten failed to use the initials of the foreign lead unit on his train (UP 5504) – identifying his movements only by “5504”. Was this failure multiple times or just one isolated incident while making a joint?

WAnswer1: Multiple

W2: Do you stand by the facts in your memo Appendix B in this investigation?

WAnswer2: Yes absolutely

Questions from Union Representative:

UR1: Why wasn’t it noted that it was multiple failures in appendix B?

URA1: It was thru the entire process.

UR3: Why did you not communicate the failures upon first indication of Mr. Weusten allegedly not using proper initials?

URA3: I notified Mr. Weusten the first time it was safe to notify him, when it was safe to do so after switching activities.

On May 5, 2016 following the investigation, Mr. Weusten was dismissed for reasons expressed as follows:

Please be advised that you have been dismissed from Company Service for the following reason(s):

For failed efficiency test CR123.2 – failure to use initials of the foreign lead unit UP 5504 on your train 241-27 when switching in Toronto Yard, while working as a Conductor on March 27, 2016.

Significant safety infractions, including prior failed efficiency failures, in a one year period.

Violation of the following rules: [9 specific violations, all related to the March 27th incident, as described below, were then listed.]

The parties confirmed that this list of nine violations did not refer back to “the one year period”. Rather, they were all different ways of viewing the one event. No evidence of prior violations was put forward. The Union grieved, and the matter proceeded to hearing. However, on February 13, 2017, the Company advised the Union that:

Notwithstanding the gravity of the situation without establishing precedent or prejudice to the position of either party regarding the assessed discipline, the Company is willing to reinstate Mr. Weusten into Company service, purely as a matter of managerial leniency ...

Certain conditions were imposed. The Company replaced the termination with a time-served suspension (about 9 months), and “last-chance” conditions. However, the letter also recorded that:

It is agreed that the Grievance filed on behalf of Mr. Weusten regarding the assessed discipline and compensation for wages and benefits may continue its progression in accordance with Article 71 of the Collective agreement by the Union. This agreement may be used

as evidence at arbitration in the event Mr. Weusten is subsequently disciplined or dismissed from Company service.

The Union's position, following this agreed reinstatement, is that (a) the grievor should not have been disciplined at all for such a failure during efficiency testing and (b) that if any discipline is warranted, a 9 month suspension without pay is grossly disproportionate and ought to be reduced significantly. As CP no longer uses the Brown point system, it is for CROA to set any appropriate penalty in the circumstances, but the Union notes that, as of the date of these events, Mr. Weusten had no residual outstanding points.

I find that Mr. Weusten did fail to use the UP prefix when required to do so, but started using it as soon as he was called up on the point by Mr. Finucane. I accept that this occurred more than once, but not over an extended time, since Mr. Finucane says he radioed Mr. Weusten as soon as it was safe to do so. It may be that on one of these occasions Mr. Weusten was within the permissible range. I have no reason to doubt Mr. Finucane's veracity at the inquiry, despite the terseness of his memo. His testimony is more clarification than a contradiction that challenges his credibility. While I accept Mr. Finucane's evidence that the failure to use initials occurred more than once, it does not lead me to conclude that the grievor was dishonest, particularly given the lapse of time before the investigation took place.

The Union takes exception to Mr. Finucane even being allowed to provide clarification in the face of his memo. I find this falls within what is permissible under Article 70.02:

70.02 Clause 70.01(4) above will not prevent the Company from introducing further evidence or calling further witnesses should evidence come to the attention of the Company subsequent to the notification process above. If the evidence comes to light before commencement of the investigation, every effort will be made to advise the employee and/or the accredited representative of the Union of the evidence to be presented and the reason for the delay in presentation of the evidence. Furthermore, should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation.

As suggested to the parties at the hearing, the expedited CROA process works best when the parties make a joint submission where they grapple with and come to a consensus on the facts and principles in issue. A CROA arbitrator faced with only an *ex parte* statement, combined with a significant difference of fact, is placed in a difficult situation. In this case, the grievor's position is that the initial-less identification occurred only once. The Employer's position is that it occurred more than once, and only stopped when it was brought to the grievor's attention. This difference was not something new, only revealed at the CROA hearing. If the parties wish to take differing positions on such matters it would be fairer and more helpful to CROA if they set out what they agreed upon and then identified their points of difference all within a joint submission.

The breach alleged involves just one act; failing to say UP5504 rather than 5504. From this single act the grievor was alleged to have violated all 9 of the provisions set

out above. The Union sees this as blatant overcharging; padding the matter to justify termination. It characterizes this as “managerial abuse” that renders the investigation less than fair and impartial.

I do not find this catalog of violations constitutes a breach of the duty to be fair and impartial in the investigation. However, I also do not find it helpful to list every conceivable way an event might be characterized when the nub of the issue relates to one clear and specific duty. Such “piling on” of charges suggests imprecision and a degree of over-aggressiveness in the managerial response. I treat the allegation as a single infraction.

The grievor’s record, prior to this incident was, as summarized in the Employer’s brief:

- **100 Career Demerits** – Assessed from 2005 through to 2012. Those demerits were amassed through serious rule infractions, conduct related incidents as well as attendance related violations.
- **September 2013** – Thirty (30) day suspension for using profanity and unwelcome remarks towards a Company officer.
- **October 2015** – Seven (7) day suspension for reporting 2 hours and 49 minutes late to his road switcher assignment.
- **January 2016** – 14 day suspension for attendance.

In the investigation the grievor conceded knowing he was a “focus employee” which meant that, due to his performance, he was subject to a higher level of managerial observation and intervention to address and correct his behaviour.

The Company refers to three **CROA&DR** decisions; **4320**, **2503** and **3495** that support the use of progressive discipline, particularly for successive rule violations. Nothing in this decision calls that principle into question. The issue is not whether progressive discipline is an appropriate approach, but whether the response in this case, originally a termination and now a 9 month suspension without pay and last chance conditions, is the appropriate response in these circumstances and in accordance with the principles of progressive discipline.

A nine month suspension, in all the circumstances is a disproportionate response. The grievor's record is significant, although much of that record, particularly for more recent offences, is not for rule violations. This breach was corrected as soon as it was brought to the grievor's attention. The Trainman who acted on Mr. Weusten's radio activity received on discipline. The grievor, with 13 year's seniority, is a relatively senior employee. The discipline imposed in this case is set aside, including the various terms included in the alterations of February 13, 2017. In its place the grievor is assessed a two week suspension without pay for "failure to use the initials of the freight lead unit UP 5504 on your train 241-27 when switching as a Conductor in the Toronto Yard on March 27, 2016, contrary to CROR 121 and Rule Book for T & E Section 4."

Mr. Weusten's record will be adjusted to reflect this reduced penalty and he is otherwise to be made whole and compensated for all lost wages, with interest, without loss of benefits and without loss of seniority.

March 29, 2017



ANDREW C. L. SIMS
ARBITRATOR