CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4563

Heard in Edmonton, June 15, 2017

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer Silas Hansen of Medicine Hat, AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Hansen was issued a letter from the Company on September 16, 2016 informing him that he was dismissed from Company service for the following reasons;

> *Please be advised that you have been assessed a dismissal from Company Service effective September 16, 2016 for failing to ensure train was being properly operated/handled in non-main track between Ogden and Alyth resulting in a collision with a proceeding train causing derailment and damage to equipment while employed as a Locomotive Engineer on train 303-646 on the Brooks Subdivision on September 3, 2016.*

The Union contends the discipline imposed is unwarranted, unjustified and excessive in the circumstances. The Union contends the incident as stated is not worthy of the ultimate penalty of dismissal and the Company has failed to provide any evidence necessary to sustain the charges as described.

The Union further contends that the Company did not consider the mitigating circumstances surrounding the incident which clearly establish that Engineer Hansen did not intentionally violate any rules. The Union further contends that the Company did not consider that Engineer Hansen remained honest and forthright during his investigation and took full responsibility for his error in judgement.

The Union also asserts this dismissal constitutes a violation of Section 94 of the *Canada Labour Code*. Finally, the Union contends the principle of progressive discipline has not been applied as is the case.

The Union requests that Engineer Hansen be reinstated to active service and that he be made whole for all wages with interest and benefits lost in relation to his time withheld from

service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's position.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) G. Edwards **(SGD.)**
General Chairperson

There appeared on behalf of the Company:

D. Pezzaniti	– Manager, Labour Relations, Calgary
C. Clark	– Assistant Director, Labour Relations, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
H. Makoski	– Vice General Chairman, Winnipeg
W. Apsey	– General Chairman, Smiths Falls
B. Fode	– Local Chairman, Medicine Hat
S. Hansen	– Grievor, Medicine Hat

AWARD OF THE ARBITRATOR

Locomotive Engineer Silas Hansen is 38 years old and has been with CP since 2003. He works out of Medicine Hat, Alberta and qualified as a Locomotive Engineer in November 2012. On September 16, 2016, following a rear end collision with a second train in the Calgary Terminal, Mr. Hansen was dismissed for the following reasons:

> Please be advised that you have been assessed a DISMISSAL from Company Service effective September 16, 2016 for failing to ensure train was being properly operated/handled in non-main track between Ogden and Alyth resulting in a collision with a proceeding train causing derailment and damage to equipment while employed as a Locomotive Engineer on train 303-646 on the Brooks Subdivision on September 3, 2016; a violation of rules listed below.

Summary of Rules violated

BOOK	SECTION	SUBSECTION	DESCRIPTION
T&E Rule Book	9	9.1 Non main track	Methods of control and authority
T&E Rule Book	2.1		Reporting for duty
T&E Rule Book	2.2		While on duty
T&E Rule Book	2.3		Crew members
GOI	1	32.1 & 32.2	Train handling

The Union and Mr. Hansen do not take issue with the basic facts, the seriousness of the incident, or the consequential damage. Rather, they advance considerations they feel makes termination too harsh a penalty.

Train 303-640 left Shepard, Alberta about 25 kilometers east of Calgary to travel via Carseland to Alyth in CP's main marshalling yard in east Calgary. With the 12 cars picked up at Carseland, the train consisted of 136 loaded grain cars totalling 18,000 tons.

At about 8:40 a.m. the crew, the grievor plus Conductor Ed Becker, was instructed to yard their train behind Train 113 in track P1 at Ogden. It was foggy. They watched the tail end of Train 113 leaving for Ogden. They left Murdoch themselves at 9:08, moving towards Glenmore, where they saw and called out a clear signal allowing them to proceed. At Ogden, the crew saw and called out a green over red signal meaning the train was to move to line 4 Track P1 at Ogden.

The crew were familiar with the area. They knew that, once they passed signal 1711 the method of train control changed from Centralized Traffic Control to Non-Main Track Control. When operating on non-main track, a train must operate at reduced speed so as to be able to stop within one-half the range of vision of equipment. They knew from a call from the Trainmaster received while moving from Shepard to Murdoch that train 113 was stopped in front of them on P1.

As their train approached Ogden, the crew heard two instances of faint radio chatter, which they assumed might be from someone on the ground with a mobile radio, which left them with the impression that Train #113, was passing through the depot, miles away. This made sense to them as #113 had been about 30 minutes ahead and therefore might be expected to have already pulled away. Conductor Becker attempted to radio #113 but received no response.

Moments later the Terminal Trainmaster radioed that #113 "hadn't pulled yet". Conductor Becker asked the Trainmaster how long #113 was and was told, about 10 seconds later, that it was 12,000 feet. They tried to figure out where the trail end of #113 would be, but then saw it around the curve in front of them. The grievor immediately put the train into emergency. Their speed at 34.9 m.p.h. proved too fast and the available breaking distance too short, and a rear end collision ensued. The two locomotives and four loaded grain cars derailed. The incident occurred in an area visible to the public and very close to CP's Calgary Headquarters.

Three days after the incident CP issued a revised operating bulletin reimposing a 20 mile per hour speed limit on tracks P1 and P2.

The Union argues that the events here do not reflect any wilful misconduct or wilful failure to adhere to the operating rules. While the Employer characterizes their conduct as negligent, the Union argues that it was simply an error of judgment involving both crew members.

Reliance is placed on **CROA 2356** for its review of the aggravating factors needed to turn a cardinal rule violation into an offence justifying discipline. That case involved proceeding past a red stop signal by four car lengths. It held that, while running a red is always a serious offence, it had not traditionally been held, without more, to justify automatic termination. Arbitrator Picher held:

> Outright discharge for a violation of Rule 292, generally coupled with other rules violations, is revealed in a relatively limited number of cases (*see* **CROA 474, 681, 745, 1479, 1505, 1677** *&* **2124** *[reduced to a suspension]*). In each of the cases involving an imposition of outright discharge by the company there has been some aggravating factor. For example, in **CROA 681** and **2124** the employee discharged for passing a stop signal had committed his second offence against the rule. In **CROA 745** a locomotive engineer was dismissed where a violation of Rule 292 was found to also involve a violation of Rule G, resulting in a collision and two fatalities. Serious collisions were also involved in **CROA 1479** and **1677**, while in **CROA 1504** the discharge of the locomotive engineer was motivated, in part, by his falsification of an employee statement intended to evade his responsibility. More recently, employers have again used the assessment of suspensions for violations of rule 292 of the UCOR and rule 429 of the CROR (*See, e.g.,* **CROA 2126, 2161,** *&* **2267.**)
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> When regard is had to the standards used by employers within the railway industry, as reflected in the records of this Office over several decades, the actions of the grievor, while serious, do not disclose the degree of gravity found in those prior cases where discharge was assessed as the penalty. That said, the evidence does reveal a serious incident which could well have resulted in a collision.

This case does involve a collision, significant property damage and minor personal injury. Arbitrator Moreau substituted a reinstatement without back pay for a termination in **CROA 3744**, again for running a stop signal, by 352 feet. That case too did not result

in any serious accident. The Union relies on the Arbitrator's listing of the relevant mitigating factors which it says, equally apply here, although this grievor's prior record is arguably less severe.

> The grievor has an unenviable disciplinary record ... His record stood at 45 demerits at the time he was discharged for the current incident. There are, however, important mitigating factors which must be considered. The grievor has 19 years of service. He has fully and unequivocally accepted responsibility for this incident. In that regard, he acknowledged at his interview both the seriousness of the incident and the potential for harm and damage that could have resulted from his negligence. That forthrightness must be viewed as a strong mitigating factor which suggests that the grievor recognizes his error and will pay greater attention to his duties and responsibilities in the future. This is a case where it would be appropriate to grant the grievor an opportunity to prove that he can be a reliable employee who will be vigilant in ensuring the safe operation of his assigned locomotive while on duty.

In support of its position that the Employer failed to consider principles of progressive discipline, the Union relies on **CROA 4294**. There, Arbitrator Schmidt said, of termination for serious insubordination and booking off sick to avoid compliance with a direct instruction:

> The Company chose to discharge the grievor outright. He had 19 years of service with the Company at the time and zero demerits on his record. Without condoning or diminishing the seriousness of the grievor's misconduct on December 7, 2011, it would not only be unprecedented in the jurisprudence of this Office, but inconsistent with the concept of progressive discipline to uphold the grievor's termination in these circumstances.

CROA 4419 arose from facts more analogous to those at hand. The grievor had only seven years of service and ten demerits. He was instructed to drive two locomotives,

in the yard, behind another train. He entered a curve at 25 miles per hour, believing the other train was further down the track. A collision resulted, causing $1.5 million dollars damage and some minor injuries. As here, immediately following the collision, the Employer revised its operating instructions. The arbitrator took this into account, saying:

> The grievor was clearly mistaken in believing that the route ahead of his reversing two locomotive consist was clear and that the crew's combined sightlines would be sufficient to protect the point during the reverse movement. His erroneous subjective belief is irrelevant to whether or not the grievor violated Rule 115. Regardless of his mistaken belief, he did breach the Rule. I have considered the Company's issuance of the bulletin reproduced above immediately after the collision and the Union's submission that the bulletin was "in addition" to Rule 115. In my view, the bulletin simply clarified what should have been obvious.

The Arbitrator in that case found:

> Notwithstanding the Company's legitimate concerns about the grievor's most serious error in failing to insist that Grewal go to the point lack of their movement, and his decidedly and exceptionally poor decision to use a gaming device during a tour of duty, I am not persuaded that the grievor's misconduct in this case warrants his termination in all of the circumstances. While it is true that the grievor is not a long service employee and his error was a critical one, it is not properly elevated to the degree of recklessness such that the employment relationship is beyond redemption.

The Employer relies on **CROA 3966** which too involved failing to reduce speed in non-main track territory. It involved a rear end collision derailing three locomotives and $1 million damages. The grievor's lack of knowledge of his own train's location and his failure to inform his locomotive engineer was described as negligent and "extremely grave". The grievor, then a locomotive engineer trainee, had three disciplinary events within 13 years of service and his termination was upheld.

The Union notes **CROA 3965**, involving the other employee in that case who was found less responsible, with an exemplary and long career he was reinstated without back pay.

The Employer also referred to **CROA 1981** and **2020** which involved the same incident, and to **2791**, for the proposition that dismissals for negligence by train crews will usually be upheld. The Employer also refers to **CROA 3881** which too involved a rear end collision, but with even more serious consequences. It suggests the grievor's error there is analogous to what happened here, as disclosed by the following passage:

> There is no dispute that the grievor committed a number of grave errors in the operation of his train on the day in question. Perhaps most disturbingly, he continued to operate under an assumption which was entirely contrary to the objective facts which had been communicated to him repeatedly, most particularly that at all relevant times train 292-05 was stopped just north of the south siding switch at Centennial. Notwithstanding repeated communication of that fact to him, Locomotive Engineer Cranston continued to operate in the belief that he should handle his train so as to come to a stop at the south siding switch, in an area plainly occupied by the other train. His failure to properly seize the reality which was unfolding was the primary cause of the disastrous rear-end collision …

The Union draws my attention to **CROA 3882**, arising out of the same facts, where, given that grievor's far less serious record and 19 years of service, termination was mitigated to reinstatement without compensation.

Engineer Hansen's record spans 9 years as a conductor and four years as a locomotive engineer. In 2008 he was cautioned for being unavailable for duty. In January

2013 he received 10 demerits for missing a call while showing available for work. In September 2013, while still a conductor, he was suspended for 14 days for:

> … failing to lock the controlling locomotive and failing to place the controlling locomotive in emergency, while working as a conductor…

The first two matters are for dissimilar conduct. The latter is still the subject of an outstanding grievance.

The grievor is 38 years old and lives in Medicine Hat, Alberta with his wife and children. The grievor immediately and fully accepted responsibility for the error. That error was assuming, without any real objective basis for doing so, that #113 had pulled away before they entered the area. They were wrong in that assumption, which they made based on faint and unconfirmed radio chatter referring to #113. The last clear advice they had was the first call from the Terminal Trainmaster that it was in front of them. They had not prepared themselves by ascertaining #113's length. They heard his first call but not his saying "they should pace themselves." By the time of the Trainmaster's second warning, things were too advanced to stop in time.

The Union argued that the blame falls more on the conductor than the locomotive engineer, but I am not persuaded that the difference between their responsibility is significant. The Union asserts that this case has been treated more severely because it occurred within sight of Head Office, and because it commanded publicity. This, in my view, is too speculative to consider as a factor.

I accept as a mitigating factor that Mr. Hansen cooperated fully during the investigation, and has been honest throughout. It is said that he is respected by his co-workers, managers and Union officers in Medicine Hat. I also accept that he has personally viewed this as a learning opportunity on the need for constant vigilance.

In my view this is a reconcilable working relationship and the grievor is capable of and willing to learn from this mistake. The question is whether the magnitude of harm caused by this negligent lack of vigilance outweighs any consideration of mitigation. I find that it does not, and that his relatively clear proven record and his years of service justify a second chance. The grievor is to be reinstated but without compensation.

September 28, 2017

ANDREW C. L. SIMS
ARBITRATOR