CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4582

Heard in Edmonton, September 14, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal of Locomotive Engineer P. Jarvis of Toronto, Ontario.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, Mr. Jarvis was dismissed from Company service for "*failing to ensure the safe operation of train 235-21 on the North Toronto Subdivision as evidenced by your train operating beyond a signal displaying stop…"* and the subsequent collision and derailment.

The Union contends that the discipline in this circumstance is excessive and unwarranted.

Mr. Jarvis was forthright and honest in the investigation. He took full responsibility for the incident. The Union contends that the discipline of outright dismissal assessed is not borne of any aggravating factor and as such, cannot stand.

Mr. Jarvis has only had a deferred suspension on his record for the last five years. Mr. Jarvis has expressed remorse and stated that he has learned from his mistake made and intends to use this learning experience for his and his fellow employees to the benefit of Canadian Pacific Railway.

The Union further contends the impartiality of the investigation came into question when the investigating officer asked questions relating to Canadian Pacific's reputation as a result of this incident. This question was objected to by the Local Chairman as being self-incriminating to Mr. Jarvis and not lending itself to the fact-finding purpose of investigations. The investigating officer compelled Mr. Jarvis to answer this question, which is self-serving to CP. The investigation officer further went on to ask about the cost of clean-up to this incident. Again, this question is not germane to the fact-finding purpose of investigations. The impartiality of the investigating officer is again suspect when in the step one appeal from the Local Chairman he attests to a statement made by Mr. Purdon, which given no reply to the step one appeal, has not been refuted which was *"I am here for the best interest of the Company"*. This statement is biased and prejudicial to say the least.

Notwithstanding the above, the Union contends that the outcome of the investigative process was pre-determined from the outset. In fact, one only had to read the news the morning of the incident when Vice-President of communications and public affairs, Mr. Martin Cej, had labelled the accident a result of "Human Error" mere hours after the incident. One would argue

that when a Vice-President makes a statement, not likely it would be overruled or challenged. There can be no doubt that given these remarks, published in the press, Mr. Jarvis has suffered irreparably from this statement.

The Union seeks to have Mr. Jarvis re-instated to employment without loss of seniority. The Union further seeks that Mr. Jarvis be made whole for all wages and benefits lost with interest while discharged. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

The Company considers the discipline assessed as appropriate and that it met its burden of proof.

FOR THE UNION:
(SGD.) J. Campbell
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

S. Oliver	– Labour Relations Officer, Calgary
D. Pezzaniti	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
J. Campbell	– General Chairman, Peterborough
P. Jarvis	– Grievor, Smiths Falls

AWARD OF THE ARBITRATOR

Train 235-21 operated by Locomotive Engineer Paul Jarvis and Conductor Shayne Taylor missed a slow to stop signal and then were unable to stop at the next signal causing a major collision, summarized in the Transport Safety Board report as follows:

> On 21 August 2016, at approximately 0517 Eastern Daylight Time, Canadian Pacific Railway freight train 118-18 was crossing from the north to the south track at approximately Mile 3.3 on the North Toronto Subdivision in Toronto, Ontario. Freight train 235-21, proceeding westward with 2 locomotives only, collided with the tail end of train 118-18. Four of train 118-18's intermodal cars (10 platforms) were struck and damaged. Four of the platforms derailed upright. The 2 locomotives of train 235-21 derailed upright. The fuel tank on train 235-21's lead locomotive was punctured, resulting in the release of about 2500 litres of diesel fuel. A number of small fires were extinguished. The conductor of train 235-21 sustained injuries.

Mr. Jarvis grieves his termination questioning the impartiality of the investigation and alleging that termination was too onerous a penalty in the circumstances.

Fair Investigation

The Union maintains that the result of the investigation was "pre-determined from the outset". It bases this firstly on a media statement by CP Rail spokespersons Martin Cej. The Company says he was quoted as saying:

> "Preliminary indications are that the incident was as a result of human error" Martin Cej said "there were no track, mechanical or signalling issues."

The Union says he was quoted as saying: "The collision was as a result of human error."

I do not infer any pre-judgement for this. The liberties the press take in compiling headlines often result in exaggerated statements. It is unrealistic to think that the Company would not need to respond to press inquiries after such a serious collision in a populated area. What is attributed to Mr. Cej was not directed at any particular person and was accurate to the extent it ruled out mechanical or equipment failure.

The Union objected and still objects to question 155, which it suggests pre-judgment.

> Q155: Do you understand that the incident at Howland on the morning of August 21, 2016 effected the reputation of CP in a negative way, especially with the general public living in the area of the accident scene?

> A: I have no way of knowing how the general public felt before or after this accident. I can only comment on how I feel and I am very disappointed on what happened, nobody feels worse than I do. I even sought counsel with EFAP as this incident negatively affected me. I would never intentionally do anything to harm my own image or CP's.

While the question calls for a self-evident and largely irrelevant answer, the grievor's answer was appropriately responsive. I view the question about the cost of the crash in the same light.

The Union further objects to Mr. Jarvis being required to fill out an initial incident report right after the shock of the collision, and without Union representation. It urges this is contrary to Article 23.04. By ordering this statement the Union says the Company was commencing its investigation but in an unfair way. I do not find this fact reflects on the fairness of the subsequent investigation and the grievor, with Union advice, was fully able to answer questions and put forward his account of events without being prejudiced by anything that had gone before.

Lastly, the Union infers a lack of impartiality from a statement made, in response to a comment from Local Chairman Baxter, outside the formal investigation. Mr. Baxter suggested Mr. Purdon was only there to look out for the best interests of the Company to which Mr. Purdon admits he replied "I am here for the best interests of the Company". Again, I am not convinced of bias or pre-judgement in this exchange. Having examined the full investigation interview as well as the neutral Transport Safety Board report this one, perhaps bad tempered, exchange between officials does not taint the process.

Having considered the entirety of the investigation I do not find it indicative or pre-judgement or in violation of the tests set down in **CROA 1561**, and **CROA 2934**.

Justification for Termination

The Union argues that termination was excessive and unwarranted. It urges and I accept that the grievor is remorseful. It argues that the evidence shows no wilful misconduct or wilful derogation from the Operating Rules. Indeed, it says no serious rule violation occurred. That proposition I cannot accept, and I am inclined to think the Union's brief contains an editing error.

The evidence discloses both Rule 411 and Rule 439 violations. It shows that the grievor failed to reduce speed in response to the situational issues that arose; the smoke obscuring where a signal would have been known to exist, and any feeling of distraction or overload due to the pedestrian warning. The very proximity of train 118-18, close to a crossover point, should also have induced caution.

A Rule 439 offence is a cardinal rule violation and has been treated very seriously in prior CROA decisions as cited by the Employer, for example **CROA 4391** and **4112**. The Union argues that certain compelling factors, beyond the control of the grievor were insufficiently weighed by the Company.

- There were distractions at the time caused by the warning of a possible trespasser. I accept that to be so.
- Thick smoke from 118-18 blocked the view of the signal. That may be so, but the locomotive camera still showed signal visability and the

smoke itself called for some cautionary movement given the grievor's knowledge of the route and the signal and the movement's significant speed at the time.

- Alteration to practices and policies have since been made. Had such changes been instituted earlier, the incident might not have occurred. Saying that does not diminish the breaches that actually took place.

In the Employer's submission, the grievor's record, albeit over twenty years of service is not sufficient to be a mitigating factor.

Mr. Jarvis is forty-four years old, married with two children. He began with CP in 1997 and qualified as a locomotive engineer in 2007. His termination has caused him and his family financial hardship and he has sought counselling with EFAP.

His record disclosed a 7 day suspension for train delay plus 50 demerits earned from:

- Failure to ensure his movement was properly lined for the direction of travel resulting in a run through switch (2001),
- Failure to bring his movement to a stop resulting in a run through switch (2002), and
- Failure to stop prior to fouling another track, failure to ensure his movement was properly lined for the direction of travel, and failure to verbally communicate with all crew members and ensure all crew members maintained awareness of conditions that affect safe train operations (2008).

The Employer argues that the seriousness of the accident is an aggravating factor, particularly given the history of serious crashes in the past due to similar conduct, for example the Hinton train disaster. The damage here, in a populated area, amounted to $675,000. The Employer rejects the notion that the grievor was legitimately distracted by the pedestrian alert and other activities since it is the express task of the locomotive engineer to multi-task and to maintain situational awareness. It emphasizes Rule 2.2(a) "if in doubt, the safe course must be taken".

A derailment, serious injury, or extensive equipment damage, has in the past been found to be a significant aggravating factor. **CROA 2356** quoted by the Union reflects that proposition.

The Union argues that, without aggravating factors, a Rule 439 violation involving passing through a stop signal should attract a lengthy suspension, not outright termination. It refers to **CROA 2356**.

> 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.**)

See also **CROA 3744**. I agree with the Union that each Rule 439 case must be assessed on its merits.

However, considering all the evidence in this case, I am satisfied that the aggravating factors outweigh the grievor's remorse and personal circumstances. The incident reveals a lack of attention by a railroader thoroughly familiar with the territory that caused very significant damage. It resulted from not only inattention to crucial signals, but an absence of caution in circumstances, even if momentarially confusing, called for a reduced speed. Reluctantly, I must deny the grievance.

November 29, 2017

ANDREW C. L. SIMS, Q.C.
ARBITRATOR