

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

CASE NO. 4591

Heard in Montreal, October 12, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of a 5-day suspension, and subsequent discharge of Conductor S. Wojcik of Wynyard, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant matter involves two separate assessments of discipline.

5 Day Suspension

Following an investigation Mr. Wojcik was issued a 5 day suspension, which was described as "*Failure to comply to the rules on six separate occasions as evidenced by proficiency test failures for CRT11 - Entraining and Detraining, CR113 - Coupling to equipment, CR115A- Shoving equipment on non-main track, CRGRC - Verbal communication between crews, CR123 - applies proper radio procedures, CRTJOB1 -Job briefing, while working as a qualified Conductor in the Wynyard Terminal. A violation of CROR General Notice, CROR General Rule A (i), (iii), & (vi), CROR Rule 113, CROR Rule 115 (a), CROR Rule 123.2, and T&E Safety Rule Book Section 11 - Entraining and detraining, while employed as Conductor in Wynyard, Saskatchewan.*"

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. Wojcik be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. In the alternative, The Union contends that Mr. Wojcik's 5 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is discriminatory, contrary to the arbitral principles of progressive discipline, and violates company policy.

The Union requests that the discipline be removed in its entirety, and that Mr. Wojcik is made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's contentions.

Discharge

Following an investigation the Company dismissed Mr. Wojcik for “Failure to properly protect your shoving movement and to confirm track was clear while spotting Louis Dreyfus grain elevator on the Tisdale sub while working 2N16-09 on January 9, 2016, resulting in a sideswipe. A violation of CROR General Rules A (i), (iii), (iv), (v) and (vi), CROR General Rules C (i), CROR Rule 106, CROR Rule 115 (a), Rule Book for T&E Employees Section(s) 2.2 (a), (v), (vii) (x), (xi); Section 4.2; Section 12.6 and T&E Safety Rule Book T-0.” The Company did not respond to the Union’s grievances.

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. Wojcik be made whole.

The Union further contends that Mr. Wojcik’s dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union’s contention that the penalty assessed is discriminatory, and contrary to the arbitral principles of progressive discipline.

The Union requests that Mr. Wojcik be reinstated without loss of seniority and benefits, and that he 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.) W. Apsey
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

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| D. Guerin | – Senior Director, Labour Relations, Calgary |
| C. Gilbert | – Manager, Labour Relations, Montreal |
| E. Routhier | – Labour Relations Intern, Montreal |

And on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| D. Edward | – Senior Vice General Chairman, Calgary |
| I. Marnoch | – Vice Local Chairman, Wynyard |
| W. Apsey | – General Chairman, Smiths’ Falls |
| S. Wojcik | – Grievor, Wynyard |

AWARD OF THE ARBITRATOR**Nature of the Case**

1. The TCRC grieves two separate incidents involving Conductor Sean Wojcik: i) a 5-day suspension and ii) his later dismissal following a sideswipe. The TCRC contests

both the fairness of CP's investigations, as well as the severity of the discipline issued to Mr. Wojcik.

2. For the reasons which follow, the arbitrator rescinds Mr. Wojcik's 5-day suspension on the basis that CP failed to conduct a fair and impartial investigation. CP did demonstrate it had cause to discipline Mr. Wojcik for the sideswipe, but termination was excessive in the circumstances. A 7-day suspension will be substituted for that termination.

5-day suspension

3. Investigations are crucial to the CROA process: [CROA&DR 4549](#). They provide a factual transcript for the parties' and the arbitrator's use at the expedited arbitration hearing. For over 50 years, the parties' collective efforts in developing factual transcripts has enabled this Office to provide, when compared with the alternatives, timely and cost-effective arbitration decisions.

4. In [CROA&DR 2073](#), Arbitrator Picher emphasized that, while investigations must remain informal and expedited, they still must generally provide an opportunity "to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence".

5. While specific collective agreement language governs the process, an investigation generally is designed to be an open-ended inquiry into the facts. The investigation mandates evidence disclosure and provides the employee with an opportunity to call witnesses and put his/her position on the record.

6. The TCRC contested the fairness and impartiality of CP holding a January 2016 investigation meeting with Mr. Wojcik to review six (6) efficiency test (ET) results. CP's January 6, 2016 letter described its investigation as covering a period over a year in length, from January 1, 2015 to January 5, 2016.

7. The importance of ETs for everyone in the railway industry is clear. CP's policy notes that ETs are "not intended to be a discipline tool" (Union Exhibits; U-2; Tab 6), but discipline may occur in certain circumstances. If an ET results in discipline, then CP will have the same burden of proving the facts as it would in any other case.

8. The TCRC objected to the scope of the investigation during Mr. Wojcik's January 8, 2016 interview. The arbitrator notes that 5 of the 6 ETs took place in the November 2015 - January 2016 period. The earliest one CP addressed occurred on June 23, 2015.

9. The TCRC persuaded the arbitrator that CP did not conduct a fair and impartial investigation. This renders the 5-day suspension void *ab initio*: [CROA&DR 3322](#). There

are several reasons which, on a cumulative rather than stand alone basis, support this conclusion.

10. The scope of an investigation which potentially goes back over a year to review ETs initially causes concern, even though the ETs being examined occurred between June 2015 and January 2016. While an ET does not necessarily exclude discipline for the same event, undue delay may prejudice a grievor's procedural rights.

11. In [CROA&DR 3011](#), Arbitrator Picher described the prejudice arising from undue delay:

“For reasons touched upon in other awards of this Office, including one award interpreting article 73.6, it is inconsistent with the precepts of a fair and impartial investigation for an employer to withhold from an employee a complaint of serious allegations of misconduct for a substantial period of months, thereby depriving that individual from adverting as freshly as possible to the date and incident in question, so as to be able to fairly respond to the allegation made...Apart from hampering a person's own ability to recall, such a delay would also hamper, if not destroy, the employee's ability to identify and confer with other persons or witnesses who might assist in his or her defence”.

12. CP argued there are no time limits for when it starts its investigations. For example, CP might investigate matters long after they occurred, such as inappropriate wage claims. The difference between those situations and the current one is that CP knew of the facts when the ETs occurred. Its decision not to address at least one of them as a disciplinary matter for a significant period resulted in undue delay.

13. The investigation raised further issues as well.

14. One important principle for investigations is that the investigating officer cannot have been personally involved in the matter being reviewed: [CROA&DR 3167](#). In that case, Arbitrator Picher noted that:

While it may be stressed that in the instant case there is no suggestion that Mr. Lencucha acted other than in good faith, the inescapable conclusion is that by assuming the role of both witness of the scene, albeit after the fact, and investigating officer he stepped outside the well-established requirements for a fair and impartial investigation.

15. The TCRC objected to the investigating officer being involved in one of the ETs being investigated (Union Exhibits; U-2; Q23). CP did not address why this situation did not create a conflict of interest.

16. The TCRC further objected during the investigation that its request to ask Mr. Wojcik a question had been denied (Union Exhibits; U-2; Tab 5 Q24). CP did not explain why the TCRC could not ask its question. The transcript does indicate, however, that the TCRC subsequently asked questions for other matters (Union Exhibits; U-2; Tab 5 Q36-37).

17. The arbitrator concludes that the investigation did not meet the standard of being fair and impartial. CP can investigate matters, but an excessive scope and undue delay in proceeding may cause prejudice to a grievor. Undue delay prevents employees from conserving their recollections of the facts, since they may have assumed that CP had decided to deal with the matter solely by way of ET.

18. What is considered “undue” in terms of delay will be a question of fact in each case. Undue delay clearly existed for the June 2015 ET which was only investigated in January 2016.

19. In addition to the scope and delay issues, the arbitrator did not find a response to the allegation that the investigating officer might have been in a conflict of interest for another one of the ETs. Similarly, CP did not allow the TCRC to pose a question during the investigation for reasons which were never explained.

20. For the foregoing reasons, and on a cumulative basis, the arbitrator concludes that CP’s investigation was not fair or impartial in the way the collective agreement requires. The 5-day suspension shall be removed from Mr. Wojcik’s record.

Termination

21. On January 9, 2016, a sideswipe occurred on the train on which Mr. Wojcik was working. Another train had been left foul, with the result that Mr. Wojcik’s train sideswiped the other one. Mr. Wojcik was riding the point when his movement struck the foul railcar. Mr. Wojcik did not notice the contact until 3 cars had gone by.

22. The TCRC objected to CP’s introduction of a photograph only at Q56 of the investigation (Union Exhibits; U-2; Tab 23). The arbitrator agrees that this document

should have been produced prior to the start of the interview. However, compared with past CROA cases submitted during argument which found discipline to be void *ab initio*, this isolated instance paled in comparison. Moreover, the TCRC did not seem to pursue this objection any further in its July 8, 2016 grievance (Union Exhibits; U-2; Tab 26).

23. The arbitrator dismisses this procedural objection.

24. CP has met its burden that discipline was warranted for this sideswipe incident. However, dismissal was clearly excessive. Progressive discipline should have been followed.

25. The arbitrator substitutes a 7-day suspension for the dismissal. The parties did not dispute that any sideswipe is a serious incident. But the arbitrator can find no support in the case law the parties filed that a first offence like that of Mr. Wojcik merits termination of employment.

26. The arbitrator orders CP to reinstate Mr. Wojcik, with full seniority, and with compensation for any lost wages and benefits, other than for the period of the 7-day suspension. The arbitrator remains seized for any issues arising regarding this reinstatement order, including for sums earned in mitigation.

November 3, 2017



GRAHAM J. CLARKE
ARBITRATOR