

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4595**

Heard in Calgary, November 15, 2017

Concerning

CANADIAN PACIFIC RAILWAY

-And-

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the two assessments of discipline and two assessments of discharge to Conductor C. Merrifield of Winnipeg, MB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant matter involves four separate assessments of discipline.

14 Day Suspension

Following an investigation Mr. Merrifield was issued a 14 day suspension (7 deferred) described as "please be advised that you have been assessed with a 7 day suspension from Company Service to commence on Wednesday January 6, 2016 at 22:01 and returning on Tuesday January 12 at 22:01 without pay for violating the Train and Engine Safety Rule Book, Section 11, T-21 Personal Protective Equipment, CROR General Notice, General Rule A, Sub Items (i), (ii i), (vi), (vii i), and (x); for being observed with your safety glasses on the top of your head not on your eyes as required, walking beside cars while working as the Foreman on the PS11-01 Assignment on December 1, 2015, in Winnipeg, MB. In addition you have been assessed with 7 day deferred suspension which will be recorded into your work record as such and subject to the following conditions will not be served at this time. In the event you have any incident within 12 months of the issuance of this letter, the discipline noted herein may be activated. In the event the discipline is activated as an actual suspension you will be required to serve the suspension in addition to discipline that may be associated with any infraction subsequent to the one being assessed herein".

The Union contends the Company has improperly applied the process of deferral in the instant matter, which therefore fails all tests required to properly establish Company policy as it pertains to assessing discipline, as is in violation of Article 70.09.

The Union submits the Company has failed to meet the burden of proof required to sustain formal discipline regarding many of the allegations outlined above. In the alternative, the Union contends that Mr. Merrifield's 14 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 is contrary to the arbitral principles of progressive discipline and Company policy.

The Union requests that the discipline be removed in its entirety, and that Mr. Merrifield 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 and denies the Union's request.

21 Day Suspension

Following an investigation Mr. Merrifield was issued a 21 day suspension (14 & 7) described as "Please be advised that you have been assessed with a 14 day suspension for failing to wear your seatbelt while operating a Company vehicle on February 25, 2016 while employed as a Conductor. A violation of CROR General Rules and T&E Safety Rules, Section 1, Core Safety Rules Rights and Responsibilities. In addition, the seven day deferred suspension as outlined in form 104 dated December 31, 2015 is henceforth activated in a cumulative 21 day suspension without pay, to commence on Monday March 14, 2016 returning Sunday April 2, 2016."

The Union contends the Company has improperly applied the process of deferral in the instant matter, which therefore fails all tests required to properly establish Company policy as it pertains to assessing discipline, and is in violation of Article 70.09. Additionally, the Company has improperly activated a penalty of suspension which was previously assessed.

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. Merrifield's 21 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. Merrifield 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 and denies the Union's request.

Discharge - TGBO

Following an investigation Mr. Merrifield was dismissed on June 28, 2016 which was described as "For Failure to have the correct TGBO in your possession while operating on train 100-08 from Brandon to Winnipeg and failure to report violation after becoming aware of it upon your arrival at Winnipeg".

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. Merrifield be made whole.

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

The Union requests that Mr. Merrifield 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.

Discharge – Productivity

Following an investigation Mr. Merrifield was dismissed on June 28, 2016 which described as "For failure to work in the most productive manner on June 12th, 2016 while working on train P21-12 through failure to put engine in conventional mode when qualified to do so resulting in a 15 minute delay to assignment".

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. Merrifield 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 the penalty of dismissal is discriminatory, 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 contrary to the arbitral principles of progressive discipline.

The union requests that Mr. Merrifield 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:

S. Oliver	– Labour Relations Officer, Calgary
L. McGinley	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stubeing	– Counsel, Caley Wray, Toronto
D. Edward	– Senior Vice General Chairman, Medicine Hat
W. Edel	– Local Chairman, Winnipeg
C. Merrifield	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

The facts can be discerned from the Statement of Issue as well as the extensive submissions and materials filed by the parties. This award will avoid the repetition of those facts and, rather, focus on the reasons for decision.

The Grievor is 35 years old and has been with the Company since January 17, 2005.

Disciplinary Record

Prior to the first suspension dealt with below, the Grievor's disciplinary record consisted of a 7 day suspension for:

“...failure of efficiency tests CR114C on July 9 and CRT11 on July 11, 2015. A violation of Safety Rule Book T-23 restricted close clearances and Safe Work Procedures: detrainning moving equipment, step 4.”

14 Day Safety Glasses Suspension

Less than 6 months later, on December 1, 2015, the Grievor was working as a Yard Foreman on an assignment when he was the subject of an efficiency test by Train Master, Mike Rioux. Mr. Rioux advised the Grievor that he had been observed walking along the train, working on his assignment, without wearing his safety glasses which were propped on top of his head. Mr. Rioux' evidence was that he observed the Grievor with his glasses in that position for approximately 5 minutes. The Grievor disputes the same and suggests that the glasses were only on his head momentarily to clear them because they had fogged up.

Following an investigation, the Company assessed a 7 day served suspension and a 7 day deferred suspension, effective January 6, 2016.

The Union argues that the 7 day suspension was unwarranted in the circumstances and that the further 7 day deferral is improperly applied in that deferred discipline may only be assessed in specific circumstances contemplated by Article 70.09 of the Collective Agreement which states in part:

“This clause is intended to address an individual who has been responsible for an incident and circumstances that by themselves are

not dismissible, but which, due to the existence of demerit marks on the individual's record, would result in dismissal.”

Although the argument of the Union appears to be on point, it is unnecessary for me to deal with the same in order to reach my conclusion with respect to the discipline imposed in the circumstances here.

Everyone, including the Grievor, supports the importance of employees wearing Personal Protective Equipment (PPE), including the safety glasses. The decisions are abundant which confirm that the Company may discipline an employee who fails to wear his/her PPE.

While I accept that it may be necessary, on occasion, to momentarily remove one's glasses, or otherwise clear or change them, I conclude that the Grievor was not wearing his glasses for the period of time as described by Train Master Rioux. Accordingly, I do not accept that the Grievor's failure to wear his safety glasses, was a “momentary lapse”.

It strikes me as rather severe for there to be a 7 day suspension for the failure to wear the safety glasses. However, having regard to the fact that the Grievor served an earlier 7 day suspension, and keeping in mind the principles of progressive discipline, I accept that the 7 day suspension is appropriate.

That said, there is no basis for the further 7 days (deferred) which would amount to a 14 day suspension for a failure to wear safety glasses. Accordingly, the suspension

is reduced to 7 days and the deferred portion of the suspension will be entirely removed from the Grievor's record.

14 Day Seatbelt Suspension

On February 25, 2016, the Grievor was observed operating a Kubota RTV in the CP Rail yard while failing to have his seatbelt fastened as required by the Safety Rules.

An investigation ensued. At the conclusion of which the Company determined that the assessment of a progressive disciplinary measure of 14 days suspension, effective March 14, 2016, was warranted.

The Grievor took the position that, during his training with respect to the operation of the RTV, he was not made aware that the seatbelt needed to be fastened. Although, other individuals that he spoke to were aware of the necessity to wear the seatbelts, he allowed that he was not fully aware until after he spoke with Danny Krahn and Alan Ross, the Train Master. The Company issued a 14 day suspension (with the additional 7 days deferred suspension tacked on which I have already removed).

While the Grievor took the position that he was not aware of the necessity to wear the seatbelt, it is apparent from the interviews that he told Car Foreman, Danny Krahn, at the time that he was first confronted, that he had been told about the necessity to wear them (Union: Tab 15, Q&A 10). That said, I regard a 14 day suspension for this PPE violation as too severe. In its place – having regard to his previous suspensions - I impose a 7 day suspension.

Dismissal for TGBO (Tabular General Bulletin Order) Violation

On June 9, 2016, the Grievor and Locomotive Engineer were directed to work on assignment 100-08 out of Brandon, Manitoba.

At the outset of his assignment, the Grievor went to the Carberry Subdivision profile on the Field Intelligent Terminal (FIT) and pulled, what he observed was, the only TGBO that was available at the time, along with all of the associated paperwork and authorities required for the trip. The Grievor and the Locomotive Engineer then reviewed, initialed and signed the TGBO as required. When the train arrived, he and the Engineer also performed a job briefing with the incoming crew. They then boarded the train and proceeded to Winnipeg. At approximately 08:38 on the morning of June 10, 2016 the Winnipeg Train Master spoke with the Grievor regarding his trip on train 100-08 and specifically inquired about the Grievor having pulled out the TGBO for train 101-08 as opposed to train 100-08 which had been assigned to him and his crew. At that point, the Grievor conceded that he had pulled the wrong TGBO and that, although he had done the job briefing, he only noticed his error when he did his tie up in Winnipeg.

Prior to this call the Grievor realized that he had pulled the TGBO for train 101-08 and, as a result, decided to pull out the second TGBO for train 100-08. He did this, he said, so as to assist the other crew from being confused. He states (Union; Tab 20: Q&A 21-22):

Question 21: When you removed the TGBO from the FIT at Winnipeg for train 100-08 you stated you did this to assist train 101-08 from taking

the incorrect TGBO. Did you notice a TGBO for train 101-08 in the FIT at that time?

Answer: No. There was not one for 101-08.

Question 22: What made you think that train 101-08 would pull a TGBO for 100-08?

Answer: By me taking their TGBO at Brandon and leaving mine in Winnipeg FIT, I was thinking they could possibly (sic) make the same mistake I made. After just realizing we had made the trip with the wrong TGBO I was panicking and made a big mistake by pulling the TGBO, I regretfully made this error.

Subsequently, when asked in a second interview:

Question: Why did you not report this when you became aware of the mistake?

Answer: I was panicking and made a big mistake by pulling the TGBO. I regretfully made this error.

It is important to review the provisions contained in the Rule Book for Train and Engine Employees with respect to the Conductor's obligation relative to the TGBO:

Verification

(a) You must ensure that:

- (i) The train symbol (a movement identification number; e.g. 102-12 or an assignment; e.g. K41) on the TGBO designating their movement is correct;
- (ii) The limits cover the specific routing; and
- (iii) TGBO contains the correct number of pages.

...

(d) If incorrectly designated or there is no TGBO, the RTC must be contacted immediately. Although not part of the designation, advise the RTC if the leading locomotive number, and initials if other than CP, is not correct or if there is none shown.

Occupying

A movement must not occupy any track where TGBO is applicable, unless in possession of a Train Specific TGBO correctly addressed to the movement, with limits covering the specific routing.

In his investigatory interview, the Grievor allowed (Q.16) that he was familiar with his obligations, as set out above.

Notwithstanding the Grievor's explanations for the shared obligations for compliance with the Rules, it is apparent that the ultimate obligation fell to him as set out therein. This was a serious offence. He breached the CROR General Bulletin and the CROR General Rules when he failed to have the correct TGBO in his possession while operating train 100-08 from Brandon to Winnipeg. In addition, his failure to report the clear violation of the rules after he became aware of it in Winnipeg represents an equally serious breach.

In **CROA 3781**, the Arbitrator ordered a penalty of 25 demerit points and a suspension of 8 months without pay to an employee with 43 years of service for a "*clear failure to observe the requirements of initialling the TGBO's in two subdivision in contravention of CROR Rule 157...*"

A similar position with respect to the seriousness of a breach of a TGBO rule was taken by Arbitrator Picher in **CROA 2936** and resulted in the dismissal of the employee.

I was given significant pause by the Grievor's explanations that the blame ought to be spread around due to the fact that errors had been made by the RTC in sending TGBO's to the incorrect FIT. Even more egregious is his explanation of why he pulled the second TGBO when he got to Winnipeg. He says he did so in order to avoid confusion by the incoming crew in case they pulled his TGBO rather than their own. Frankly, I am

not convinced by that explanation and more inclined to take the view of the Company that the pulling of the second TGBO was done in an effort to cover up his “big mistake” rather than be forthright and disclose the error. I accept the observations of Arbitrator Picher in **CROA 3607** wherein he refers to the quotes:

“...the ongoing general obligation of the Grievor is to be truthful with their employer and, as required by the rules cited above, to immediately advise the rail traffic controller of the rules violations and the incident which resulted from them.”

... To some degree, the continued concealment of what transpired by reason of the mix up in the use of cell phone numbers can be viewed as an ongoing deliberate failure by the grievors to bring a potentially hazardous condition to the attention of their supervisors. In the facts of the case at hand, it is the failure of candour and honesty on the part of the grievors, much more than their rules infractions in the operation of their train, which calls into question their ongoing employability in the operation of a high-profile public passenger train service.

While other employees have made errors with respect to an incorrect TGBO's (as outlined in the Union's Brief at para. 93 et seq.), the discipline imposed upon them would have been, by definition, dependant on the individual circumstances of each case. Here, the Grievor's disciplinary record leading up to his final two disciplines was significant particularly given the time frame in which they occurred. Notwithstanding the Union's thorough submissions, in light of the fact that the Grievor failed to self-report this serious violation and thereafter attempted to cover up his mistakes when he got to Winnipeg, I cannot arrive at the conclusion that what happened here was mere inadvertence in failing to notice a discrepancy.

The discipline of discharge imposed on the Grievor for this transgression was dealt with at the same time as the incident which follows. On both matters he was dismissed.

Dismissal/Alleged Productivity Issue

While the investigation of the above incident was underway, the Grievor was involved in another violation of the rules. As described by Train Master Ryan Thomas:

At approximately 21:00 June 12th, 2016 Locomotive Engineer on P21-12 Lorne Ozuk informed Terminal Trainmaster Leo Arnaud by radio that the 4421 which was parked at Paddington was still set up in belt pack mode and that no one knows how to knock it down to conventional. I went out to Paddington to handle the situation. When I arrived at the 4421 I then realized that the other member of the crew on the P21-12 was Clayton Merrifield who is PC qualified. I asked Mr. Merrifield if he could have knocked it down to which he did not reply. Mr. Ozuk stated that's not his responsibility because I am the Engineer.

This assignment was delayed approximately 45 minutes on account of this issue. (Emphasis added)

While there was some debate about whether or not the Grievor was qualified to knock the engine from belt pack mode down to conventional, the issue is essentially laid to rest by the Grievor's answer in his interview that, in fact, he could (Q. 26-27):

Question 26: Considering if the units were knocked down and the locomotive brake test was complete prior to the arrival of the documents, this train would have been ready to depart within 5-10 minutes from the arrival of the documents based on your response to question 21 indicating checking the danger bills and the continuity test took between 5 and 10 minutes. Is this correct?

Answer: Yes.

Question 27: In Mr. Ozuk's statement in response to question 20 he could not recall if you offered to knock the unit down into conventional. Can you recall if you offered to knock the unit down to conventional?

Answer: I believe I said I was RCLS qualified and that I could.

It is apparent from the submissions of the Union that there were other circumstances which may have contributed to the delay in the train's departure. They need not be enumerated here. The fact remains that, irrespective of which viewpoint one takes, the train was delayed for some period, at some point, by the purposive decision of

the Grievor not to knock the unit down to conventional mode. His "*culpability*" in this respect cannot be diminished or deflected by the fact that the Locomotive Engineer directed him not to do so. The Grievor is obligated to perform his tasks as required; and, those obligations cannot be diluted or avoided by directives from the Locomotive Engineer who, in the circumstances here, was not in a position to alter those obligations. In all events, the Locomotive Engineer was dismissed and then reinstated for his participation in the event.

Coming within 3 days of each other, the Grievor's breach of the TGBO obligations and his delay of train activity were dealt with at the same time and the cumulative discipline that the Company imposed was dismissal.

Although the Union argued that this was essentially a "*pillling on*", I do not agree. These were two discrete incidents that happened within 3 days. In the circumstances, the Company cannot be accused of holding in abeyance an action on disciplinary conduct in order to pile it on at a subsequent time. Nor am I satisfied that the references to other employees' discipline with respect to similar offences, operates here to suggest a discriminatory or improper treatment of the Grievor

It struck me as odd that the Company did not immediately remove the Grievor from service pending the TGBO violation. It might be argued that this failure indicates that the Company did not initially view the violation as a dismissible offense. Because of that fact, I considered the suitability of last chance opportunity. However, I am simply unable to

ignore the failed previous attempts at progressive discipline in such a short time prior to his last two violations. Particularly, I was given to wonder why - if progressive discipline was having an effect on him - the Grievor, while he was already under investigation for the TGBO matter, would not have availed himself of the opportunity to assist while he was a party to the belt pack issue at Paddington.

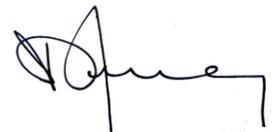
Having regard to the fact that the Grievor is not a long service employee; that his record demonstrates that he had been repeatedly – to no apparent avail - disciplined on a progressive basis on three separate occasions prior to the TGBO and delay of work violations; and, taking into consideration the seriousness of the TGBO violations, there are few mitigating factors in his favour. The most significant breach, of course, is his failure to follow the rules and requirements with respect to the TGBO and his subsequent attempt to cover up his actions with respect to the same. As indicated in **CROA 3607**:

“... it is the failure of candour and honesty on the part of the grievors, much more than their rules infractions in the operation of their train, which calls into question their ongoing employability ... “

In the result, I am led to conclude that there is no basis for mitigating the penalty assessed by the Company.

The grievance is dismissed.

February 2, 2018



RICHARD I. HORNUNG
ARBITRATOR