

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

CASE NO. 4604

Heard in Montreal, December 14, 2017 and January 10, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

- A.** Appeal of assessment of a 30-day suspension to Trainman A. Stringer.
- B.** Appeal of the 7-day deferred suspension of Conductor A. Stringer.
- C.** Appeal of the dismissal of Conductor A. Stringer.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

A. 30 Day Suspension

Following an Investigation, on July 31, 2015, Trainman Stringer was assessed a thirty (30) day suspension for "Please be advised that you have been assessed with 30 days of suspension for the following reason(s): For not having respected item T-20 (do not sit or lean on railway equipment) from the train and locomotive safety manual, resulting in you having sat down on the locomotive footboard while working as a yardman at St-Luc on July 17th 2015. Your suspension will be effective from August 1st 2015 to an inclusive August 30th 2015."

The Union contends that the 30-day suspension is unwarranted and excessive in all of the circumstances. The Employer failed to conduct a fair and impartial investigation. The assessment of a disciplinary suspension is contrary to the principles of progressive discipline and the educative, not punitive, purpose of such.

The Union requests that the 30-day suspension be removed and Trainman Alex Stringer be made whole for all lost earnings, benefits 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.

B. 7 Day (Deferred) Suspension

Following an Investigation, on January 13, 2016 Conductor Stringer was assessed a 7 day deferred suspension as shown on his Employee Notification Letter as follows, "*This is to inform you that you have violated the attendance management policy to try to earn your leave*"

before the end of your shift on 26 December 2015, for the next shift. For this reason, we confirm your suspension deferred for seven days. This suspension will be included in your working folder, but will not be applied for the time being subject to the following conditions. If an incident of attendance occurs within 12 months following the present date, the above suspension will be applied. If the suspension is activated as actual suspension, you will be required to serve the suspension in addition to discipline that may be associated with any infraction subsequent the one being assessed here". (Please note this is not an official translation).

The Union's position is that the facts of this investigation do not warrant, nor justify the quantum of discipline imposed by the Company. The assessment of a disciplinary suspension is contrary to the principles of progressive discipline and the educative, not punitive, purpose of such. The Union also states that suspensions both assessed and deferred are in violation of the Collective Agreement. Mr. Stringer was sick one time and in no way in contravention of CP's attendance management policy. Mr. Stringer is also protected under the Canada Labour Code in this instance. In the Company response, it is stated that Mr. Stringer's request to book sick or unfit account the excessive overtime was denied and subsequently he booked off for the next shift.

The Union contends that this remark is incorrect because the Company cannot outright deny an unfit or sick call placed by the employee. Mr. Stringer advised the Company that he was fatigued to the point where he needed to rest as he was sick. Mr. Stringer is the judge of his own condition and the Company supports this in its' claims that 'safety and rule compliance are of utmost importance'. The Company also remarked that 'he had something to do' and that is why he booked off. However, this is unsubstantiated and an opinion on their behalf. The evidence deduced in the investigation had proven that he was fatigued, feeling ill, and gave proper notice to the Company. Again, Mr. Stringer cannot be disciplined for a single absence. For the above mentioned reasons, the Company is in violation of the Collective Agreement, its own policy and the Canada Labour Code.

The Union requests that the suspension be removed and Conductor Stringer be made whole for his lost earnings/benefits 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.

C. Discharge

Following an Investigation Mr. Stringer was dismissed from Company service as follows; *Please note that you were fired for the following reason: For failing the CR110 effectiveness test; Resulting from not conducting a train parade inspection 142 and not complying with your last chance agreement dated April 18, 2016, when you were working as a conductor on assignment FS22 on October 14, 2016 (unofficial translation).*

The Union's position is that the facts of this investigation do not warrant, nor justify the quantum of discipline imposed by the Company, dismissal. Mr. Stringer was dismissed for a failed Effectiveness Test regarding pull by inspections on passing trains and for not complying with a last chance agreement. During the investigation of all three crewmembers and as presented in both the Step 1 and Step 2 appeals, it was deduced that the crew did perform a pull by inspection

on a passing train, but from their locomotive. Although the rule provides for the inspection to be performed “from the ground”, these duties are to be done “when duties and terrain permit”. In essence, the inspection could not be done from anywhere but the locomotive because of the safety concerns regarding the abundant coyote problem in this area. Many times, was it asked and answered in the investigations of the crew, and many times was the seriousness of the possibility of the crews’ compromised safety discussed before the event, during, and in within the grievance procedure. The well-known fact of the coyote problem was known to the Company, the public, and to the employees. The very Trainmaster that failed Mr. Stringer and crew of the E test was involved in the resolution of the coyote problem himself. Trainmaster McRobbie had email exchanges with other management and the Union in this regard. Although no formal instruction/ training/ awareness was provided for the employees, the Company had participated in reviewing the problem with the public. So too was the media involved as there had been many sightings and attacks in the area. The Company needed to use this situation as one of educational purpose, and not a disciplinary one. Mr. Stringer and his crew had a job briefing where it was determined that the safest course of action was to perform the inspection from the safety of the locomotive. This decision was also an effective one in completing their task, as they were able to perform the inspection too. The crew had fulfilled the General Notice of the CROR, in that “safety and willingness to obey the rules are of the first importance”. As per the Company’s own E test procedure, *“A proficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure proficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action. Proficiency testing is also not intended to be a discipline tool. While this may be, the corrective action required, depending on the frequency, severity and the employee’s work history, education and mentoring will often bring about more desirable results”*. Education should have taken place here.

Regarding his non-compliance with a last chance agreement, the Union contends that this is an untimely and unneeded use of this arbitrary agreement. The employee was given this agreement without the Union’s presence and did not sign it. These factors make the agreement unfair, a violation of his rights, and a procedural flaw. To hold him to a 2-year contract is unfair in this situation, where the Union contends that no discipline is required in the first place. Therefore, the last chance agreement has no bearing and should not be enacted, let alone contribute to a dismissal.

The Union requests that the dismissal be removed and Mr. Stringer be made whole for all loss earnings with interest, recalculation of EDO's, without loss of benefits/pension/AV 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 Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Pezzaniti

– Manager, Labour Relations, Calgary

C. Clark – Manager, Labour Relations, Calgary
R. McRobbie – Trainmaster, Montreal

And on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
W. Apsey – General Chairman, Smiths Falls
D. Psychogios – Vice General Chairman, Montreal
A. Stringer – Grievor, Montreal

AWARD OF THE ARBITRATOR

Introduction

1. This award resolves three separate grievances the TCRC filed on behalf of Conductor Alexandre Stringer, who CP hired in 2008.
2. CP imposed a 30-day suspension for Mr. Stringer violating T-20 (sitting or leaning on equipment). CP issued a 7-day deferred suspension, which Mr. Stringer later served, for his alleged violation of the Attendance Management Policy. Finally, CP terminated Mr. Stringer for violating CROR Rule 110.
3. The arbitrator has decided to reinstate Mr. Stringer.
4. The 30-day suspension for violating T-20 was excessive; a written warning will be substituted. CP failed to prove that Mr. Stringer violated the Attendance Management Policy; suspicion is not enough to meet the burden of proof. Finally, while CP did demonstrate that it had grounds to discipline, the facts warrant the substitution of a 30-day suspension for the termination.

Procedural Issue

5. This matter initially involved only Mr. Stringer's termination grievance. During the December 2017 CROA session, this Office learned that Mr. Stringer's two other pending discipline grievances had not been included.

6. CP argued it could rely on Mr. Stringer's discipline record as it stood, despite the pending grievances. In CP's view, the TCRC decided which grievances to schedule before this Office. If they did not contest earlier sanctions at the same time as the dismissal grievance, then CP could rely on the existing discipline record.

7. The TCRC argued that an arbitrator cannot rely on contested discipline in a culminating incident case. Moreover, it noted that CP could add other relevant discipline incidents to a CROA hearing.

8. Neither party had time to verify the existing arbitral jurisprudence on the issue. The arbitrator advised the parties that, on a preliminary basis, neither position seemed persuasive. Contested discipline pending before this Office cannot be relied upon in arbitration to support a penalty, including dismissal. Such a result would unfairly render the still pending grievances moot.

9. But neither does it appear practical to hear an employee's termination grievance without also resolving related pending matters before this Office. The entire context is

essential. The parties have shown in [CROA&DR 4524](#) that five separate cases involving the same employee can be heard at the same time.

10. The parties successfully resolved the issue. At the December 2017 CROA session, they pleaded Mr. Stringer's dismissal case. At this Office's January 2018 session, they then pleaded the two earlier disciplinary matters.

30-Day Suspension

11. On July 17, 2015 at the St. Luc Yard in Montreal, Mr. Stringer sat down on a locomotive footboard (a step). A Trainmaster advised him not to do it. Five days later CP gave notice to Mr. Stringer to appear for an interview. Following the investigation, CP imposed a 30-day suspension.

12. The parties did not contest that Item T-20 of the Train and Locomotive Safety Manual forbids anyone from sitting on equipment. One of the concerns is the potential danger if the equipment were to move.

13. The arbitrator accepts that Mr. Stringer did not respect T-20. But CP's discipline was excessive, especially given its failure to prove its suspicion that Mr. Stringer's explanation lacked candour. There is a fundamental difference between suspicion or speculation and proving that an employee had not been candid when explaining an incident.

14. Mr. Stringer explained that he sat down because he was feeling dizzy on a hot July day. While CP may feel that that explanation was self-serving, it had the burden to prove it. CP did not demonstrate how Mr. Stringer failed to be candid in his explanation for why he sat down.

15. Based on these facts, the situation did not merit a 30-day suspension. In [CROA&DR 4483](#), Arbitrator Flynn substituted a 15-day suspension for a termination in circumstances involving a more serious incident and repeat violation of T-20:

It is not disputed that the Grievor violated Train and Engine Safety Rule, T-20. Such rules require that there be a minimum of 50 feet of separation when walking between cars. During the investigation, the Grievor explained that he was paying attention to the task to be done and felt that there was enough space to cross the tracks without any fear of being injured. The Grievor also acknowledge that he failed an efficiency test in January 2015 for not having 50 feet of separation and that he had then committed to comply with the safety rule.

The evidence shows that the Grievor took an unacceptable risk and did so just a few months after being observed to have broken the same rule (T-20) (sic).

16. In Mr. Stringer's case, there was no previous T-20 violation and the risk of injury was minimal given that he sat on his own locomotive while the crew was waiting for the switch list from a Trainmaster. This does not excuse a failure to follow T-20, but context impacts the severity of the discipline.

17. CP satisfied its burden that it may decide to discipline for a violation of T-20 given the importance of safety in the workplace. But CP did not demonstrate why anything more than a written warning was required. The arbitrator orders that the 30-day suspension be

removed from Mr. Stringer's record and that he be compensated accordingly. A written warning will replace the 30-day suspension.

7-Day Suspension

18. CP imposed a deferred suspension on Mr. Stringer for violating its Attendance Management Policy. Mr. Stringer later served the suspension.

19. CP alleged that Mr. Stringer, while at work on December 26, 2015, had attempted to book off sick for December 27 (E-1; Company Submission; Tab 1):

La présente vise à vous informer que vous avez enfreint la politique de gestion de l'assiduité de l'entreprise en essayant de vous rapporter en congé avant la fin de votre quart de travail du 26 décembre 2015, pour le quart de travail suivant. Pour cette raison, nous confirmons votre suspension différée de sept (7) jours.

20. On December 26, 2015, Mr. Stringer advised his Trainmaster, Mr. David Braun, that he could finish his tour of duty, but had doubts about working the next day (December 27). Mr. Braun advised Mr. Stringer that he was the best judge of his ability. Mr. Braun described the situation in a memo (U-1; Union Submission; Tab 3):

...Je lui ai dit qu'il fallait qu'il termine son quart de travail, et qu'il ferme son ticket. Ensuite, s'il ne se sentait pas apte à venir travailler son prochain quart de travail, qu'il pouvait communiquer avec le bureau des équipes et changer son status respectivement. A la fin de son quart, je lui ai parlé et offert les services du PAPF s'il en sentait le besoin. Je lui ai aussi informé qu'il était le seul juge de son état physique. Il m'a répondu qu'il était fatigué et qu'il verrait s'il se sentait apte au travail pour le 27 décembre.

21. Mr. Stringer explained why he booked off sometime after his shift had ended (E-1; Company Brief; Tab 5):

Q27 Désirez-vous ajouter quelque chose à cette déposition?

R27 j'ai estimé d'aviser le Trainmaster David Braun, suffisamment d'avance au cas au que mon état pourrais (détériorer). Effectivement entre la fin de mon quart de travail et le moment que j'ai appelé le CMA mon état m'empêchait de couvrir mon assignment. (sic).

22. CP clearly suspected Mr. Stringer's actions, perhaps because of the time of year. It further characterized as suspicious Mr. Stringer's conversation with the Trainmaster.

23. But that does not prove that Mr. Stringer was dishonest or intended to abuse his rights under the collective agreement. There is no presumption in this area. Discipline must result from the evidence, on a balance of probabilities, as opposed to speculation or suspicion. There was no evidence, as just one possible example, that Mr. Stringer did anything inconsistent with being sick when he was off.

24. The evidence demonstrates that Mr. Stringer spoke to his Trainmaster about his condition. He finished his tour of duty, but later called in sick for his next shift on December 27. Whether he booked unfit under the collective agreement or sick, there was no evidence to support CP's inference that Mr. Stringer was not being honest.

25. CP suggested that Mr. Stringer had a premediated plan when he called far in advance of his next shift to book off. However, Mr. Stringer called at 00:43 in the morning

prior to going to bed for 8 hours. This time frame does not support the inference CP asks the arbitrator to draw.

26. In [CROA&DR 4441](#), this Office dealt with a situation where questions were raised about an employee's activities when he had booked off under the collective agreement:

The Grievor said he did not feel as though he could work on October 28, 2014. He had been upset about the earlier altercation and needed sleep. There is no evidence to dispute that other than that Assistant Superintendent Smith briefly saw him on an excavator on the day in question. I am not persuaded, given the Grievor's undisputed evidence provided at the investigation and the purpose of the booking unfit provision, that his time on the excavator undermines the Grievor's credibility.

27. In the absence of evidence sufficient to demonstrate that Mr. Stringer had in fact been abusing his rights under the collective agreement, the 7-day suspension must be overturned. The 7-day suspension will be removed from Mr. Stringer's record and he will be compensated for that period.

Termination of Employment

28. CP terminated Mr. Stringer's employment effective November 11, 2016 based on an alleged violation of [Canadian Rail Operating Rules](#) (CROR) Rule 110 and his existing disciplinary record¹. This decision has already modified two of the elements in that prior disciplinary record.

¹ CP's dismissal letter referred to an "entente de dernière chance" (E-1; Company Submission; Tab 5). The French document in question (E-1; Company Submission; Tab 7) is a warning letter about possible future conduct, but is not a "last chance agreement" as that term is commonly used in labour relations.

29. [CROR Rule 110](#) reads:

110. Inspecting Passing Trains and Transfers

(a) When duties and terrain permit, at least two crew members of a standing train or transfer and other employees at wayside must position themselves on the ground on both sides of the track to inspect the condition of equipment in passing trains and transfers. When performing a train or transfer inspection, the locomotive engineer will inspect the near side. When a group of wayside employees is present, at least two employees must perform the inspection.

EXCEPTION: Crew members of passenger trains are exempted from the above requirements except when standing at meeting points in single track territory. However, every effort must be made to stop a train or transfer when a dangerous condition is noted.

(b) Employees inspecting the condition of equipment in a passing freight train or transfer must, when possible, broadcast the results of the inspection.

(c) Every effort must be made to stop a passing train or transfer if a dangerous condition is detected. Each crew member of a train or transfer must be alert at all times for a stop signal or communication given by an employee. The report to the train or transfer being inspected must state only the location of the dangerous condition and what was observed and not speculate as to the cause.

(d) When a crew member is located at the rear of a train or transfer, a front crew member must, when practicable, notify the rear crew member of the location of employees in position to inspect their train or transfer.

30. The visual inspections mandated by Rule 110 allows the crew of one train to alert a passing train's crew about potentially dangerous situations, which could include dangling hoses, leaking tank cars, damaged safety equipment and hot journals (wheels).

31. On October 14, 2016, Mr. Stringer worked on assignment FS22 along with two other crew members. Trainmaster McRobbie, who was riding on passing Train 142-13, noticed that Mr. Stringer and his fellow crew members were not outside on the ground to perform the required Rule 110 pull-by inspection. Trainmaster McRobbie's memo also noted in part that Mr. Stringer's crew did not contact train 142-13 to relay the results of the inspection (E-1; Company Submission; Tab 2):

As we passed by the crew, I noticed that nobody was outside performing a rule 110 pull-by inspection on our train. I also noticed the conductor's door on the 2260 open slightly and then close as we approached. I then remarked to 142's crew of what I saw and they too noticed and remarked that there was no one outside in position to watch our train. Also, at no time did the crew of the CP 2260 contact us to relay the result of any pull-by inspection performed.

32. Trainmaster McRobbie also described his conversation with Trainmaster Drouin who had spoken to Mr. Stringer and his crew after they had arrived at the St. Luc Yard:

After speaking with Trainmaster Drouin, he informed me the crew of FS22 advised they were still moving when 142 pulled past them and that was the reason they were not in position.

After reviewing the downloads here is what they reveal:

142-13 was stopped from 19:30 to 19:36(as 113 passed) and then proceeded to HO. The CP2260 was stopped from 19:33 until 19:49 waiting for 142 to clear the crossovers.

This indicates that the crew of FS22 were in fact stopped when we pulled past them and as such, should have been in position to perform the pull-by inspection on 142's train.

33. Trainmaster Drouin's memorandum described his interaction with Mr. Stringer and the crew of FS22 (E-1; Company Submission; Tab 2):

...When we got to the shop, I asked the crew if they had done a pullby inspection when they met train 142-13 at Hampstead before they went in for lunch. Mr. Stringer the foreman answered no we were not in position as we were not completely stopped at the time. I then advised them that Trainmaster Rob McRobbie was onboard 142-13's train and the whole crew of FS22 would have efficiency test failures inputted against their records for not doing a pullby inspection on 142's train at Hampstead. The answer I was given was "qu'est ce que tu veux qu'on fasse". The conversation ended and the FS22 crew boarded 252's power and started to double up the train.

34. During Mr. Stringer's interview, he explained the discrepancy between his comment that his train had been moving when Train 142-13 passed when the records indicated it was stopped. Mr. Stringer indicated he thought Trainmaster Drouin had been talking about Train 113 rather than Train 142-13. Moreover, Mr. Stringer indicated that the crew did not know about Train 142-13 and only learned of it when seeing it roughly 300-500 feet away.

35. Mr. Stringer also stated in his interview that he and his crew did not perform an inspection of Train 142-13 from the ground because of a concern about coyotes. There was no dispute between the parties that there had been coyotes in the news and that Mr. Stringer and another crew member had had an altercation the previous week. The issue separating the parties concerned whether this was the reason for Mr. Stringer not performing a Rule 110 inspection on October 14, 2016.

36. The TCRC argued in its brief that Mr. Stringer performed a partial inspection of Train 142-13, but did so from the safety of the locomotive rather than on the ground due to the coyote issue. CP argued that Mr. Stringer changed his story three times rather than acknowledging a failure to respect Rule 110.

37. CP has demonstrated that there were grounds for discipline when the crew of FS22 failed to conduct the mandatory Rule 110 inspection. On a balance of probabilities, the arbitrator finds CP's evidence more credible than that of Mr. Stringer et al. There are several reasons for this credibility finding.

38. First, a crew which inspects a passing train is obliged to communicate its findings to the crew of that train. If a crew is unable to conduct the pull-by inspection, in full or in part, it does not follow that they are then relieved of communicating. One would think it would be just as crucial, if not more so, to advise the other train of the reasons why a proper inspection could not occur.

39. Second, while it is conceivable that Mr. Stringer thought Trainmaster Drouin had been talking about a different train (Train 113) (U-1; Union Submission; Tab 10; QR 12), Trainmaster Drouin's written recollection was quite detailed.

40. Third, even if one accepted Mr. Stringer's suggestion his crew did a partial inspection of Mr. McRobbie's Train 142-13 (U-1; Union Submission; Tab 10; QR 32), it seems incredible that they would not advise that train's crew of this fact and the coyote

problem. Moreover, it seems again incredible that they would make no mention of the coyote problem when questioned virtually contemporaneously by Trainmaster Drouin.

41. On a balance of probabilities, and given the obligation to decide credibility issues within the parameters of the parties' longstanding expedited arbitration system, the arbitrator concludes that it is more probable than not that Mr. Stringer failed to do the Rule 110 inspection and later attempted to avoid taking responsibility for that failure.

42. The arbitrator has, however, decided to substitute a suspension for the original termination. The earlier decisions in this award which reduced the 30-day suspension down to a written warning, and overturned the 7-day suspension, impact the disciplinary record on which CP can rely.

43. This Office's case law also provides some guidance on the appropriate penalty for a Rule 110 violation.

44. In [CROA&DR 3924](#), Arbitrator Picher intervened in the employer's decision to impose 15 demerit points for a Rule 110 violation, which had put the employee over the 60-point threshold under the Brown System. Based on the grievor's long service and few operating rules violations, Arbitrator Picher instead substituted a time served suspension for the dismissal.

45. In both [CROA&DR 3711](#) and [CROA&DR 4342](#), the employer imposed 15 demerit points for Rule 110 violations. In [CROA&DR 4366](#) and [CROA&DR 4369](#), 20 demerit points were assessed for a Rule 110 violation.

46. These cases assist in analyzing what penalty should be substituted for Mr. Stringer's dismissal. CP no longer follows the Brown System of demerit points. In this case, Mr. Stringer failed to follow Rule 110 which, at least under Brown, would merit something in the range of 15-20 demerit points. While candour is an important factor for an arbitrator weighing an employee's discipline, a lack of candour constitutes an aggravating factor.

47. The arbitrator will not substitute a "time served" suspension in this case, in part due to the findings on the two previous incidents above, the cases on Rule 110 violations and the initial discipline handed out to Mr. Stringer's fellow crew members. Instead, a 30-day suspension will be substituted for the dismissal.

Disposition

48. This award decides three separate grievances.

49. The arbitrator orders that CP replace Mr. Stringer's 30-day suspension with a written warning for the violation of T-20. The arbitrator overturns Mr. Stringer's 7-day suspension due to a lack of evidence regarding the allegation he booked off inappropriately.

50. For the reasons expressed above, the arbitrator substitutes a 30-day suspension for Mr. Stringer's dismissal.

51. Mr. Stringer is entitled to compensation, without loss of seniority, but less any amounts he earned in mitigation.

52. The arbitrator retains jurisdiction for any issues which arise out of this award, including the calculation of the compensation owing to Mr. Stringer.

January 31, 2018



GRAHAM J. CLARKE
ARBITRATOR