

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION  
CASE NO. 4622**

Heard in Edmonton, March 15, 2018

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The Union advanced an appeal of the dismissal of Locomotive Engineer B. Johnston of Red Deer, Alberta.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Following an investigation, Engineer Johnston was dismissed for the following reasons, Please be advised that you have been dismissed from company service for the following reason(s): *For failure to properly secure the AEX7313 in Red Deer yard while working as an engineer on the A32-02 on May 2nd, 2017, resulting in the car rolling unattended onto the main track and fouling OCS limits on the Red Deer Subdivision. A violation of GOI, Section 4, Testing Hand Brake effectiveness, Section 4, 1.0 Leaving Equipment - Non Main Track (b) and {c}, Rule Book for Train and Engine Employees, section 11, item 11.9 -Securing, Rule Book for T&E employees Section 2, 2.2 A, 2.1 A(ii), 2.2 C(v)(vi) and (xii).*

The Union contends that the Company has not met its burden of proof to establish any culpable behavior in this case and therefore no discipline is warranted. The Union contends did not meet the burden of proof necessary to impose the ultimate penalty of dismissal. As a result, the Union contends the discipline is unjustified, unwarranted and extreme.

The Union contends the investigation confirmed that the car in question was outfitted with a substandard handbrake. It was also confirmed the handbrake had the effective braking effort of fifty percent. The Union contends that while this information may have played a part in the incident, the fact of the matter is that Engineer Johnston was not given that information and therefore had no way of knowing that the car being secured had a substandard handbrake. During the test of the handbrake effectiveness, Engineer Johnston was located three Locomotives away from the car, it is the Union contention that he would not have been physically able to see whether the car was secure and acted on the information he received, that being, the car was tested and secure.

The Union further contends the investigation was not conducted in a fair and impartial manner that complies with Article 23.04. The Investigating Officer relied heavily upon video evidence, video evidence collected from the Locomotive camera. The Union objected to the use of the video and specifically requested full disclosure of all evidence that the Company would be relying on. That request was denied.

The Union requests that Engineer Johnston be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

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

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Calgary
H. Makoski	– Senior Vice General Chairperson, Winnipeg
B. Myre	– Local Chairperson, Red Deer
T. Doherty	– Former Local Chairperson, Red Deer
D. Edward	– Senior Vice General Chairperson, Medicine Hat
B. Johnston	– Grievor, Red Deer

### **AWARD OF THE ARBITRATOR**

The grievor, Locomotive Engineer Barry Johnston of Red Deer, Alberta was dismissed from service on May 25, 2017. The Union grieves that the discipline is null and void for want of a fair and impartial investigation. It asserts that the Employer has failed to meet its onus of proving the culpable conduct alleged against Mr. Johnston, and that the discipline should be set aside, or mitigated.

#### **The Grievor**

The grievor had twenty-three years of service at the time of this incident. He became a Locomotive Engineer in 2000. His record is as follows:

- (1) 5 demerits for failing to properly detrain from a standing locomotive resulting in a personal injury (1991);
- (2) 10 demerits for failing to ensure the route was properly lined for the intended movement, resulting in a run through switch (2000);

- (3) Caution for failing to fulfill contractual obligations in regards to being available for work (offsick days) (2004);
- (4) 20 demerits for failing to ensure the route was properly lined resulting in the movement derailing (2006);
- (5) 30 day suspension for failing to properly communicate and confirm critical tasks during your job briefings with the Conductor and for failing to properly protect the point of movement and ensure that it was protected throughout the movement resulting in the derailment of 2 cars (2014);
- (6) Dismissal (reduced to a 30 day suspension) for failing to stop short of an improperly lined switch (2016); and
- (7) 7 day suspension (deferred) for failing to failing to apply proper train handling techniques resulting in a broken knuckle (2016);

### **What happened**

A three person crew worked in the Red Deer Yard on May 2, 2017. Mr. Johnston was operating the locomotives from the cab of one of the three motive units. Mr. Robert Duncan was the Conductor and Mr. Cody McGregor the Brakeman. Mr. Duncan was at the other end of the yard at the time and not involved.

The crew had several tasks to perform. They held a pre-job briefing, but the Company takes issue with its sufficiency. One task was to move a single box car, AEX7313, onto track 6, and secure it on that track, which had a southerly downward slope. Mr. McGregor and the grievor did so and then went on to other work. About 55 minutes later, AEX7313 was seen rolling south. It came to rest, on the main line, in OCS territory where trains are cleared to travel at 30 mph. This could have caused a very serious collision but fortunately it did not.

The question is why the car had moved, and the instinctive answer is that it had been improperly secured in its location on track 6 in the yard. That is the conclusion the Employer came to and, following investigations, it terminated both Mr. McGregor and the grievor.

### **The Allegations**

The termination letter alleged the following breaches:

Book	Section	Subsection	Description
Rulebook for T&E Employees	Section 2	2.2A	Safety and a willingness to obey the rules are of the first ...
Rulebook for T&E Employees	Section 2	2.1A(ii)	You must familiar with your duties and the territory ...
Rulebook for T&E Employees	Section 2	2.2C(v)	Be conversant with and comply with this manual ...
Rulebook for T&E Employees	Section 2	2.2C(vi)	Provide every possible assistance to ensure every ...
Rulebook for T&E Employees	Section 2	2.2C(xii)	Remind other crew members of requirements and restrictions ...
Rulebook for T&E Employees	Section 11	11.9	Securing – When equipment is left it must be secured as ...
GOI	Section 4	Testing hand brake effectiveness	To ensure a sufficient number of hand brakes are applied ...
GOI	Section 4	Leaving Equipment – Non Main Track (b)	A single piece of equipment must always be left with the ...
GOI	Section 4	Leaving Equipment – Non Main Track (c)	Never leave a single piece of equipment with a defective ...

Notably, the grievor was not terminated for a direct breach of Rule 112. The Union validly objects that most of the Section 2 charges are overreaching or “piling on”. The real allegations are of an inadequate job briefing (Section 2.2(c)(xii)) and a failure to

properly test the hand brake once applied. The other Section 2 charges could not be established without particulars, and the only particulars of any substance are these two matters. They add nothing, and would not, even if upheld, affect an appropriate penalty.

### **Events post-incident and pre-investigation interview**

Steps were taken to obtain evidence in advance of the grievor's May 12, 2017 investigation. Re-enactments were conducted, but without either Mr. McGregor's or the grievor's presence. Union health and safety representative Mr. Cory Prya did take part. The Union takes issue with the grievor's exclusion since it meant he was not privy to the full information to be used in his case, contrary to Article 23 and 24. More particularly, neither he nor Mr. McGregor were present to see whether the re-enactment faithfully reproduced what had originally occurred. The Company's reply on this point reads:

40. The Union alleges that the grievor was not invited to take part in the reenactments, which duplicated the events of May 2, 2017. A closer look at the grievor's statement confirm that while the grievor was pulled from service and sent home prior to the reenactments taking place he did not ask to participate either. It is disingenuous for the grievor to state after the fact that he was not invited to participate, when he did not seek initial participation. (*emphasis added*)

The Union's submission, as well as the record of investigation, provides a full answer to this rather inflammatory submission. The grievor was held out of service and excluded from the property. He had no way of knowing a re-enactment was about to take place, let alone any ability to ask to participate.

The Employer's brief also asserts that "the grievor confirmed the results of the reenactments". What the grievor said is simply that those sections of the re-enactment

report put to him as questions were indeed what was stated in the report. This is hardly “confirming the reenactments”. Indeed, the Union protested throughout that it had no way of knowing if the re-enactments matched the original events.

CP’s Director of Mechanical, Mr. Chad Decoene, undertook a mechanical assessment of AEX7313. This disclosed that it was fitted with a non-standard handbrake only capable of exerting 50% of the braking force of a normal handbrake meeting the AAR standard of 11%. Neither the Company nor the grievor had any knowledge of this fact prior to the incident. The grievor, three locomotive lengths away in his cab, had no ability to see the hand brake mechanism and had to rely solely on his conductor.

During the re-enactment a release test was performed on the railcar which uncovered an air brake leak. Mr. Decoeue explained the results of the mechanical inspection test and was asked, during Mr. McGregor’s investigation:

Q.23 Was there a defect with the air brakes on this car?

A.23 Yes. A leaking brake cylinder hose was noted and during the automated single car air test a defective service portion was noted.

Repairs for this defect were then made in the Red Deer shop.

Computer downloads were taken from the locomotives involved which show times and air pressures during these events.

Video evidence was secured from a camera located on a tower in the yard. The parties had prior disagreements about the propriety of making such videos. A copy was not given to the grievor or to the Union. The notice of investigation said instead:

(h) A video will be made available for viewing of A32-06 performing single car set off in the south end of track ARD6 in Red Deer.

### **The Investigation Meeting**

The Union's null and void argument involves two main concerns; the exclusion of the grievor and Mr. McGregor from the re-enactment and the refusal to provide, followed by reliance upon, the video evidence from the tower.

The Union's submission that exclusion from the re-enactment voids the process really depends on the proposition that any time a re-enactment is conducted, reliance upon its results will always be sufficiently unfair to the grievor under Article 23.04. There are circumstances where the failure to provide details of what was being taken from a re-enactment may have that effect, but that is not so in all cases, and I do not find it to be the case here given the prior disclosure of the reports of the re-enactment. The question of whether the re-enactment, conducted without confirmation that the steps taken were true to the event, provides sufficient proof of the misconduct alleged, is an entirely separate question. Here it is sufficient to say that:

- (a) the grievor's exclusion from the re-enactment does not of itself result in a less than fair and impartial investigation, and
- (b) there may well be circumstances where the absence of the grievor's presence during an investigation, depending on the sufficiency of what is disclosed and the scope of any reliance, may lead to a finding of an unfair or impartial investigation.

Similar considerations apply to the use and disclosure of the video. To some degree, the Union's position was torn between its objection that monitoring such activity was always wrong, and its objection, for this particular case, to the failure of the company to supply it with a copy of what was filmed.

The Company answers that "the video evidence was made available during the investigation" (para. 41 of its brief) and:

42. The allegation that the Investigating officer relied heavily on the video is completely unfounded. The Company is no obligation to provide the surveillance footage physically to the Union. The footage was made available during the hearing and the Union had many opportunities to review and rebut the video surveillance, which formed part of the investigation.

The Company added nothing to support the first sentence in paragraph 42 and the questions and the results speak somewhat against that proposition. The balance of the paragraph avoids the Union's point entirely, which is that the obligation is to provide such information in advance where it is to be relied upon. Here, I find that the Union indeed had sufficient notice and opportunities prior to the investigation to review the video, and while providing a copy would have been the more appropriate course, I do not find the fundamental fairness of the investigation was compromised. Once again, what reliance can be placed upon the video is a different question.

### **Sufficiency of the Job Briefing**

The Company takes issue with the sufficiency of the crew's job briefing. The grievor testified that (at answers 19 & 20):

We discussed what tracks they were going into and at the end, as a last move to set the head end car into track 6. Then putting the power



to the shops and grabbing the new power. We also discussed we were going to come out to the lead with the new power and change ends. And Robert Duncan said over the radio that Cody was to go in and get new paperwork for the moves that we would be doing at the north end of the yard.

Specifically in relation to car AEX7313, they discussed that:

“we were going to shove it clear of the crossing and secure it”

The Company maintains that the failure to specifically discuss the southern slope of the track was part of what contributed to the car's movement. Nothing else is alleged to make this briefing insufficient except perhaps some mention of the obvious point that since this was a single car, there was but one hand brake. I am not persuaded that anything further being said in the job briefing would have affected this incident one way or the other.

### **The Sufficiency of the Hand Brake Test**

The essential task in securing this car was to apply and test the hand brake, as specified in CRO Rule 112. Again, the grievor was not disciplined for violating that rule and applying the hand brake was the conductor's task. The grievor could only rely upon his conductor for assurance that the hand brake was properly applied and those assurances were given and received. It is the testing that brings the locomotive engineer's responsibility into play. Located in the locomotive cab he had no independent ability to see the breaking mechanism.

Rule 112 provides:

112. Leaving Equipment Unattended

(a) Equipment must be secured if it is left unattended. The following are acceptable methods of ensuring securement:

(i) sufficient number of hand brakes;

...

(v) a movement secured as per paragraph (c) in this rule

...

(e) Instructions governing testing the effectiveness of hand brakes will be carried in special instructions.

(f) Application of hand brakes must not be made while equipment is being pulled or shoved.

(g) Before leaving equipment at any location, the employee securing such equipment must confirm with another employee the manner in which the equipment has been secured.

The General Operating Instructions provide:

Section 4

Testing Hand Brake Effectiveness

To ensure a sufficient number of hand brakes are applied, release all air brakes and allow or cause the slack to adjust or apply sufficient tractive effort to provide force on the equipment. It must be apparent when the slack runs in or out, or when force is applied, that the hand brakes are sufficient to prevent that equipment from moving. This must be done before uncoupling or before leaving equipment unattended.

**IMPORTANT:** When air brakes are released to test effectiveness, allow sufficient time for the brakes to release.

The test chosen involved backing up to the car to apply pressure. That was appropriate due to the southerly grade and the weight of the locomotives, as confirmed by Trainmaster Grant Duncan who said at Q54:

Q54 Is it your experience, when performing a handbrake effectiveness test that you should cause the slack to adjust pushing up grade?

A: First what we teach with locomotive engineers, it's that when you're on the grade with a downhill. You release your independent and automatic brake to ensure the slack runs out. And all the brake cylinders are released on the locomotives. And then to cause or allow the slack to adjust is when you come back on the pin.

At paragraph 62 and elsewhere, perhaps due to an overenthusiastic desire to equate this event to Lac-Megantic, the Company maintains that “on the day in question the grievor failed to confirm the number of hand brakes applied to the equipment ...” At paragraph 63 the brief’s author continued “... there can be no doubt that the grievor failed to confirm the number of hand brake(s) applied to the equipment throughout the spotting process ...” It is hard to accept these submissions when there was just one car being spotted with just one hand brake.

The grievor confirmed that he indeed performed a hand brake effectiveness test, which he described at Q.44:

A.44: I released the independent and backed into the car with the hand brake on it.

Conductor Cody gave his description of the test at Q.61 in his interview:

Q61: After detraining from the equipment, can you please explain what occurred next?

A: After detraining I asked the engineer to release and test. He said release test coming back on a bump. I confirmed with him coming back on a bump. And as he came back the car moved and the slack came in and stayed in I heard squealing. I then confirmed with the engineer that the car was secure, he confirmed with me the car was secure. As we cut off the car went into emergency and we proceeded over the bull.

The question then becomes, what did the grievor, as locomotive engineer, fail to do properly? The Company argues that:

32. Based on the reenactments, the Company was able to infer that a proper handbrake effectiveness test was not performed on the AEX7313. During the re-enactment, when the release test was performed, air could be heard leaking. This air leaking ultimately led to the car rolling on its own. Had the crew properly performed the release test, they would have noticed the air leak and then manually

bled off the air ensuring the car did not move; as evidenced in the third re-enactment.

The question is not just is this inference justified; but whether it was something Mr. Johnston could have been aware of or prevented? He was in no position to hear air leaking, and Mr. McGregor did not tell him of any such thing.

The Company's brief, at paragraph 38 argues:

38. Based on the reenactments conducted, and the mechanical inspection report, the car moved even with the handbrake applied in 2 of the 3 scenarios. Only when the air supplying the brakes was manually bled off did the car not move. This would have been evident had a proper handbrake effectiveness (release test) been performed.

However, at paragraph 32, the Company indicates the symptoms would have been the sound of leaking air. What this does not disclose is whether Mr. McGregor failed to observe or communicate leaking air, or whether there was a defect in the way Mr. Johnston undertook the test. The absence of the two of them from the reenactments means the tests do not help establish which of those two possibilities might have occurred.

The Company relies heavily on Trainmaster Duncan's evidence that, based on the download, he believed no proper effectiveness test had been conducted.

Q50: Referring to appendix F, Can you explain what brake cylinder action you see with CP9634 while performing their handbrake effectiveness test?

A: I see the brake cylinder pressure on the 9634 is at Opsi for only 2.1 seconds.

Q51: Referring to appendix F, Can you explain what brake cylinder action you see with middle unit 8525 while performing their handbrake effectiveness test?

A: While the 9634 is at 0, the CP 8525 is at 6psi.

A52: Referring to appendix F, Can you explain what brake cylinder action you see with trailing unit 9733 while performing their handbrake effectiveness test?

A: While the 9634 is at 0 psi the CP 9733 is at 10psi brake cylinder pressure.

Q53: Referring to Q&A 50, 51, 52, do you believe the brakes on the locomotive were fully released when the handbrake effectiveness test was conducted?

A: No, I do not.

The Company says this opinion went unchallenged at the time of the investigation and objected to it being challenged by a contrary explanation at the hearing.

The allegations against the grievor thus comes down to the assertion, from the download, but not from the reenactments, that he failed in releasing the independent and automatic brakes on the locomotive for long enough before he backed onto the railcar. It then goes on to assert that “the grievor’s inaction and failure to perform the release test was a direct result of AEX73B rolling away under its own momentum”. Unscrambling this sentence, I understand the argument to be that the railcar’s movement was directly caused by the grievor’s performing the release test when his locomotive’s air pressure was not at zero for long enough, and the ancilliary locomotives were still slightly above zero. It is on this basis that the Company compares the case to the Lac-Megantic disaster. At paragraph 53 the Company refers to the TSB finding that:

“the locomotive air brakes were left on during the [hand brake effectiveness] test, meaning the train was being held by a combination

of hand brakes and air brakes.” The TSB further explained how “this gave the false impression that the hand brakes alone would hold the train.”

Continuing with its analogy to Lac-Megantic the author of the brief goes on to say at paragraphs 62 and 63:

... on the day in question the grievor failed to confirm the number of hand brakes applied to the equipment and failed to release the minimum brake resulting in the same “false impression that the hand brakes alone would hold the train” as was seen in the disaster at Lac-Megantic. This is not a case of a single failure on the part of the grievor, but rather of multiple failures resulting in the unintended movement of equipment.

63. Regarding the first failure, there can be no doubt that the grievor failed to confirm the number of hand brake(s) applied to the equipment throughout the spotting process in violation of the aforementioned rules.

This submission fails to recognize that there was just one car with one hand brake (albeit a substandard and defective one). This misconception is repeated at paragraph 76 where the grievor’s defaults are said to include “(3) Insufficient hand brakes”, and at paragraph 77 where it said:

77. The grievor failed to release the minimum brake application prior to testing the effectiveness of the hand brake(s) giving the false impression that the hand brake alone would hold the equipment. The test failed to identify that an insufficient number of hand brakes had been applied to secure the equipment. Moreover, the grievor failed to verbally confirm compliance with the Time Table restrictions regarding the number of hand brakes to be applied thereby violating a number of operating rules.

The first sentence is clear. The balance of the paragraph makes no sense when it talks about “an insufficient number of hand brakes had been applied” and failing to confirm compliance “regarding the number of hand brakes to be applied”. Counsel, given

the opportunity to explain the author's thinking, was unable to explain how such submissions could apply to a single car.

The question is whether the Company has established sufficient fault in the grievor, as alleged in the form 104, to justify his termination. I find that it has not. The only matter the Employer could point to that was omitted from the job briefing was the southerly slope of the track. The back up test, rather than the push-pull test used, indicates both the Locomotive Engineer and the Conductor knew of this and carried out their tasks cognizant of what this required.

This car's movement could have involved a series of factors. The failure of Mr. McGregor to apply the hand brake with sufficient force, the substandard brakes installed on the unit, the defect in the braking system that was installed, Mr. McGregor's failure to hear or communicate over any air leak from the car's braking system. It could also be that the level of air in the air brake system was too high, and the pause period (2.1 seconds) too short to prevent the airbrakes continuing to distort the test that was performed. There is no evidence to suggest this last point was tested as part of the re-enactment. The proposition that it was a cause relies wholly on the Trainmaster's assertion and the Union's not, at the time of the investigation, providing contrary evidence.

It is apparent from the factors below that the Company saw much greater breaches than the evidence supports.

- The number of sections alleged to have been violated;
- The inability to particularize what, beyond the slope was omitted from the job briefing;

- A variety of statements in the Company's briefs such as, at para. 13 "this incomplete job briefing was the first lapse of many which resulted – the AEX7133 making its unintended movement"; and
- The concern over not knowing the number of hand brakes for a single car.

On the basis of the proven matters here, the decision to terminate a long service employee, even considering the grievor's prior record, is excessive. It is set aside and replaced with a seven day suspension for failing to adequately ensure an adequate time for air brakes to release before conducting an efficiency test. Otherwise the grievor will be fully reinstated to his position as a Locomotive Engineer and made whole in all respects. I remain seized of the matter to the extent necessary to finalize any remedial steps upon which the parties are unable to agree.

April 11, 2018



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