

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

CASE NO. 4660

Heard in Calgary, November 15, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of discipline and dismissal of Rail Traffic Controller Kari Essery of Calgary, AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant dispute involves two (2) assessments of discipline including the dismissal of Rail Traffic Controller Kari Essery.

RTC Essery was issued a letter from the Company informing her of a 20-day suspension for the following reason: "...a twenty (20) day suspension without pay...for your failure to properly voice TOP #124".

RTC Essery was issued a letter from the Company informing her of a dismissal for the following reason: "Violation of CROR 571."

The Union contends that the assessment of discipline in all disputes was excessive and not progressive and the dismissal of RTC Essery is not warranted.

The Union requests that RTC Essery be reinstated without loss of seniority and be made whole for all lost wages and benefits.

FOR THE UNION:

(SGD.) J. Bailey

GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

S. Oliver	– Manager, Labour Relations, Calgary
D. McGrath	– Manager, Labour Relations, Calgary
S. Shaw	– Senior Director, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
V. Linkletter	– Vice General Chairperson, Calgary
J. Bailey	– General Chairperson, Edmonton
J. Godesla	– General Chairperson, Calgary
K. Essery	– Grievor, Calgary

AWARD OF THE ARBITRATOR

This award involves two assessments of discipline which ultimately resulted in Ms. Essery (the Grievor) being dismissed.

20 Day Suspension – Facts

While working as the Mountain/Shuswap Railway Traffic Controller (RTC) on April 13, 2017, the Grievor incorrectly issued a Track Occupancy Permit (TOP) in violation of CRO Rule 136. The TOP, by definition, provides exclusive permission for Foremen to be on a track and protects them from train traffic. The Grievor's intention was to give TOP 124 to Foreman Paul Hynes. However, during the issuance of that authority, instead of selecting Foreman Hynes' name she selected Foreman Paul Jaswal. She did this even though the computer screen, from which she was working, clearly displayed Foreman Paul Jaswal's name. That notwithstanding, the Grievor voiced Paul Hynes. She then listened to the repeat and underscored Paul Jaswal while she voiced Paul Hynes' name.

After she realized her mistake, she approached her Director and advised him of the same. In his memo, Director Gysbers (*Tab 10*) provided the following explanation:

"...Kari approached me and asked me to ... help. She told me that she had issued TOP124 to the wrong Foreman. The name on the TOP was to Paul Jaswal but she issued it to Foreman Paul Hynes. She told me that she caught it at the end when she was to underscore the Foreman's name on the complete..."

Following an investigation, the Grievor she was issued a letter informing her of a 20-day suspension for failing to adhere to CRO Rule136 in failing to properly issue

Track Occupancy Permit 124 to a Foreman. In addition, the letter (*Company Tab 1*) advised that:

“...this is considered a last chance leniency opportunity, any future incidents within one year of this event could result in additional discipline up to and including dismissal from service.”

The Company cannot unilaterally impose a last chance agreement; however, the letter is an indication of the seriousness with which her error was regarded and the precarious nature of the Grievor’s continued employment.

Although it is accepted that RTC’s must, at all times, be meticulously attentive to their duties and that track limits be confirmed in the manner provided by the rules (**CROA 3746**), it is also true that no one was put at risk because of the Grievor’s error. All traffic on that track would have been be in lock down because she put it on “*hold*” while she recruited the assistance of her Director.

There is no dispute that, because of the nature of their work, it is incumbent on RTC’s to be completely focused on what they are doing. Failure to do so is a serious mistake and warrants discipline (**CROA 4613**). In this case, the Grievor agreed that she did not properly read - and flawlessly repeat - the information on the screen as is required of her. Rather, she “*read it from memory*”.

Dismissal - Facts

On January 27, 2018, the Grievor set up routing for train 401-26 signals westbound down the main track through Otter Tail. At approximately 12:47, the Grievor decided to change the train’s routing. The provisions of CRO Rule 571 require that in

order to change the route of a train, it must be three blocks from the signal, otherwise the RTC must contact the Locomotive Engineer to ensure that the train can stop short of the signal.

In a discussion with the Engineer, the Grievor asked if she could: *“pull the west end of Otter Tail”* to which the Engineer replied: *“I guess if you have to, west end Ottertail, 401 Engineer Richards”*. Although Locomotive Engineer Richards said *“west end Ottertail”*, the Grievor incorrectly restored the east end Ottertail signal to stop. As a result, while the train was passing through it, the signal unexpectedly dropped compelling crew 401-26 to put the train in to emergency stop.

In the investigation that followed, the Grievor allowed that when she cancelled the west signal, the train was less than three blocks away from it. Further, she also failed to obtain permission from the Engineer to take down the westward signal. By way of explanation, she said (Q. 38):

“I allowed myself to take a short cut by asking two questions in one. I must ensure this doesn't happen.”

Following the investigation, the Company concluded that dismissal was warranted in the circumstances.

There is no dispute that the Grievor's conduct was as described above. To her considerable credit the Grievor acknowledged it, apologized for it and - in the investigation on both matters – outlined the manner in which she intended to address her future conduct in order to avoid further errors and further discipline.

The only issue in both matters is whether or not the degree of discipline imposed was warranted in the circumstances.

20-Day Suspension; Discipline

The Company takes the position that the 20-day suspension is warranted in that CRO Rule 136(c) speaks to the very fundamental duty of an RTC to accurately verify and communicate information between the Company's system and other employees. An RTC's inaccuracy affects the safety of employees and has the potential to cause grave consequences. One of the core responsibilities of an RTC is to verify each written word and digit each time it is repeated. In this case, the Grievor allows that she did not follow the specific directives of her job but rather repeated the wrong Foreman's name "from memory". In **CROA 4613**, with respect to a similar CRO Rule136 violation, Arbitrator Moreau noted:

"There is the aggravating factor that the breach goes to the core of an RTC's duties of having to properly read and flawlessly repeat numbers as part of their assignment. It was incumbent on the Grievor to be completely focused on what he was doing. His failure to do so was a serious mistake and warranted the discipline imposed."

The Grievor's record reflects that, less than 4 months earlier, she had been assessed a 20-day suspension (15 days served/ 5 days deferred) for multiple efficiency test failures and the release of an active TBGO. Since 2016, the Grievor had multiple suspensions (*Union Tab 2*). The Company argues that, taking into the consideration the fact that her previous suspension was for 15 days served, a 20-day suspension was within a reasonable response for the current violation of CRO Rule136.

The Union argues that a 20-day suspension for a Rule 136 violation is heavy handed and retributive as opposed to educative and corrective, as progressive discipline is intended to be. In its brief, it refers to a number of individuals whose breach of CROR 136 resulted in discipline less than that imposed on the Grievor (*Union Tab 10*). It suggests that, having regard to the discipline imposed on the employees enumerated in *Tab 10*, the penalty imposed on the Grievor is disproportionate and represents preferential treatment of the Grievor's RTC colleagues. It thus raises concerns regarding the equitable nature of the 20-day suspension assessed in the Grievor's case.

It is trite to say that each case must be taken on its own merits and the imposition of reasonable discipline determined on the circumstances of each case and the individual involved. With respect, without being aware of the circumstances in each case including: the disciplinary records of the employees involved; the employees' length of service, and the circumstances surrounding the penalties imposed, I am unable to reach a conclusion that the 20-day suspension in the Grievor's case is discriminatory.

Taking all of the appropriate factors into consideration, I am not persuaded that the 20-day suspension in this case is unreasonable.

The grievance in this respect is dismissed.

Violation of CRO Rule 571; Dismissal

The Union argues that taking into consideration the mitigating factors, the Grievor ought to be reinstated with, at worst, conditions determined appropriate by me. It points out that this incident occurred on the Mountain/Shuswap desk, which has one of the highest workloads, and requires RTC's to coordinate: high volumes; power moves; fueling requirements; ES demands; and issues caused by extreme winter weather. The cumulative effect of these raises the stress level of the RTC's job at this desk. It points out that the Grievor has twenty-seven years invested with the Company and clearly loves her job. Given this point in her life, it would be difficult for the Grievor to move to another position. Furthermore, while her disciplinary record is less than stellar, the Grievor had not made this specific error in the past and, as reflected in her statements, did not intentionally violate any rules or procedures.

The Company argues that dismissal is appropriate especially having regard to the fact that, between 2015 and her dismissal, the Grievor was assessed discipline ten times. Her violations included: a missed power move; poorly executed meet; and, inappropriate language over the radio. Of further significance were the violations involving safety infractions. In January, 2016 she was assessed a 10-day suspension for reversing a switch under a Foreman's track machine. In June 2017, the Grievor released a TGBO leaving a train unprotected on the main line. The Company points to the safety sensitive nature of the Grievor's position which leaves little room for the kind of inattentiveness and carelessness exhibited by her conduct which she has been

unable to rectify notwithstanding repeated progressive disciplined opportunities to do so.

Decision

Ms. Essery (53), began her employment with the Company in 1990. At all material times she was a qualified RTC.

I have concluded that, given the mitigating circumstances, the Grievor ought to be reinstated to a position in the Company. However, for the reasons which follow, the reinstatement is not immediately to her previous position

It is apparent that the progressive corrective discipline imposed by the Company has not had the desired impact. While I am prepared to accept that her failure to follow accepted procedures is not purposive, serious reflection on the Grievor's disciplinary record indicates that she is unlikely to change her behavior in the short term. Given the seriousness of her continued breaches, and the safety sensitive role of an RTC, I am not convinced that the Grievor is currently capable of meeting the obligations of her position.

The circumstances surrounding the Grievor's violation of CROR 571 are particularly egregious. They evince the serious nature of the consequences which could flow from an error on the part of an RTC in failing to follow the necessary

procedures when pulling down a signal. The Grievor's response in Question 24(c) of her interview is cause for particular concern.

Q24c: Please explain how you could have mistaken Engr Richards instruction when he stated "I guess if you have to, west end Ottertail, 401 Engr Richards", what specifically about this statement made you think he was giving you permission to take down the East signal?(sic)

A24c: I have been racking my mind since Saturday to understand what made me think he stated East end but I really don't understand. I didn't expect to hear the east signal but I wanted to hear east signal and when he responded, I remember thinking wow he must not be that close to Ottertail and I pulled the East signal. And when the emergency light came on I still didn't think that I had misheard him until he explained the situation to me.

While the Grievor's answer reflects her commendable candor, it also exhibits her serious yet inexplicable lack of focus and attention to the important details of her job.

As stated by Arbitrator Schmidt in **CROA 4448**:

"I am troubled by the grievor's failure to follow proper procedures as evidenced by (her) conduct in this case. The RTC's constant focus on his or her attention to detail is absolutely necessary while he or she prioritizes tasks to be undertaken in the fast paced environment of Rail Traffic Control."

The comments of Arbitrator Schmidt are apropos regarding the circumstances here. The Grievor's failure to focus and her lack of attention to detail – particularly having regard to the progressive discipline which preceded this latest disciplinary response, regrettably, leads to the conclusion that the Grievor is currently not up to the duties of an RTC.

However, while her record, lack of compliance with the rules and lack of effectiveness of progressive discipline, might otherwise provide grounds for dismissal, I am swayed by the mitigating factors set out in the Union's submission and conclude that

the grievance ought to be allowed in part with conditions which allow her to continue in her employment with the Company.

In this regard, the decision of Arbitrator Frumkin in **AH 333** is of instructive assistance. He states (at p. 6):

“Temporary demotion as an employer response in dealing with employee misconduct can in no way be assimilated in its essence to the measure of permanent demotion. Its purpose is purely disciplinary and its design is to correct a course of conduct that is corrigible. Here competence is not a fundamental issue. While unsatisfactory work performance may be present, it is rooted not in basic incompetence for the position at hand, but in unsatisfactory work performance which it is believed will improve after a time in some lesser position.

...

The Arbitrator has carefully examined Ms. Tupling's record and the incident which precipitated the Company's action in this case. The record is far from exemplary. It reveals some difficulty in complying with regulations. ..Ms. Tupling's record and the incident, therefore, can serve to justify demotion, but demotion within a purely disciplinary context.

As such, the demotion imposed, as far as the Arbitrator is concerned, should have been accompanied by definite limitations beyond which the position of Rail Traffic Controller would be open to Ms. Tupling. The measure of permanent demotion, however, was inappropriate.

...

The position of Rail Traffic Controller is a highly responsible position. It allows for little leeway insofar as full attention and optimum work performance is concerned. The consequences of anything less than this may be most serious and include severe damage to property, not to mention loss of life. (emphasis added)

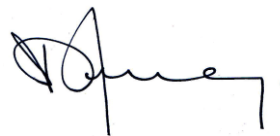
I adopt Arbitrator Frumkin's logic and its application to the Grievor in this case. I conclude that an appropriate substitution of penalty is to direct reinstatement with conditions.

Accordingly, I direct that the grievance will be allowed, in part, on the following conditions:

1. The Discipline of dismissal shall be set aside;
2. The Grievor to be reinstated - without loss of seniority and without compensation - to a position with the Company that is non-safety sensitive for a period of 18 months before she is eligible to return to the position of a Rail Traffic Controller;
3. Before she returns to an RTC position, the Grievor must:
 - a. Submit to a Health Services Department (HS) directed Safety Sensitive medical assessment and any other medical assessment deemed necessary under the terms and conditions directed by the HS;
 - b. Be determined to be medically fit to return to service in a Safety Sensitive position by the Chief Medical Officer or his designate;
4. Complete a screening interview with her local manager, the purpose of which will be to review the Company's ongoing performance expectations regarding the Grievor's return to work as an RTC and to provide understanding and clarity regarding those expectations;
5. Any violation of, or failure to comply with, any of the terms of the Collective Agreement or the Company's Operational Policies that leads to discipline being imposed during the first eighteen months following this reinstatement will result in the Grievor's dismissal, with recourse to arbitration only for the purposes of determining whether the Grievor's conduct warranted discipline.

I will retain jurisdiction with respect to the application, interpretation or implementation of this award.

December 17, 2018



**RICHARD I. HORNUNG, Q. C.
ARBITRATOR**