

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

CASE NO. 4670

Heard in Calgary, February 13, 2019

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Veinot of Winnipeg, Manitoba.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation Mr. Veinot was dismissed from Company service which was described as "Based on the culminating incident in which you were found to have side swiped equipment with your movement at the west end of FA YARD. A fair and impartial investigation revealed your train handling as the cause to the incident. Further and in any event your dismissal is warranted as you have breached the bond of trust as a result of your prior discipline record and the culminating incident as outlined above."

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding many of the allegations outlined above. The Union further contends that the discipline assessed is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter.

The Union requests that Mr. Veinot be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings 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.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation Mr. Veinot was dismissed from Company service which was described as "based on the culminating incident in which you were found to have side swiped equipment with your movement at the west end of FA Yard. A fair and impartial investigation revealed your train handling as the cause to the incident. Further and in any event your dismissal is warranted as you have breached the bond of trust as a result of your prior discipline record and the culminating incident as outlined above."

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding many of the allegations outlined above. The Union further contends that the discipline assessed is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter.

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

The Company maintains that dismissal was appropriate with regard to Grievor's culpability for the incident that took place on April 22, 2017. The Grievor was the operator PG15-22 utilizing a remote control locomotive system (RCLS) as a Yard Service Helper at the time of the collision that occurred on April 22, 2017. The Grievor in the statement indicates that he was operating PG15-22 at 10MPH. Visibility was poor, with heavy snow at the time of the incident. The grievor admits to not complying with RCLS rules and instructions in the investigation as it relates to winter conditions where ice and snow may be present.

FOR THE UNION:

(SGD.) D. Fulton

General Chairman

FOR THE COMPANY:

(SGD.) W. McMillan

Labour Relations Office

There appeared on behalf of the Company:

- | | |
|----------------|---------------------------------------|
| W. McMillan | – Labour Relations Officer, Calgary |
| J. Bairaktaris | – Director, Labour Relations, Calgary |

And on behalf of the Union:

- | | |
|-----------|---|
| M. Church | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairman, Calgary |
| D. Edward | – Senior Vice General Chairman, Calgary |
| W. Apsey | – General Chair, Smiths Falls |
| W. Edel | – Local Chairman, Winnipeg |
| S. Veinot | – Grievor, Winnipeg |

AWARD OF THE ARBITRATOR

The grievor, as noted in **CROA 4669**, was initially hired in 2004 in the Company's Engineering Services Department. He became a Conductor in 2007 and then qualified as a Locomotive Engineer in 2012. He was terminated from his employment on May 5, 2017 for an incident that occurred on April 22, 2017.

The grievor was working on April 22, 2017 as a Yard Service Helper at the Winnipeg yard with Yard Foreman Bill Sidon. The assignment consisted of a RCLS (remote control locomotive system) belt pack on train PG15-22, consisting of 44 cars, from track FC02 to track FA02.

The grievor stated at his investigation that it was raining lightly as he started pulling into FA02. The rain then turned to heavy snow. The grievor controlled the movement of 44 cars on to FA02 at a speed of approximately 10 mph. When the movement was some 15 lengths from its projected stopping point, the grievor said he began setting the independent brake on the locomotive. He then applied the independent brake fully at about 10 car lengths from the destination point. The grievor described the moments before the collision as follows: "*Approximately 2 car lengths away I was moving approx. 1 mph, I put it in emergency to attempt to stop it before sliding into the equipment*". The movement then collided with the stationary equipment.

The grievor did not set up the air brakes, leaving the locomotive brake alone to stop the train. He stated during the investigation that he had done this move numerous times in the past and felt that the independent brake was sufficient as it had been at all other times during this type of shift.

The Company pointed out that the grievor's decision not to set up the air brakes, despite the slippery conditions, left the braking of the 44 cars and the ability to slow the movement of the train to the locomotive brake with no braking assistance from the cars themselves. This lack of braking ability in turn led the locomotive to collide with the equipment on the track. In that regard, the Company submits that the grievor should have complied with the RCLS instructions, which states at 1.14:

Brakes must be kept free of ice and snow in winter conditions by doing the following:

- Condition brake shoes periodically on locomotives by requesting a slower speed; OR

- on cars charged with air, toggle the train brake selector to MIN position (at speeds of 4 mph or less).

The Company's position is that the grievor was not in control of his train. He failed to ensure that all precautions were taken, including the use of air brakes. He also failed to follow the RCLS provisions with respect to the proper handling of equipment in winter weather conditions.

The Company cited several authorities in support of the imposition of significant discipline to employees who are responsible for collisions on track including **CROA 3673**, **CROA 3884**, cases which similarly involved the operation of belt packs. In **CROA 3884** the grievor, a short service employee with four prior disciplinary infractions, failed to control the RCLS equipment while riding on the point and received 30 demerits. The 30 demerits was upheld at arbitration and resulted in the grievor's termination. Mitigating factors led the arbitrator in **CROA 3673** to substitute the grievor's dismissal with a similar 30 demerit disciplinary penalty.

The Union, as a preliminary matter, takes the position that the Company failed to perform a fair and impartial investigation in contravention of Articles 70.01, 70.02 and 70.04 of the Collective Agreement. The Union submits that the investigation was flawed because the condition of the equipment, specifically the conditions of the independent brake, was not investigated post-incident. Alternatively, if the condition of the equipment was investigated, the evidence obtained was not produced at the grievor's interview, or afterwards, despite the request for full disclosure at the outset of the investigation.

I do not find any evidence that the investigation was improper. This case turns on the actions of the grievor while operating the belt pack. As the Company points out, this is not a case of equipment failure and I accept that any evidence of this kind would have been produced by the Company at the investigation if this had been an issue. I note in that regard that there is no reference to any equipment issues in the Union's Ex Parte Statement of Issue nor were there any questions raised by the Union about the condition of the equipment at the time of the grievor's interview. The Union's preliminary objection that the investigation was unfair or impartial is dismissed.

There is no dispute, in my view, that the grievor had full control over a train consisting of 44 cars. The grievor was moving the unit at the recommended speed of 10 mph but with only the independent brake available to stop the movement. When asked at his interview whether he considered the independent brake to be sufficient given the number of cars he was pulling, the grievor replied that "*...he felt that the independent brake was sufficient as it was every other time during this shift*".

The grievor also admitted that he was familiar with the RCLS special instructions as they relate to winter conditions. The grievor was asked at what point the weather had changed from rain to snow:

Q25: How long was it snowing prior to and leading up to the incident?
A: The snow had just started as we started pulling into FA02

Q 26: Was it a really heavy snow or light snow?
A: Heavy snow.

The key factor here, in my view, is the weather. The RCLS special instructions require the belt pack operator in winter conditions to either condition the brake shoes to reach a slower speed; or, toggle the train break selector if the air brakes are on.

The grievor evidently miscalculated his speed during what were clearly winter conditions. He was left to rely on the independent brake alone before putting the unit in emergency in an attempt to stop the 44 cars from sliding into the equipment at the end of FA02. The grievor had the opportunity before moving the unit to set up the air brakes but chose not to do so even though this was a clear option open to him under the RCLS instructions given the heavy snow conditions. The grievor's efforts to condition the brakes evidently came too late and he was unable to stop the unit travelling at what he estimated was the required speed of 1 mph. It is fortunate that the collision with the equipment did not result in extensive damage or a derailment.

I find, in the end, that the collision was caused by the grievor's failure to take appropriate steps, consistent with RCLS Instructions, when he sideswiped equipment with his movement at the west end of the FA Yard on April 22, 2017. The grievor did not take the proper precautions to avoid the collision given the heavy snow conditions. He should have either taken the time to run air through the consist once the snow began and before he started pulling the 44 cars; or, alternatively, realized that he had to cut his speed and condition the brake because he had only the locomotive brake to rely on to stop his movement and prevent a sideswipe of equipment at FA02.

In terms of penalty, I note that the grievor's record, as a result of the decision in **CROA 4669**, stands at having a written warning in lieu of a 30 day suspension for an incident that occurred on May 27, 2016, just short of one year prior to the current incident which took place on April 22, 2017. The grievor was also the subject of an *Offer of Leniency* dated March 17, 2017 which resulted in his reinstatement of employment after he was terminated for an incident which occurred on September 9, 2016. The grievor is alleged on September 9, 2016 to have not reported a yellow flag on a right-of-way and also for failing to reduce his train speed to 10 mph while working as a Conductor. The *Offer of Leniency* agreement indicates that a 30 day suspension (of which 15 days was without compensation) was substituted for the termination. The grievor was otherwise made whole.

What is noteworthy is that the grievor had three significant incidents which led to discipline within one year, one on May 27, 2016, another on September 9, 2016 and the current incident on April 22, 2017 for which he was terminated. I note that the grievor committed the most recent offence less than a month after signing the *Offer of Leniency Agreement*.

Although I have concerns that the grievor is not fully engaged in his work, I also recognize that he has some fifteen years of service with the Company, starting in the Engineering Services Department in 2004. I note that he has demonstrated initiative over that time by qualifying first as a Conductor in 2007 and then as a Locomotive Engineer in

2012. In addition, as a result of the findings in **CROA 4469**, he no longer has two 30 day suspensions on his record but rather a written warning followed by a 30 day suspension.

In the end, despite my concerns over the grievor's ability to focus at all times on his assigned tasks, I am prepared to allow him another opportunity to prove that he is capable of performing the duties of his position. Given that this was his third incident in less than one year, I do not think this is an appropriate case to order compensation.

The termination for the incident of April 22, 2017 shall be substituted with a suspension for his period out of work, in addition to his reinstatement without compensation or loss of seniority. The period between his termination on May 5, 2017 and his reinstatement shall be recorded as a suspension for the incident of April 22, 2017. The grievor should understand that further rule violations or incidents of this kind will leave him in a position where his continued employment will be in serious jeopardy.

February 25, 2019


JOHN M. MOREAU, Q.C.
ARBITRATOR