

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

**CASE NO. 4682**

Heard in Montreal, April 11, 2019

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Conductor C. McGregor of Red Deer, Alberta.

**JOINT STATEMENT OF ISSUE:**

Following an investigation, Mr. McGregor was dismissed from Company service for multiple rules violations during his tour of duty on A32-02 and the culminating incident of: Failing to properly secure the AEX7313 in Red Deer yard while working as a brakeman on the A32-02 on May 2<sup>nd</sup>, 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, Leaving Equipment – Non Main Track (B) (C), Rule Book for T & E Employees, section 11, item 11.0 – Securing, Rule Book for T & E Employees Section 2, 2.2A, 2.1A(ii), 2.2C(v)(vi)(xii), Train and Engine Safety Rulebook T-20, Item 3, Train and Engine Safety Rulebook T-11, Item 7 & 8.

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. McGregor be made whole.

The Union submits that the Company has not demonstrated that it had reasonable and probable grounds to engage in the extraordinary step of subjecting Mr. McGregor to surreptitious monitoring and surveillance for reasons outside of the matter at hand, or to improperly withhold the evidence when refuted. The Union contends that the Company's conduct in this regard has breached Mr. McGregor's rights under PIPEDA, appropriate privacy legislation and arbitral jurisprudence.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined within the discipline assessment. In the alternative, the Union contends that Mr. McGregor's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

The Company failed to respond to the Step 1 grievance.

The Union requests that Mr. McGregor 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 maintains the Grievor's culpability was established following a fair and impartial investigation into this matter and the discipline was properly assessed in all the circumstances. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors and relevant arbitral jurisprudence.

The Union states the Company engaged in "surreptitious monitoring and surveillance for reasons outside the matter at hand". This argument is without merit. The Company was investigating a major safety violation and reviewed all available evidence to determine the facts. This was in no way a violation of the grievor's rights including under PIPEDA, privacy legislation and arbitral jurisprudence.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstance. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

**FOR THE UNION:**

**(SGD.) D. Fulton**

General Chairperson

**FOR THE COMPANY:**

**(SGD.) S. Oliver**

Labour Relations Manager

There appeared on behalf of the Company:

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|----------------|---|
| D. Pezzaniti   | – Assistant Director, Labour Relations, Calgary |
| J. Bairaktaris | – Director, Labour Relations, Calgary           |
| M. MacDonald   | – CP Legal, Calgary                             |

And on behalf of the Union:

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|-------------|--|
| K. Stuebing | – Counsel, Caley Wray, Toronto                         |
| D. Fulton   | – General Chairperson, CTY-W, Calgary                  |
| D. Edward   | – Senior Vice General Chairperson, CTY-W, Medicine Hat |
| C. Woodcock | – Local Chairman, Red Deer                             |
| C. McGregor | – Grievor, Red Deer                                    |

**AWARD OF THE ARBITRATOR**

On May 2, 2017, the grievor was employed as a Brakeman on Train AEX7313, working with Locomotive Engineer Barry Johnston and Conductor Robert Duncan. Conductor Robert Duncan was at the north end of track 5 at the time and did not participate in the move. The assignment, as discussed in the pre-departure meeting, was to begin switching cars at the south end of the Red Deer Yard in tracks 1, 2, 3 and 5.

At around 7:30 p.m., the grievor set off a single loaded grain car (AEX 7313) into the south end of the Red Deer Yard. The grain car was sitting on a downhill grade slope. During the course of setting off the grain car, the grievor applied a hand brake. He then requested that Engineer Johnston release the air brakes and perform a hand brake effectiveness test on the brakes. Engineer Johnston did so by releasing the independent air brakes and then backing into the grain car with the hand brake on. The grievor stated that he heard the hand brake squeaking as the engineer backed into the grain car which indicated to him that the hand brake was properly applied.

After cutting off the grain car, the crew went into the shop and began another switching assignment at the north end of the yard. In the meantime, the grain car was seen rolling south. It came to rest on the main line, in OCS territory. It had rolled south down the track for more than a mile before coming to a stop. The grievor and the rest of the crew were informed of the incident but were told to continue with their switching assignment. Fortunately, there was no serious collision caused by the rolling train.

It is understood that when a single car is set out as it was here, the hand brake alone must be capable of holding the grain car in place.

Several re-enactments were performed the following day, May 3, 2017. In the second re-enactment, the Company applied a hand brake and performed the same release test as the grievor and the engineer. It is described in part as follows:

...We released the handbrake and fully charged the car. We then performed a brake test on the car with the Carmen to see if the airbrakes were working, no issues were found. I then was instructed to

tie on the hand brake the same way it was found when the car got away. Trainmaster Pfeifer had taken a video and pictures of the hand brake and the location of the chain when he found the car so I was able to replicate the hand brake. Trainmaster Pfeiffer also gave the handbrake a wiggle to see if it was the same stiffness as when he found the car. We then did a release test on the car. The slack rolled out and the car moved with the unit southwards. I then got a pin and cut away and the car went into emergency at approximately 01:30. After the car went into emergency, we could hear a slight air leak from the A side of the car... We then cut the car back [in] released the hand brake and put the car back in its original position. I was then instructed to see if I could put a stiffer hand brake on. I was able to get about  $\frac{1}{2}$  to  $\frac{3}{4}$  turn more than the first brake. I made note that this wasn't a normal hand brake and I really had to put force into it. We then did a release test slack rolled out and car started to roll with units. We then cut away and bled the air off the car. The car moved slightly then stopped under the power of the handbrake.

A mechanical inspection on the grain car was performed by the Director of Mechanical, Mr. Chad Decoene, after the incident. He noted that the car was fitted with a non-standard hand brake which was only capable of exerting fifty per cent (5.5 % breaking ratio) of the brake force of a normal hand brake in order to meet the AAR standard of 11%.

In addition, a defect in the air brakes was noted following the re-enactment. As the grievor stated in his investigation:

Q 24: Was there a defect with the air brakes on this car?

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

During the interview of Engineer Johnston, Trainmaster and Technical Expert Grant Duncan was asked about the locomotive downloads. He noted that he did not

believe that Engineer Johnston had adequately ensured a proper amount of time for the independent air brakes to release:

Q 53 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 maintains that the grievor, in his capacity as the assigned Brakeman, was the “eyes” of the Locomotive Engineer. He depended on the grievor’s instructions that the hand brake had been properly applied on the grain car. It was entirely up to the grievor, in the Company’s view, to ensure that the test for hand brake effectiveness was properly performed and that the hand brake was secure. The grievor, the Company maintains, missed a crucial step when he failed to properly tie down the equipment and test the effectiveness of the hand brake. His failure to do so, in the Company’s view, resulted in the runaway movement.

The Company also points out that a crew heading north bound on a train cleared into Red Deer would have been incapable of knowing that the runaway grain car was on a collision course. Or, for that matter, would a foreman who was working on a track. This was clearly a mistake with a potential for serious harm of Lac Megantic proportions and the Company has no faith that it can trust the grievor to properly perform his duties in such a safety-sensitive position. In addition, the grievor put himself in danger by walking down a track between the rails. He also failed in his duties by jumping down with two feet from the grain car; and finally, by reaching in between the moving locomotive and car to turn the angel cock.

The arbitrator notes that the grievor claims he did not actually jump from the car to the ground and the recording does not clearly indicate that he did so. I do not believe the evidence supports this allegation. The grievor also apologized for walking between the tracks. I accept this as a minor violation.

The main issue here is whether the grievor is responsible for the incident which, it is clear, could have had catastrophic results. The Company conducted a thorough re-enactment. The last move in the re-enactment at the south end of the Red Deer yard was to cut away the grain car. The following was noted during the re-enactment on the question of whether proper force had been applied to the hand brake by the grievor:

I was then instructed to see if I could put a stiffer hand brake on. I was able to get about  $\frac{1}{2}$  to  $\frac{3}{4}$  turn more than the first brake. I made note that this wasn't a normal hand brake and I really had to put force into it. We then did a release test slack rolled out and car started to roll with units. We then cut away and bled the air off the car. The car moved slightly then stopped under the power of the handbrake.

What is clear is that the extra force applied to the hand brake through a further  $\frac{1}{2}$  to  $\frac{3}{4}$  of a turn was enough to keep the grain car secure on the track after the air was bled off the car. Without the air brake applied to the grain car, however, the car was held stationary only under extreme pressure. Mr. Sims concluded at p.16 in the arbitration award involving Engineer Johnston, **CROA 4622**, that the downloads support the conclusion that Mr. Johnston “... *failed to adequately ensure an adequate time for air breaks to release before conducting an efficiency test.*” In other words, Engineer Johnston did not allow sufficient time for the air brakes to completely bleed after the hand brake was applied by the grievor.

As Arbitrator Sims further noted in **CROA 4622**, there were other factors that could have contributed to the runaway car besides the hand brake not being applied with sufficient force, such as the use of a non-standard hand brake which was only capable of exerting half the normal pressure of the break force of a normal hand brake. A leaky brake cylinder hose was also documented after the grain car was inspected. The Union notes in their second step reply that Mr. Decoene indicated that there was no record of any repair by the Company since the car was placed in service in 1974.

The documented re-enactment, on the other hand, indicates to me that the grievor could have applied more force when he applied the hand brake. As noted, a half turn might have succeeded in avoiding the whole incident. On the other hand, the re-enactment and other evidence adduced through the investigation, including the expert analysis of the downloads, indicates there were other factors which could have contributed to the incident.

I note from some of the cases presented that a finding of shared fault is a mitigating factor in the assessment of discipline. Arbitrator Flynn in **CROA 4471** noted that Arbitrator Picher reduced the 45-day suspension in **CROA 3253** to 20 days “...because the cause of the accident was shared and the grievor committed no violations of this in the past”.

The grievor had only been in the service of the Company for 2 ½ years at the time of the incident. He had one prior disciplinary event relating to a missed call for which he

was given a 5-day suspension. As the Union pointed out, this was his first rules-related violation.

But as Arbitrator Sims noted in **CROA 4464**: “*Deterrence remains a serious factor given the nature of the offence*”. The overriding message must be that incidents of this nature will attract a serious disciplinary response. In my view, the grievor must accept that, although there were other contributory causes to what occurred, primary responsibility for this incident falls on his shoulders. A runaway car for a mile down the track is a frightening event. It could have had grave consequences.

Under the circumstances, given in particular the evidence of the other contributing factors that led to the events involving runaway train car AEX7313 besides the grievor’s negligence, I do not find that termination is the appropriate disciplinary response. I make this finding notwithstanding the grievor’s short service and his major role in the incident. Both the grievor and the Company have an investment in his career and I believe that he should be granted a second opportunity to show that he has the skills to become a valued conductor.

The grievor shall be reinstated forthwith but without loss of seniority or compensation for lost wages or benefits.

May 3, 2019



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**JOHN M. MOREAU, Q. C.**  
**ARBITRATOR**