

# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

## CASE NO. 4724

Heard in Montreal, January 16, 2020

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

### **DISPUTE:**

Appeal of the 20-day suspension given to Yard Service Employee (YSE) S. Twomey.

### **THE JOINT STATEMENT OF ISSUE:**

Following an Investigation YSE Sean Twomey was accorded 20-day suspension as shown on his Form 104 as follows, "Formal investigation was issued to you in connection with the occurrence outlined below: "your violation of failing to protect the point while Shoving into AB04 which caused coupling onto other cars in track which resulted in rolling out the west end sideswiping T13-22."

Formal investigation was conducted on May 2nd, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined that the investigation record as a whole contains substantial evidence proving you are in violation of: Rule Book for T&E Employee's item 12.5 – Coupling Equipment

In consideration of the decision stated above, you are hereby accorded a twenty (20) day suspension.

#### **Union's Position:**

The Union's position is that the 20-day suspension accorded to Mr. Twomey was excessive and does not provide an reformatory process but simply a punitive one.

Mr. Twomey a long service employee, made a mistake and as provided within his investigation showed what he had learned to move forward. The Company should not have assessed a suspension without pay, but instead used the process as the educational tool it should have been.

The Union requests that the 20-day suspension be removed and YSE Twomey be compensated all loss of wages with interest, and benefits. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

#### **Company's Position:**

The Company disagrees and denies the Union's request.

The Company has reviewed the Union's grievance, the statement and investigation in its entirety and cannot agree with the Union's contentions. The Company maintains there was just cause to assess discipline and that the level of penalty issued was appropriate, given the circumstances.

Accordingly, the Company sees no reason to re-evaluate the penalty issued.

**FOR THE UNION:**  
**(SGD.) W. Apsey**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.) D. Zurbuchen**  
Manager, Labour Relations

There appeared on behalf of the Company:

- D. Pezzaniti – Assistant Director, Labour Relations, Calgary
- D. Guerin – Senior Director, Labour Relations, Calgary
- T. R. McMahon – Superintendent Operations, Montreal

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- W. Apsey – General Chairperson, Smiths Falls

### **AWARD OF THE ARBITRATOR**

1. On July 15, 1991, the Grievor was hired by the Company. He has 28 years of service. On April 22, 2019, he worked as a Yard Service Employee in the Toronto Yard.
  
2. On April 29, 2019, he was given a notice of a formal investigation in connection with “the circumstances surrounding the Sideswiping Incident that occurred morning of April 22<sup>nd</sup>, 2019 while working Assignment TT11-22”.
  
3. The investigation was held on May 2, 2019.
  
4. During the investigation, answering the following questions, the Grievor described the event leading to the incident:

Q17. Please describe in your own words the events leading up to this Sideswipe Incident that Occurred April 22, 2019

A17. We grabbed 26 loaded Auto cars, put the air to the headend 6 cars. When we came over the the north side form F-yard I had to put our tail end car into AB03, then proceeded with the remaining 25 autos to AB04. I rode the point into AB04 till approx. 12 auto lengths observing the track was cleared as of most of B-yard other than Approx. 9 cars that appeared to be in B3 or B2 at the very west end. I

detrained and observed my movement from approx. the middle of the track where I could observed my headend and tail end. With approx. 5 cars lengths remaining to get in the clear in B4 I watch my tail end connect with 9 cars at west end of track. Which I thought were in B3 or B2. I immediately applied full set IND. And Train brake. Which set the head end 6 cars with brakes. The movement came to a stop and I called east tower who immediately told me to stop my movement. Now concerned jump in the crew bus and went to the west end where I Observed B4 west end car Tank was touching the train that was strung out b-yard lead on the west end. Conductor Devin Stockley advised that everything was on the rail and damage look minimal. I informed my mate that was protecting the east end movement of our train who is position on the headend that I was slowly going to stretch a couple of car lengths. ...

Q18. According to your previous answer you had stated that you had detrained in the middle of B4, you had Observed cars at the west end of track that you thought were in B3 or B2. If you weren't sure why didn't you ride the point until your cut of cars were in the clear.

A18. I was sure or I would have.

5. The Grievor admits that if he had stayed on the point of the cut of cars he would have been able to see that the cars were in a different track:

Q20. Can you explain how you had couple to equipment when you sure that the cars that you had Observed where on a different track then AB04.

A20. Yes. The cars were in AB04

Q21. If you had stayed on the point of the cut of cars that you were shoving in AB04 and rode it out would you have then been able to stop short and confirm the cars were in a Different track or not.

A21. Yes

6. The Grievor states that in the future he will ride the point until he can confirm the clarity of the track:

Q23. In the future what will you do differently to prevent an incident like this from Occurring again.

A23. I would ride the point, till I could more positively confirm the clarity of the track.

7. On Mar 13, 2019, The Grievor was assessed a 20 day suspension for being in violation of Rule Book for T & E Employees item 12.5 – Coupling Equipment (Item 12.5):

12.5 Coupling equipment

Before coupling to:

- a. Equipment, care must be taken to ensure that such equipment is properly secured.
- b. Equipment on other than tangent track, a stop must be made not less than 6 nor greater than 12 feet from the coupling and extreme caution must then be used, ensuring couplers are properly aligned prior to coupling being made.
- c. Or moving equipment being loaded or unloaded, all persons in or about such equipment must be notified and vehicles and loading or unloading devices must be clear unless otherwise specified in special instructions.
- d. Or moving service equipment in employees occupying such equipment must be notified and any attachments secured.
- e. Passenger equipment, a stop must be made not less than 6 nor greater than 12 feet from the coupling and a speed of 2MPH must not be exceeded.

(Emphasis added)

8. The Union alleges that the penalty issued is excessive given notably the Grievors seniority, discipline history and remorse.

9. For its part, the Company says that it instituted the principles of progressive discipline as described in the Company's Hybrid Discipline and Accountability Guidelines (Hybrid Discipline Policy) by imposing a 20 day suspension on the grievor for a major incident.

## **DECISION**

10. The Union concedes that the Grievor was in violation of Item 12.5 and admits that the Grievor misconstrued the location of the cars in AB04, resulting in an accidental connection. However, the Union asserts that the Grievor believed in good faith that the

track was clear and he made an error in judgment when he determined that the other cars in his line of sight were not on track AB04.

11. The grievor was in violation of part (b) of Item 12.5 as he did not stop less than six feet short of the equipment.

12. The Grievor has accepted responsibility and agrees that, had he remained at the point, he would have observed that the track was not clear. The behaviour of the Grievor does not reflect a pattern of misconduct or deliberate disregard or wilful derogation from adherence to train handling procedures or the Operating Rules.

13. The Grievor has expressed remorse over what happened:

Q25. Do you have anything you wish to add to this investigation?

A25. I consider myself a very safe Employee. my 28 years of safe railroading would hopefully be taken into consideration, let the record state that I am remorseful for my incident that occurred on April 22, 2019 .

14. The Grievor has been employed by the Company for 28 years. Prior to the present event, he had one instance of informal discipline in 2018 and a clean record for the preceding ten years. In his disciplinary file, there are no prior instances of violations of Rule Book for T&E Employees item 12.5 - Coupling Equipment. This is the first time since 2007 that he has been disciplined for a security breach.

15. The damage caused by the incident was minor and did not cause serious material or financial harm to the company.
16. The arbitrator agrees with the Union that the jurisprudence of this office regarding rule 115 is relevant to the present case. Rule 115 allows for the shoving of equipment without an employee on the point only if the track is known to be clear. Rule 115 states:

115. SHOVING EQUIPMENT

(a) When equipment is shoved by an engine or is headed by an unmanned remotely controlled engine, a crew member must be on the leading piece of equipment or on the ground, in a position to observe the track to be used and to give signals or instructions necessary to control the move.

EXCEPTION: A crew member need not be so positioned when the portion of the track to be used is known to be clear. However, equipment not headed by an engine must not approach to within 100 feet of any public, private or farm crossing unless such crossings are protected as described in Rule 103 paragraph (b) or (g).

(b) Known to be clear is defined as seeing the portion of the track to be used as being clear and remaining clear of equipment and as having sufficient room to contain equipment being shoved. This determination must be made by a qualified employee who can observe the track and has radio contact with the employee controlling the movement. Where a track that has been seen to be clear and no access to that track is possible by another movement, the track may be considered as "known to be clear".

Note: When it can be determined that other movements are not on duty or will not be performing work in the track to be used, the requirement of "known to be clear" can be considered to be fulfilled continuously.

(c) On main track, when equipment is shoved by an engine or is headed by an unmanned remotely controlled engine, unless protected by a crew member as described in paragraph (a), this move must:

- (i) have the required authority;
- (ii) not exceed the overall length of the equipment;
- (iii) not exceed 15 MPH; and
- (iv) not be made while the leading car is within cautionary limits.

(d) Unless the route is known to be clear, when reversing with a locomotive consist and visibility is restricted, a member of the crew must be on the leading end and in position from which signals necessary can be properly given.

17. On April, 22, 2019, the Grievor misjudged the location of the cars. He thought the track was clear and that the cars were on another track.
18. Previous case law of this office confirms that the penalty for a confirmed violation of Rule 115 and derailment is in the order of 15 demerits. This principle can be summarized as follows in the decision of Arbitrator Picher in **CROA 4251**:

The Union submits that the assessment of the thirty day suspension was excessive. In that regard its counsel draws to the Arbitrator's attention a substantial number of awards of this Office dealing with similar violations of CROR 115. He submits that a review of those cases confirms that the assessment of demerits, generally in the order of fifteen demerits, is the more appropriate measure of discipline. In that regard reference is made to CROA&DR 2990 and 3237, where fifteen demerits were assessed by the employer for violations of CROR 115 and were sustained by this Office. Additionally, similar infractions were reviewed in CROA&DR 3752, 3773, 3936 in which cases higher awards of demerits were all reduced to fifteen demerits.

Having reviewed the cases in question, and the facts of the instant case, the Arbitrator is compelled to agree with counsel for the Union. The assessment of a thirty day suspension for the facts of the instant case is in my view excessive, particularly having regard to the grievor's length of service and his prior disciplinary record. In twenty-two years of service the grievor has received only minor demerits on two prior occasions, in addition to a single written reprimand. Given the history of dealing with similar infractions by the assessment of demerits, as confirmed above, I can see no compelling basis for the substantial financial penalty which was imposed upon the grievor. I therefore direct that the discipline be reduced to the assessment of fifteen demerits, with the grievor to be compensated for any wages and benefits lost, and with the thirty day suspension to be stricken from his record.  
(Emphasis added)

19. In light of the standard for violations of article 115, the Grievor's suspension is excessive and unjustified in these circumstances.
20. In **CROA 4455**, a junior employee was assessed 20 demerits for failure to comply with CROR 105, 113 and 115. In his short tenure, the Employee had an unenviable

discipline record including a prior Rule 115 violation. Accordingly, the Arbitrator maintained the 20 demerits assessed.

21. In the present case, the Grievor does not have any prior Rule 115 or Item 12.5 incident on his record.

22. In **CROA 3845**, a junior employee was assessed a 15 day suspension for a side collision resulting from a violation of Rule 115. In that case, the Union argued that a two week suspension was excessive. Arbitrator Picher noted that:

“Its counsel submits that prior awards of this Office would indicate that violations of CROR 115, which governs vigilance of operating employees in charge of switching operations, typically results in the assessment of fifteen demerits. The Arbitrator does not dispute the Union’s characterization of the general course of the jurisprudence”.

23. However, in that case No. 3845, the Company had undertaken a concerted campaign to raise employee consciousness and diligence with respect to the application of Rule 115 including a missive from the Company’s Senior Vice-President for the Western Region expressing concerns on the matter. In those circumstances, the 15 day suspension was maintained by the Arbitrator.

24. In the present case, the Grievor has 28 years of employment with the Company the effort of the Company to raise awareness is not a factor to be considered in the present case.



25. The case law submitted by the Company all relates to collisions on railway tracks but the circumstances of those cases were different and have more serious consequences than those in the present case. Furthermore, the grievors involved were in violation of more than one rule and their record contended more significant disciplinary measures.

26. For the foregoing reasons, the grievance is allowed in part. The twenty day suspension is to be reduced to a tree day suspension and the Grievor's record revised accordingly.

27. The Grievor is to be compensated for loss of wages and benefits for the period other than during the substituted suspension.

28. The arbitrator will retain jurisdiction should any issues arise in the implementation of this award.

March 17, 2020



---

**SOPHIE MIREAULT  
ARBITRATOR**