

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

CASE NO. 4738

Heard in Montreal, May 29, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor D. Neglia.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an Investigation, Conductor Neglia was dismissed as shown in his Form 104 as follows,

“Formal investigation was issued to you in connection with the occurrence outlined below:

In connection with: the circumstances surrounding your tour of duty on May 18, 2019 while working 421-18 specifically standing on an operating lever to apply a handbrake.

A formal investigation was conducted on May 23, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

Careless act to comply with T&E Section 2 item 2.2, Safety Rule Book T-8 which resulted in putting yourself at a risk of injury.

In consideration of the decision stated above, please be advised that you have been dismissed from company service effective June 6, 2019. Notwithstanding the above mentioned incident, based on your previous discipline history, this incident constitutes a culminating incident which warrants dismissal”.

The Company did not respond to the Union's Step 2 grievance as provided by in Arbitrator Weatherill's Award and in violation of the CCA Article 40, Letter: Management of Grievances & the Scheduling of Cases at CROA.

Union's Position:

The Union's position is that the dismissal of Mr. Neglia was excessive and unwarranted.

Mr. Neglia apologized and accepted his responsibility for his actions and provided his commitment moving forward.

Mr. Neglia was honest and forthcoming and took full responsibility for his actions, acknowledged the error, reviewed the rules during the investigation, was mentored, was educated, expressed remorse, and guaranteed compliance going forward.

Mr. Neglia did not follow a best practice by standing on an operating lever but mentoring, education would have provided the necessary move forward steps, not the excessive discipline of discharge as was provided in CROA 4098.

The Union does not believe the quantum of discipline in this instance (dismissal) was warranted.

The Union requests that the dismissal of Conductor Neglia be expunged and he be made whole for his lost earnings/benefits with interest, without loss of seniority.

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 an Investigation, Mr. Neglia was dismissed as follows:

“Formal investigation was issued to you in connection with the occurrence outlined below:

In connection with: “the circumstances surrounding your tour of duty on May 18th, 2019 while working 421-18 specifically standing on an operating lever to apply a handbrake.”

A formal investigation was conducted on May 23rd, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contained substantial evidence proving you violated the following:

- Careless act to comply with T&E Section 2 item 2.2, Safety Rule Book T-8 which resulted in putting yourself at risk of an injury.

In consideration of the decision stated above, please be advised that you have been dismissed from company service effective June 6, 2019. Notwithstanding the above mentioned incident, based on your previous discipline history, this incident constitutes a culminating incident which warrants dismissal”.

Company's Position:

Preliminary Objection:

To begin with, the Company objects to the following reference in the Union's Ex Parte Statement:

“The Company did not respond to the Union's Step 2 grievance as provided by in Arbitrator Weatherill's Award and in violation of the CCA Article 40, Letter: Management of Grievances & the Scheduling of Cases at CROA.”

The Union was provided with the ability to review the Grievance response. Despite their assertion to the contrary, the Union's lack of appreciation in the way the response is delivered to them, does not equate to a lack of response.

Further, as the Union is well aware, any attempt to bring this issue in front of the Arbitrator in the context of this grievance would be inappropriate, an expansion of the Union's position, and only serve to delay the proceedings. The rules of the CROA office of arbitration do not permit parties to raise disputes not first processed through the grievance procedure.

Notwithstanding the aforementioned, the Company disagrees and denies the Union's request.

The Grievor's culpability was established through a fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's past discipline record and his service. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union contends that the dismissal of the Grievor was excessive and unwarranted, that the Grievor apologized, accepted responsibility for his actions, and provided his commitment moving forward. The Company cannot agree.

The Grievor's acceptance of the rule violation does not negate its severity. Further, as provided within the memorandums, the Grievor stated he would be inclined to violate the rule again.

The Union's suggestion that the Grievor did not follow a best practice is egregious on all counts. The Grievor blatantly violated the Train & Engine Safety Rule Book. The Company takes great exception to the Union's nonchalant view of safety. Further, the Company cannot agree with the Union's interpretation and application of CROA 4098.

Notwithstanding the incident was worthy of discipline in and of itself, as identified in the 104, this violation also constituted a culminating incident.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

Union's Position:

The Union has filed their own Ex Parte Statement of Issue.

FOR THE UNION:

(SGD.) W. Apsey

General Chairman

FOR THE COMPANY:

(SGD.) J. Shaw

Labour Relations Officer

There appeared on behalf of the Company:

D. McGrath	– Manager Labour Relations, Calgary
S. Oliver	– Manager Labour Relations, Calgary
J. Shaw	– Officer Labour Relations, Calgary

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The grievor entered the service of the Company on October 10, 2011.

On May 18, 2019, the Grievor was working as a Conductor on train 421-18 in the Company's Toronto yard. The Grievor and his Locomotive Engineer were advised that a boxcar on their train was a bad order car and needed to be set out. While the Grievor was applying a hand brake to the boxcar, he stood on the operating lever instead of

using the proper safety appliances. The incident was reported by Trainmaster Twoney and Trainmaster McVicar who observed the grievor on the operating lever, and sent him home afterwards.

The grievor acknowledged at his investigation that he understood that he failed to comply with the safety handbook T08(4) of the Safety rule book "*Crossing Over or Between Equipment*". The grievor was also asked about a comment he made to the Trainmasters at the time with respect to repeating his behaviour in the future:

Q14: Referring to Appendix C & D you had express that you would probably do it again tomorrow as you feel it's safer is this correct?

A: I did say it, I regret saying it and I didn't mean it literally

He further added in that regard:

Q 21: Do you have anything you wish to add to this statement?

A: Yes, Poor choice of wording when confronted by my supervisors, I took a short cut I regret doing, in the future I will fully comply with the rules.

The Company pointed out in their submissions that in order to apply a handbrake, conductors must maintain a minimum of three points of contact. That stance is achieved by having two hands and a foot, or two feet and a hand, while maintaining contact with a safety appliance at all times. The Company further notes that the operating lever is used to couple and uncouple cars and not as way to pivot and operate the hand brake. A person could fall off a lever and injure themselves if they chose to stand on it like the grievor did in this case. The Company further submits that the grievor was evidently unapologetic about his behaviour at the time of the incident given his assertion that he would repeat it again in the future. The Company maintains in

summary that the grievor's behaviour merits discipline. The Company further submits that termination is an appropriate disciplinary response given the grievor's escalating record and the fact that his behaviour is unlikely to change in the future, as demonstrated by his disregard for Company safety rules.

The Union acknowledges that the grievor did not follow best practices by standing on the operating lever. The incident, however, also did not reach the seriousness level of a cardinal rule safety violation. Further, the Union submits that the observations of the grievor standing on the operating lever took place in the context of a proficiency test which should not have attracted any formal discipline under the Company's policy (*"Efficiency Test Codes and Descriptions for Train and Engine Employees"*).

The arbitrator notes that, apart from any objection of the Company with respect to the requirement for the parties to plead all issues through to and including the last step of the grievance procedure (clause 9 of the Memorandum of Agreement), I accept that the Letter of May 30, 2018 ("Letter Re: Management of Grievances and the Scheduling of Cases at CROA") stipulates that a party "...will only be able to raise and pursue the issue raised in the JSI or their Ex Parte Statements of Issue as the case may be". The Union did not raise the issue of the incident taking place in the context of a proficiency test in their Ex Parte Statement. Accordingly, given the Agreement of the parties in the Letter of May 30, 2018, the Union is precluded from raising this issue at arbitration.


One of the overriding concerns with respect to this incident, which is an obvious safety violation, is the insolence the grievor displayed when he stated to the Trainmasters that he would repeat his behaviour again. Although the grievor indicated that he regretted making this comment at the investigation, it does not demonstrate the same level of genuine remorse as an apology would have at the time of the incident. Overall, I find that the imposition of discipline was appropriate under the circumstances for this incident.

Nevertheless, I do find that notwithstanding the grievor's unenviable record, the penalty of termination is excessive and that a lengthy suspension is the appropriate disposition in this case. The suspension must be significant given the grievor's record and, in particular, his habit of responding inappropriately to management when he violates a safety rule or ignores instructions.

The grievance is allowed to the extent that the grievor shall be reinstated to his position without loss of seniority but without any further compensation.

I shall retain jurisdiction should any issues arise with respect to this matter.

June 11, 2020



**JOHN M. MOREAU
ARBITRATOR**