

# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

## CASE NO. 4745

Heard in Edmonton via Video Conferencing, June 11, 2020

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

-and-

**TEAMSTERS CANADA RAIL CONFERENCE**

### **DISPUTE:**

Appeal of the 20 day suspension (19-day suspension and 1-day rules) of Conductor D. Demaray.

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

Following an Investigation, on October 11, 2018 Conductor Demaray was assessed discipline as shown in his Employee Notification Letter as follows: *“Please be advised that you have been assessed with a twenty (20) day suspension, which you will serve nineteen (19) days suspension without pay from Company Service, a one (1) day Rules Refresher with a Manager and a meeting with myself and your Union Representative for your failure to comply with CRT123.2 – switching without using engine numbers; CRT20 – walked directly behind movement and adjusted knuckle and CRT27 – did not give 3 point protection when behind movement adjusting knuckle, while working as a Trainman on Assignment T78 on September 21, 2018. Violation of the following rules:*

#### *Summary of Rules Violated:*

<b>Book</b>	<b>Section</b>	<b>Subsection</b>	<b>Description</b>
GOI	T&E Safety Rule Book	T-20.5	Allow at Least 15 feet when passing
GOI	T&E Safety Rule Book	T-27.1	Provide 3-Point Protection if Cars are
Rule Book for T&E	Switching By Radio	12.4.A(iii)	The Controlling Locomotive Number

Your suspension date will start at 0001 hrs. on October 15, 2018 and end at 23:59 hrs on November 2, 2018.

### **Union’s Position:**

The Union’s position is that the discipline assessed was excessive.

Mr. Demaray provided responses to the allegations at the time of incident and during the investigation through Q and A as well as maps and notes. Mr. Demaray contends that the

alleged violations are false as he did use engine numbers in communication with the Locomotive Engineer, he did not require 3 point protection as his torso did not break the plane of the rail when opening the knuckle, and the movement did not reverse until he was safely on the opposite side entraining. Mr. Demaray's knowledge and experience at Pender allowed him the confidence in controlling his move safely. The 20 multilevel cars were stationary with at least a 10-pound reduction in air brakes and the 2 locomotives were at the low end of a steep grade which contributes to the delayed or slower reverse movement.

In addition, the denial of allowing witnesses as requested by the employee and Union is against Article 39 of the CCA which challenges the right to a fair and impartial investigation.

The Union requests that the 19-day suspension be removed and Conductor Demaray be made whole for his lost earnings/benefits with interest.

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 grievances, the statement, and the investigation package and cannot agree with the Union's contentions. The Company maintains the Grievor's culpability for the aforementioned violations was established through the fair and impartial investigation. Contrary to the position of the Union, the Company maintains the investigation contained substantial testimony demonstrating Grievor's culpability.

When considering the appropriate disciplinary assessment, each case is considered individually and on its own merits. Discipline was determined following a review of all pertinent factors including the Grievor's past discipline record and his service. This includes looking at all mitigating and aggravating factors.

As put forth previously, the Company simply cannot agree with the Union's alleged violation of Article 39 of the Consolidated Collective Agreement and maintains that the investigation was both fair and impartial.

Accordingly, the Company maintains there was cause to assess discipline and that the assessment of suspension was just, appropriate and warranted. The Company maintains the discipline assessed should not be disturbed.

**FOR THE UNION:**

**(SGD.) W. Apsey**

General Chairperson

**FOR THE COMPANY:**

**(SGD.) P. Sheemar**

Labour Relations Officer

There appeared on behalf of the Company:

S. Oliver	– Manager Labour Relations, Calgary
D. McGrath	– Manager Labour Relations, Calgary
P. Sheemar	– Labour Relations Officer, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smiths Falls
D. Demaray	– Grievor, London

## AWARD OF THE ARBITRATOR

1. As indicated above, the Grievor was suspended for 20 days for three Rule Violations which took place while he was working as a Trainman on Assignment T78 on September 21, 2018; namely, a failure to comply with:

- a) CRT123.2 – switching without using engine numbers;
- b) CRT20 – walked directly behind movement and adjusted knuckle; and
- c) CRT27 – did not give 3 point protection when behind movement adjusting knuckle

2. At the outset of the hearing, the Company filed a preliminary objection with respect to submissions in the Union's Brief referring to:

- Targeting
- Unwarranted level of scrutiny
- Unreasonable level of scrutiny
- Unnecessary scrutiny
- Null and void/void ab initio

3. For the reasons set out in **CROA 4739 / 4744** the Company's objection relative to the first four items, listed above, is sustained. The Union did not raise those matters in the JSI and is, accordingly, precluded from raising the issues at arbitration.

4. With respect to "*null and void/void ab initio*", the JSI raises the issue of the lack of a fair and impartial investigation - the consequence of which, depending on the facts, may lead to a conclusion that the discipline imposed is declared void *ab initio*. Accordingly, it will be considered.

5. In **CROA 4744**, I dealt with the principles and considerations relative to the application of discipline for breaches of Rule Violations discovered during proficiency testing. They apply here.

### **Lack of Fair and Impartial Hearing**

6. The Union argued that the failure to adjourn the investigation to accommodate the Grievor's witnesses, constitutes conduct which established the absence of a fair and impartial hearing. I do not agree.

7. The Grievor was provided appropriate advance notice that witnesses would be made available at his request. No such request was made until the hearing was underway. Further, and, in any event, the Grievor admitted to the conduct of which he was found culpably responsible. It is difficult to envision that the witnesses would provide evidence at the investigation which would differ with his own categorization of his conduct.

### **Conclusion**

8. After a review of the circumstances, the balance of probabilities is that the Grievor missed repeating the engine number. However, that must be taken in context.

As stated by Mr. Kirkland (UMHA14):

*... the odd miss certainly could be understood and forgiven. The major issue was our fear for Mr. Demaray's life.*

9. Whether or not the Company feared for the Grievor's life does not colour the determination of whether or not he failed to mention the engine number. Even though he did, by the Company's admission, the "*odd miss certainly could be understood and forgiven*".

10. Accordingly, I conclude that although the Grievor did not mention the engine number in the finite time in which Mr. Kirkland and Mr. Hayes overheard the conversations, the breach "*...could be understood and forgiven*". The appropriate discipline should have been a verbal warning at best.

11. The Grievor admitted that he was in breach of CRT20 and CRT27.

12. These also must be taken in context. All of the events raised here took place within a 3 minute interval. I accept the Grievor's description that his crossing the tracks while reaching out to adjust the knuckle as he walked by, was part of a single motion.

13. While in no way diminishing the importance of either Rule CRT20 or CRT27, applying them both against the Grievor in the circumstances would essentially be unfair.

14. Accordingly, I find his conduct, by his own admission, culpable. The determination of his culpability is not lessened by the explanation of his experience, along with his knowledge, and his ability to listen to the engine and hear the brakes etc... If anything, they go to the mitigation of the discipline. The Grievor would be

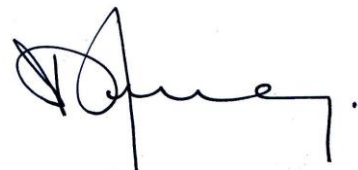
advised to pay more attention to adhering to the rules, and accepting responsibility when he breached them, rather than attempting to justify his conduct.

15. In all events, the breach of Rules CRT20 and CRT27, although regarded as one act for the purposes of discipline here, are culpable. The mitigating circumstances convince me that their breach does not justify a 20-day suspension.

16. Accordingly, I direct that the grievance be allowed in part. The Grievor's suspension shall be set aside. Having regard to his repeated failure to follow the rules (even though discovered in the course of proficiency tests), I impose a discipline of a 10 day suspension.

17. The Grievor shall be made whole. I shall remain seized with respect to the interpretation, application and implementation of this award.

July 3, 2020

A handwritten signature in black ink, appearing to read "R. Hornung", written over a horizontal line.

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