

CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4756

Heard in Montreal with Video Conferencing, July 16, 2020

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 19-day suspension of Conductor D. Carron.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Mr. Carron was assessed discipline as shown on his Form 104 as follows;

Formal Investigation was issued to you in connection with the occurrence outlined below: In connection with: Your alleged E-test observation made by TM Twomey and Supt. B. McDaniel while working as Conductor on Train DIM-012 on October 16, 2018”.

Formal investigation was conducted on October 30, 2018 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 are in:

Violation of Train & Engine Safety Rule Book dated October 2015,

- 1. Rule T-20 on or about tracks when walking between equipment, ensure there is a minimum of 50 feet of separation between equipment.*
- 2. Rule T-27-3 Point Protection Provide 3-point protection if cars are connected to locomotives and working on the ground when:
 - a. one of both feet enter between the rail, between equipment or within 15 feet of the end of the equipment; or*
 - b. breaking the plane of the rail with your torso, between equipment or within 15 feet of the end of equipment.”**

In consideration of the decision stated above, you are hereby assessed with a nineteen (19) day suspension in addition to a one-day rules refresher and one day simulator exercise. Your nineteen-day suspension will commence on Monday November 19th, at 00:01 until December 7th at 23:59.

Details of the course are as follows:

Instructor M. Krzywicki

Date: December 11, 2018, for Rules Refresher

Date: December 12th, for Simulator training

Time: 10:00; Location: Toronto GYO

As a matter of record, a copy of this document will be placed on your personnel file.

The Union's Position:

The Union's position is that the discipline assessed was excessive in all circumstances and serves no education aspect.

Mr. Carron provided his reasons within the investigation and it is clear the Company chose to suspend without wages rather than education. Further as noted within the grievance process, specifically Q&A 29, Mr. Carron is asked about T&E 2.3, clearly this rule shows both crew members are responsible yet Mr. Carron's Engineer is not investigated.

The Company in their Step response refer to the Company's Step 1 response, it must be very clear that this was submitted in violation of the Collective Agreement, over 60-days and in fact after the Union submitted their Step 2, therefore it does not form part of this file.

The Union requests that the discipline be removed and Conductor Carron be made whole for his lost earnings/benefits with interest during the period of time suspended.

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. Carron was issued a 19-day suspension as follows:

"Formal investigation was issued to you in connection with the occurrence outlined below: In connection with: "Your alleged E-Test observation made by TM Twomey and Supt Brad McDaniel while working as Conductor on Train DIM-012 on October 16, 2018."

Formal investigation was conducted on October 30, 2018 to develop all the facts and circumstances 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 are in:

Violation of Train & Engine Safety Rule Book dated October 2015,

- 1. Rule T-20 On or About Tracks When walking between equipment, ensure there is a minimum of 50 feet of separation between equipment.*
- 2. Rule T-27 3-Point Protection Provide 3-point protection if cars are connected to locomotives and working on the ground when:

 - a. One or both feet enter between the rail, between equipment or within 15 feet of the end of equipment; or*
 - b. Breaking the plane of the rail with your torso, between equipment or within 15 feet of the end of equipment.**

In consideration of the decision stated above, you are hereby assessed with a Nineteen (19) Day suspension in addition to a one (1) day rules refresher and one (1) day simulator exercise.

Your nineteen (19) day suspension will commence on Monday November 19th at 00:01 until December 7th at 23:59.

Details of the course are as follows:

Instructor: M. Krzywicki

Date: December 11th, 2018 for Rules Refresher

Date: December 12th, for simulator training

Time: 10:00; Location: GYO

As a matter of record, a copy of this document will be placed in your personnel file."

Company Position:

The Company disagrees and denies the Union's request.

The Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's past discipline record and his service.

The Union contends the Company chose to suspend the Grievor without wages rather than education. The Company simply cannot agree. The Grievor admitted culpability within his investigation for violating major safety rules, putting his safety in immediate danger. This also resulted in damage to Company property. The discipline assessed was warranted and the Company duly considered all mitigating and aggravating factors.

The Union submits the Grievor was investigated and disciplined for the Rulebook for Train & Engine Employees Item 2.3 Crew Members and his Locomotive Engineer was not. The Company cannot agree. The Grievor was investigated and disciplined for violating the T&E Safety Rulebook item T-20 On or About Tracks and item T-27 3-Point Protection. It was the Grievor who was in violation of these safety rules. The handling of the Locomotive Engineer in no way negates the culpability of the Grievor.

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.

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

FOR THE COMPANY:
(SGD.) D. Pezzaniti
Director, Labour Relations

There appeared on behalf of the Company:

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

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smiths Falls
J. Campebell	– General Chairperson, Peterborough
D. Carron	– Grievor, Nepean

AWARD OF THE ARBITRATOR

1. Following an investigation, Conductor Mr. Carron was assessed a 19-day suspension for violations of Rule T-20 On or About Tracks and T-27 3 Point Protection. The discipline arose from an "Efficiency Test", a procedure designed to evaluate an employee's compliance with safety procedures.

2. I must first determine whether the Company has satisfied its burden to establish, on a balance of probabilities, that there was conduct warranting discipline. If so, I must assess whether the discipline is warranted given the circumstances.

3. On October 16, 2018, Trainmaster Twomey and Superintendent McDaniel (“the Supervisors”) arrived on inbound DIM train. As they were driving along L2 at West End, they observed Mr. Carron making a cut on the CP2316. According to the Supervisor’s, Mr. Carron pulled the pin on the locomotive. During the separation process between the locomotives, the MU cables were pulled from one locomotive and the chains were broken, as they were not removed and secured.

4. MU cables are connected from one locomotive to another to allow the separate units to work together as one. The cable measures 6 feet long and weighs between 20 to 30 pounds. Mr. Carron acknowledges he did not separate the MU cables and untie the safety chains between the two locomotives before pulling away from Locomotive 2316. He claims he “forgot”. As a result, the safety chains broke from the tension.

5. Immediately after observing these safety violations, the Supervisors approached Mr. Carron to review safety procedures and provide coaching on proper compliance. They contemporaneously drafted memorandums to be kept in the employee file. This prompted the Company to investigate the alleged safety violations.

6. Regarding violation of Rule T-20, the Company states Mr. Carron did not ensure there was 50 feet of separation when walking between equipment. It relies on the

Supervisors' memorandums reporting Mr. Carron was only at approximately 10 feet of separation between the locomotives. Mr. Carron disputes that suggestion and claims that the movement pulled apart at "car length", which is approximately 50 feet.

7. Absent any objective evidence establishing the measurement between the locomotive and Mr. Carron, I am left with a discrepancy of 40 feet between the contradictory statements provided. I must therefore assess their credibility. I am satisfied, on a balance of probabilities, that the written recollections provided by the Supervisors are credible, and are to be preferred to Mr. Carron's claim, for the following reasons.

8. Both Supervisors state Mr. Carron was approximately 10 feet from the locomotive. Their observations were shared with Mr. Carron and discussed for coaching purposes immediately after observing him. The Investigation Officer asked Mr. Carron what he discussed with the Supervisors on the date of their assessment. He recalls they discussed the following: reaching and throwing MU cable up on the locomotive, 3 Point Protection and distance between the equipment. The Supervisors discussed proper distancing with Mr. Carron after assessing that the distance observed, was less than the required distance under the safety procedures.

9. There is another reason to prefer the information provided by the Supervisors. It relates to a response Mr. Carron gave to the Investigation Officer. When asked by the Investigation Officer what he did with the MU cables once detached from the locomotive, he responded: "*Tossed them up on the locomotive.*" It is highly unlikely that Mr. Carron could "toss" MU cables onto the locomotive with 50 feet of separation.

10. Mr. Carron was questioned about rule T-27 governing 3-point protection during the investigation. Employees are required to request 3-point protection from the Locomotive Engineer in two specified circumstances: 1) one or both feet enter between the rail, between equipment or within 15 feet of the end of the equipment; or 2) breaking the plane of the rail with one's torso, between equipment or within 15 feet of the end of equipment.

11. In their memorandums, the Supervisors report that after the locomotives separated, Mr. Carron told the Locomotive Engineer to stop. The locomotives were approximately 10 feet apart when Mr. Carron went between them without 3-point protection. It is at that moment that he tossed the MU cables. When questioned on this safety procedure, Mr. Carron claims *"I believe, I did not fouled [sic] the track between the two locomotives."* No further explanations were provided.

12. For all these reasons, I prefer the Supervisors' account of what happened. Their reporting of the incident was consistent, contemporaneous, and reliable. I am satisfied that Mr. Carron did not abide with safety procedures and there is cause for discipline.

13. Was the 19-day suspension appropriate? Mr. Carron had approximately sixteen (16) years of service with the Company at the time of the incident. Forgetting to perform tasks is not excusable for an employee of his tenure. He holds a safety critical position, engaged in the daily operations of trains. One single violation of an operating rule or procedure by a Conductor may result in catastrophic consequences. Mr. Carron performed his work in dangerously close proximity to locomotives and failed to follow the

proper safety measures. In this instance, his conduct posed a threat to his own safety. Thankfully, there was no injury resulting from these safety violations.

14. Mr. Carron works in an environment with no supervision and is provided with the Company's utmost trust. His past disciplinary record is of no assistance. He was last assessed a 10-day suspension (5 days served; 5 days deferred) in November 2017 for violation of CPR SOSA Regional Bulletin Trains Working / Travelling in Yards / Industrial Tracks which caused his train to separate. The Company applied progressive discipline in deciding to issue a 19-day suspension.

15. The fact that the Locomotive Engineer received no discipline is of no assistance to the Union's position. The safety violations were those of Mr. Carron alone.

16. Absent of compelling mitigating factors, I see no reason to intervene.

17. The grievance is therefore denied.

August 10, 2020



AMAL GARZOUZI
ARBITRATOR