CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4758

Heard in Montreal with Video Conferencing, July 16, 2020

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 45-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 the circumstances surrounding "Your tour of duty, more specifically the train location report by your crew at Mile 82 on the Mactier Subdivision while working train 112-22 as a Conductor on August 26th, 2019."

Formal investigation was conducted on September 10th, 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 are in violation of:

T&E Safety Rule Book – Job Briefings

- *Rule Book for T&E Employees – Section 2 Item 2.1, 2.3, 2.3*
- *Rule Book for T&E Employees – Section 5 Item 5.1*
- *Rule Book for T&E Employees – Section 9 Item 9.3*
- *Rule Book for T&E Employees – Section 11 Item 11.5*
- *Rule Book for T&E Employees – Section 15 Item 15.1*

In consideration of the decision stated above, you are hereby assessed with a timed served forty-five (45) day suspension.

Your remaining twenty-eight (28) day suspension will commence on Wednesday September25th, 2019 at 00:01 until Tuesday October 22, 2019 at 23:59.

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

The Company did not respond to the Union's Step 2 grievance in violation of the CBA and Arbitrator Weatherill's Award.

Union's Position**:**

The Union contends that the disciplined assessed in these matters is excessive in all circumstances and serves no education aspect. The Union further believes a fair and impartial process was not provided to Mr. Caron as outlined in the Union's grievance.

Mr. Caron was not provided a fair and impartial process and then is discriminated against when he is assessed discipline which should be null and void based on the Company's actions throughout. As further noted within the Union's arguments the Form 104 was no more than the usual piling on which Arbitrator Simms has dealt with.

Mr. Caron even though he was subjected to an unfair and non-impartial process, still took responsibility for his actions and provided his "moving forward" outlook from the education that was received. The fact that an unnecessary suspension was assessed (and in violation of Mr. Caron's rights) continues to show that the Company is not looking to educate, but to simply try and build a record of discipline on employees in order to try and justify any dismissal down the road.

The Union requests that the discipline assess 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:

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try and build a record of discipline on employees in order to try and justify any dismissal down the road.

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Company's Position:

It is the position of the Company that Mr. Carron was afforded a fair and impartial investigation on September 10, 2019. The grievor failed to provide the proper train location on August 26, 2019 which constituted a major violation of the T&E Safety Rule Book and the Rule Book or Train and Engine Employee's. It was after the fair and impartial investigation conducted on September 10, 2019 that Mr. Carron was assessed a 45 day suspension for his Major Rule Violation.

The Union claims that the investigation conducted on September 10, 2019 was an unwarranted supplemental statement to an investigation held September 3, 2019. While the Union refers to the statement of September 10, 2019 as a supplemental statement it was in fact, not. The investigation conducted on September 3, 2019 was scrapped in its entirety and a new statement was conducted in regards to the violation of the grievor on August 26, 2019 through the investigation held on September 10, 2019.

As a result of the above, 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 service and discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Company maintains that the discipline assessed was just, appropriate and warranted in all the circumstances. Additionally, the discipline assessed was proper and in line with the Collective Agreement, company policy and the *Canada Labour Code*. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) A. Stephen	**(SGD.) A. Baril**
Regional Representative	Counsel, McCarthy Tétrault

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 Chariperson, Peterborough
D. Carron	– Grievor, Nepean

AWARD OF THE ARBITRATOR

1. The issue giving rise to this dispute is a 45-day suspension of Conductor Mr. Carron for failing to provide an accurate train location report. The Union contends that the investigation was not conducted in a fair and impartial manner. It claims the discipline

should be declared null and void and ought to be removed. In the alternative, the Union argues that the discipline was excessive, and that the penalty should be reduced.

2. The material facts are not in dispute. On August 26, 2019, Mr. Carron worked as Conductor with Locomotive Engineer Mr. O'Neil. The train was heading South which means the mileages count down (mile 101, mile 98, etc.). At mile 98.1, Mr. Carron reported to the Railway Traffic Controller ("RTC") that the train was clear of mile 82 on the Mactier Subdivisions. This report was inaccurate as they had not yet reached that mile.

3. Foreman Joslin needed to perform work around mile 101 and required a Track Occupancy Permit. He overheard the train report. He contacted the train and advised they had given the incorrect mileage. Mr. Carron contacted the RTC immediately to report the correct mileage. The RTC instructed the crew to bring their movement to a controlled stop. Following these instructions, the crew stopped the train at mile 87.256 Mactier Sub.

4. First, I must determine whether Mr. Carron was provided with a fair and impartial investigation. On August 30, 2019, Mr. Carron was notified in writing to appear at an investigation in connection with the inaccurate train reporting, which occurred a few days earlier. Mr. Carron attended the investigation with his Union representative on September 3, 2019 and answered all the questions put to him. He admitted to his error in reporting the train location and claimed he mixed up the numbers. Mr. Carron acknowledges the possible threat to safety this incident could have caused to Forman Joslin and other employees.

5. On September 6, 2019, the Company issued another investigation notification to Mr. Carron to be held on September 10, 2019. The Union claims that this second investigation was improperly held as it re-examined the same evidence that was obtained in the first investigation. The Company did not provide the Union with “new facts or evidence” to conduct the second investigation. The Union had raised this objection at the outset of the second investigation and qualified it as a “do over”.

6. According to the Company, the second investigation is not a “Supplemental Investigation” but rather a retake. It claims pertinent items were missing when the statements were taken the first time, and decided to conduct a new investigation. The Company argues it has the unfettered right to expunge the first investigation from the file, conduct a second investigation and only rely on the latter in assessing discipline.

7. The investigation procedures correspond to a pre-hearing examination, a means of fact finding utilized in labour relations. In these expedited arbitrations, it requires full disclosure of the evidence to the employee before he is questioned on the record. The entire record of the investigation, comprised of the written transcript of the investigation and all supporting documents, are critical to the CROA process. The investigation transcripts often serve the purpose of *viva voce* evidence in these expedited proceedings. They form a crucial part of the evidence that the arbitrator reviews in arriving at the arbitrator’s findings. This underlines the importance of a “fair and impartial” investigation.

8. The principles referenced above are found in Article 39 of the Collective Agreement. More specifically, the right to notice accompanied with particulars and

evidence is codified in article 39.01 (4) of the Collective Agreement with explicit reference to providing the employee with time to study the evidence at the commencement of the investigation:

> (4) The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility. Upon request, the Company shall confirm to the employee whether or not technical evidence, such as Q-Tron tapes, will be used at an investigation in order that they might arrange for a qualified accredited representative. The employee and their representative will be allowed time to study this evidence as well as any other evidence to be introduced at the commencement of the investigation. **Should any new facts come to light during the course of the investigation, this will be investigated and, if necessary, further memoranda would be placed into evidence during the course of the investigation** (Note: Formerly July 25, 1989 Letter Re: Investigation & Discipline.)

9. The Company has failed to identify any "new material facts" that could justify holding another investigation. The Union continuously objected to the questions during the second investigation given their repetitive nature and lack of new information. This is properly characterized as a "repeat proceeding" and an abuse of process in the present case. This finding is reinforced by the language the parties have incorporated framing the parameters within which a supplemental investigation may be conducted. Article 39.02 of the Collective Agreement stipulates:

> 39.02 Sub-clause 39.01 (4) above will not prevent the Company from introducing further evidence or calling further witnesses should evidence come to the attention of the Company subsequent to the notification process above. If the evidence comes to light before commencement of the investigation, every effort will be made to advise the employee and/or the accredited representative of the Union of the evidence to be presented and the reason for the delay in presentation of the evidence. Furthermore, should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation.

10. If new facts arise in the course of the investigation, the Company may hold a supplemental investigation. A careful review of the material before me indicates that no new witnesses were called, and no new appendices were entered. The Company would have to present new evidence or compelling reasons to justify a second investigation. In this instance, I find that the Company had no valid justification to restart the investigation process and expunge the first one.

11. The Company referred to CROA 3221 where the grievors were assessed discipline for failing to secure locomotives, leading to the derailment of one locomotive. The issue was whether the Company conducted a “fair and impartial investigation.” An error had been made. The grievors were not provided with notice to the examination of a Yard Master, an important witness the Company relied on in assessing the grievors’ responsibility. Arbitrator Picher dismissed the matter on procedural grounds.

12. In response to the procedural flaw, Arbitrator Picher suggested that the flaw could have been remedied by setting aside the statement of the Yard Master and rescheduling another investigation, with proper notice to the grievors and their Union. Essentially, a retake would have remedied the procedural flaw and provided the grievors with a fair and impartial investigation. This differs from the case at hand. No evidence was presented suggesting the first investigation was flawed. In fact, the first investigation was conducted with proper notification and is deemed fair and impartial. In CROA 3221, Arbitrator Picher reiterated the importance of the fair and impartial investigation:

> “For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and failure

> to respect them must result in the ensuing discipline being declared null and void **(CROA 628, 1163, 1575, 1858, 2077, 2280, 2609** and **2901)**. While those concerns may appear "technical", it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office, whereby the record of disciplinary investigations constitutes a substantial part of the evidence before the Arbitrator, and where the testimony of witnesses at the arbitration hearing is minimized."

13. The Company has not demonstrated a reason to warrant a second investigation. In this case, the second investigation is the only evidence upon which the Company relies to assess discipline. I find that the second investigation was not conducted within the requirements of Article 39. Therefore, I am striking the investigation transcript from the record. Absent any evidence supporting the discipline, I find the discipline null and void and order it be expunged from Mr. Carron's file.

14. Mr. Carron is to be made whole for all of his losses, with applicable interest within 30 days of this award.

15. I remain seized of any issues arising from the interpretation, application, or implementation of this award.

August 10, 2020

AMAL GARZOUZI
ARBITRATOR