

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

CASE NO. 4801 – 4802 – 4803

Heard via Video Conference and in Ottawa, Ontario, January 12, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

4801: Appeal of the grievance of Conductor H. Grover of Vancouver, BC, appealing the assessment of a fourteen (14) day suspension for “Violation of CRO Rule 114 and General Notice No. 40/17 which resulted in the sideswipe and subsequent derailment of the East lead assignment while working on Transfer assignment YYXS01 on February 23, 2019”.

4802: Appeal of the grievance of Conductor H. Grover of Vancouver, BC, appealing the assessment of a fourteen (14) day suspension for “Violation of CROR 105, GOI Section 8.3.1, GOI Section 8.12.3 and GOI 12.10 resulting in a collision with the stop bloc at Westran (ZTS: D354) during your tour of duty on the 2300 Ewen assignment which commenced on May 28, 2019”.

4803: Appeal of the grievance of Conductor H. Grover of Vancouver, BC, appealing the discharge from employment with CN for “Violation of CROR 106 (CREW RESPONSIBILITIES) and GOI Section 8.12.3 (SHOVING EQUIPMENT) on December 29, 2019. Time held out of service from December 30, 2019 – January 16, 2020 included as suspension”.

THE UNION’S EXPARTE STATEMENT OF ISSUE:

4801: The facts of this matter are not significantly in dispute. On February 23, 2019, while working on the 1000 Full Crew Transfer Assignment, the Grievor was working as the Helper. After getting the hoses tied on the departure track, the Grievor picked up an SBU from track PF36 and moved it to the East Bungalow to pick up his journal. While standing at the SL16-25 switch, the Grievor instructed his Engineer to back up fifteen (15) car lengths. During this time, the east end PF13 switch was lined for the normal route which is the lead. At the same time the Grievor’s

movement was approaching the east end of track PF13, the 1530 East Lead was switching in the small yard and had begun to pull back using this same lead for which the Grievor's movement was lined. As the train began rolling and approached the east end of PF13 near the fouling point, the Grievor noticed an engine from the small yard lead and assumed it would stop for him. The Grievor's movement subsequently struck the 1530 East Lead resulting in a derailment. The Grievor was then required to attend a formal investigation into the matter. The investigation was completed on February 27, 2019 resulting in the Form 780 of a fourteen (14) day suspension.

The Union argues that the responsibility and degree of discipline rendered in this instant case is extreme and culpability should not be placed solely on the Grievor. Further, they argue that there is no evidence that would suggest the Grievor acted with malice or disregard and that the incident resulted from a momentary lapse in the Grievor's judgement in addition to miscommunication with the adjacent crew. The Union states the Grievor has a complete understanding of the mistake he made during his tour and has expressed his clear intentions to ensure proper communication with crews around him moving forward. The Union argues that the discipline was excessive and should be expunged or reduced to a more appropriate level and the Grievor's record made whole.

While the Company can appreciate the Grievor was remorseful for his actions, he nevertheless did not comply with CROR 114 and the General Notice No. 40/17. As such, the discipline was warranted and a fourteen (14) day suspension was deemed appropriate in attempting to obtain the desired behavior changes required toward rule and procedural compliance. As such, the Company has respectfully denied the grievance.

4802: The facts of this matter are not significantly in dispute. On May 28, 2019, the Grievor was working as the Foreman on the 2300 Ewen assignment. The crew began to spot Westran (ZTS: D354) with eight (8) loaded cars of lumber. While the Grievor was protecting the point for the shove movement towards the stop block, he misjudged the distance and discovered the movement was closer to the block than expected. He immediately instructed the Locomotive Engineer to stop, but the cars did not stop in time and the knuckle/drawbar struck the concrete block, moving it out of position.

The Union argues that the Grievor made a simple misjudgement regarding the distance and car counts he gave his Locomotive Engineer. The Union also notes that the Grievor was apologetic and made a commitment to stay focused on the current task when performing railway activities. The Union's position is that the discipline was excessive in the circumstances. The Union argues the discipline should be expunged or reduced to a more appropriate level, and the Grievor's record made whole.

The Company's position is that this incident was the Grievor's second Life Critical Rule (LCR) violation in the span of approximately three (3) months. Given the Grievor's actions and multiple violations, a fourteen (14) day suspension is appropriate. The Company disagrees with, and has denied the Union's request.

4803: On December 29, 2019, the Grievor was working as the Foreman on the 0600 East Lead Assignment. After taking a cut of cars from track PF33 he was tasked with shoving into track PF15 from the center lead. The Grievor began shoving into what he believed was track PF15 and asked the Yardmaster for room as he wouldn't be able to see the movement around the bend. However, the Grievor had mistakenly lined the wrong switch, and the cars were shoved into a different track. When the Grievor had shoved approximately six (6) car lengths down the 16-25 lead (instead of PF15), the Yardmaster gave him a car count of thirty (30) Cars. Approximately one (1) minute later, the Yardmaster instructed the Grievor to stop his movement as he discovered the Grievor was actually shoving onto the 16-25 lead and not PF15 as required. The movement stopped just past the PF17 switch. There was no injury or damage to track or equipment. The Grievor was

immediately removed from service and subjected to post-incident drug and alcohol testing, the results of which were negative for all substances.

The Union submits that, although the movement proceeded down a different track than intended, there was no accident or injury. As such, the Union's position is that discharge was excessive in the circumstances and contrary to the principles of the Brown system of discipline. The discipline should be expunged, or in any case significantly reduced, the Grievor reinstated, and his record made whole.

The Company maintains that this incident was the Grievor's third Life Critical Rules violation in the span of eleven (11) months. Due to the severity of the Grievor's violation of both CROR 106 and GOI 8.12.3, the Grievor has caused irreprehensible damage to the bond of trust between himself and the Company, wherein the Company can no longer trust him to carry out his duties in a safe manner and in compliance with all operating requirements. The obvious failure to comply with a life critical operating rule and the serious breach of safety confirms that the assessment of significant discipline was appropriate.

The Company disagrees with the Union's position and has respectfully denied the grievance.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) J. Thorbjornsen (for) **R. Donegan**

(SGD.)

General Chairperson

Labour Relations Manager

There appeared on behalf of the Company:

- L. Dodd – Manager, Labour Relations, Winnipeg
- M. Boyer – Senior Manager, Labour Relations, Montreal

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- J. Thorbjornsen – Vice General Chairperson, Saskatoon
- H. Grover – Grievor, Vancouver

AWARD OF THE ARBITRATOR

1. The Grievor was disciplined and ultimately discharged in relation to three separate incidents. Each incident is the subject of a separate grievance. With the Parties' consent, the grievances were heard together on January 12, 2022.

The Facts

2. The facts are generally not in dispute, nor is there any dispute that the Grievor bears some degree of responsibility for each of the incidents in question. At issue is

whether the discipline, and ultimately the termination, were excessive and unreasonable in the circumstances.

3. The three incidents can be summarized as follows:

- On February 23, 2019, the Grievor received instructions from the yardmaster to retrieve an SBU from track PF36 and then shove his movement eastward out of PF13. The Grievor noticed some movement by another engine on track PF13, but he assumed the other crew was aware that he had been instructed to move onto that track. The Grievor did not radio communicate with the other crew. This ultimately resulted in a sideswipe and subsequent derailment. There were no injuries, although a coworker was clearly placed in harm's way. The incident resulted in delays and damaged equipment. The Employer imposed a 14-day suspension.
- On May 28, 2019, the Grievor was protecting the point for the shove movement towards a stop block at a customer site. He misjudged the distance, which resulted in a collision with the stop block. The Employer imposed a 14-day suspension.
- On December 29, 2019, the Grievor mistakenly lined the wrong switch, and as a result, cars were shoved into the wrong track. There were no injuries or damage. The Grievor was discharged following this incident.

4. The Grievor acknowledged that he made errors in respect of each of the three incidents. He apologized and, on each occasion, he committed to paying greater attention to his duties in the future. Regarding the first incident, in particular, the Grievor recognized its seriousness as well as the significant safety risk it created for his coworker.

Was the Discipline Excessive or Unreasonable?

5. The Union agreed that discipline was warranted for the first two incidents. However, it submits that the 14-day suspensions are excessive and should each be replaced by 3-day suspensions (or 15 demerit points).

6. While significant discipline was warranted, a 14-day suspension for each of the first two incidents was excessive in these circumstances. In my view, it is appropriate to substitute each of the 14-day suspensions with a five-day suspension (for a total of two five-day suspensions).

7. In respect of the first incident, the Grievor made a number of errors: he failed to communicate with the east lead and, contrary to the communication requirements in General Notice No. 040/17, he assumed that the yardmaster had notified the east lead of the intended movement. The Grievor acknowledged during the investigation meeting that he should also have positioned himself differently, so he could have seen the east lead sooner. He also acknowledged he should have stopped his train's movement sooner, the moment he noticed the east lead movement on the track. In these circumstances and given the extent of the errors in judgement, a five-day suspension is warranted.

8. The second incident occurred within approximately three months of the first. While less serious in nature, the second incident also involved an error in judgement and a lack of care by the Grievor. In keeping with the principles of progressive discipline, a five-day suspension is appropriate for the second incident.

9. The Union submits that no discipline is warranted for the third incident. According to the Union, it would have been appropriate for the Employer to coach the Grievor or, at most, issue a caution.

10. I have considered this issue carefully. I accept that the act of shoving cars onto the wrong track has not typically attracted discipline. A non-disciplinary approach might well have been appropriate in different circumstances. However, in this particular case, the Grievor is a short service employee, with approximately twenty-six months of service at the time of the third incident. This was the third time in fewer than twelve months that the Grievor failed to exercise an appropriate level of care and diligence in carrying out his duties.

11. As of the date of the third incident, the Grievor's discipline record included 15 active demerit points as well as the two 5-day suspensions mentioned above. The Grievor's forthrightness and willingness to accept responsibility are mitigating factors. However, despite his good intentions, the Grievor did not demonstrate an ability correct his behaviour in the face of progressive discipline. In all of the circumstances, I am not satisfied that the Grievor can be relied upon to operate safely in this workplace. The termination must be upheld.

12. The Employer submitted that consideration should be given to the fact that the incidents in question involved Life Critical Rules ("LCR"). The Union disputes this, both

because the LCR Policy was not in place at the time of the first two incidents and, in any event, because it was imposed unilaterally by the Employer. It is not necessary for me to resolve this issue. Assessing the discipline based solely on existing CROA jurisprudence and principles, I am satisfied that the discharge was appropriate in the circumstances.

Conclusion

13. For the above reasons, the grievances in 4801 and 4802 are allowed. Each of the 14-day suspensions is substituted with a 5-day suspension (for a total of two 5-day suspensions). Grievance 4803 is denied and the Grievor's discharge is upheld.



January 24, 2022

MICHELLE FLAHERTY
ARBITRATOR