

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

**CASE NO. 4827**

Heard in Calgary, Alberta, May 18, 2023

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The dismissal of Locomotive Engineer J. Lazzarotto of Revelstoke, BC.

**THE JOINT STATEMENT OF ISSUE:**

Following an investigation conducted on January 20, 2021, Engineer Lazzarotto was dismissed from Company services for the following reasons:

“For your passing of a yellow flag that was not on the Mountain Subdivision TGBO on Train 101-05 on January 8, 2021. This is a violation of the Rule Book for T&E Employees Section 6.S(c) and Section 3.8 (No GBO).”

**The Union’s Position:**

On January 8, 2021, Engineer Lazzarotto was operating Train 101-05 on the Mountain Subdivision, at approximately 1245 Trainmaster Kyle Gauld and Road Foreman Rob Miskiman conducted an efficiency test by placing a yellow flag to the north of the North main at mile 117.8 on the Mountain Subdivision. Prior to reaching this location, Train 101-05 crossed over to the South track at Laretta and at approximately 1300, the headend of Train 101-05, now on the South track, passed the yellow flag located at mile 117.8 that was to the north of the North track. The crew were not informed of the efficiency test failure until they changed off ten miles later at Revelstoke.

The Union contends that the yellow flag placed north of the North track did not affect Engineer Lazzarotto’s movement on the South track as it is common practice for an RTC to route a movement on to an unaffected track rather than issue a new GBO to a crew that would not be affected by said GBO. Given this practice, Engineer Lazzarotto was not concerned with a yellow flag that did not pertain to the track he was operating on.

The Union further contends that the yellow flag was placed as part of an efficiency test, however, this test was contrary to the Company's own Efficiency Policy which states, "Testing is not intended to entrap an employee into making an error but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action." In this case the Union contends that because of the location of the flag and the common procedures at that location it cannot be considered as a fair test. Further, the investigating Officer during the investigation referred to the test as a "set up test" on numerous occasions validating that this test was meant to be a form of entrapment, there was no intention of mentoring or education whatsoever.

In addition, the Company Policy states that "efficiency testing is also not intended to be discipline tool". The Union contends the Company has demonstrated a classic case of double jeopardy by first issuing a failed efficiency test and by applying discipline in the form of dismissal.

Engineer Lazzarotto has ten years of dedicated service, and the Union contends that discipline is unwarranted in this case and even if discipline is warranted, dismissal is extreme in all the circumstances.

The Union requests that the Arbitrator expunge the dismissal from Engineer Lazzarotto's work record and that he be made whole for all wages lost, with interest, and benefits in relation to the time withheld from Company service until his unilateral reinstatement.

#### The Company's Position:

The Company disagrees and denies the Union's request.

Culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that the Union describe. 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.

The Company maintains that the Grievor's violation is considered a Major rules violation as outlined in the Hybrid Discipline Guidelines.

Further, regardless of placement, the yellow flag is a fixed signal representing slow track protection for the direction of travel Mr. Lazzarotto's train was heading and was present on his TGBO. The Rule Book for Train and Engine Employees Item 3.8 is clear "if signals are encountered for which you do not a GBO, you must (a) reduce to 10 mph; (b) immediately communicate with the RTC; and (c) be governed by instructions received."

Regarding the Union's closing allegation that the discipline was unwarranted, the Company cannot agree. Moreover, the Union supplied insufficient information in support of this allegation. The Company reserves the right to object should the Union attempt to supply any additional arguments in support this unsubstantiated allegation.

Arbitral jurisprudence has held that the assessment of discipline for rule violation identified through the efficiency testing procedure does not void the discipline assessed. Further, regarding the Union's contention on the efficiency tests, in CROA 4621, Arbitrator Sims stated in this case the "the Union objects to the use of efficiency testing as a stepping stone to discipline. That is addressed above. I do not find this voids the discipline."

The Grievor was unilaterally reinstated on June 24, 2022.

The Company maintains the dismissal assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as “fact” does not constitute acquiescence to the contents thereof. The Company rejects the Union’s arguments, maintains no violation of the agreement has occurred, and no compensation of benefit is appropriate in the circumstances.

**FOR THE UNION:**

**(SGD.) G. Lawrenson**  
General Chairperson

**FOR THE COMPANY:**

**(SGD.) F. Billings**  
Assistant Director Labour Relations

There appeared on behalf of the Company:

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|-------------|---|
| A. Cake     | – Labour Relations Manager, Calgary             |
| F. Billings | – Assistant Director, Labour Relations, Calgary |
| L. McGinley | – Assistant Director, Labour Relations, Calgary |
| R. Araya    | – Observer, Labour Relations, Calgary           |

And on behalf of the Union:

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|---------------|---|
| M. Church     | – Counsel, Caley Wray, Toronto              |
| G. Lawrenson  | – General Chairperson, LE-W, Calgary        |
| C. Ruggles    | – Vice General General Chairperson, Calgary |
| P. Boucher    | – President TCRC, Ottawa                    |
| R. Finnson    | – Vice President TCRC, Ottawa               |
| C. Murtagh    | – Local Chairperson, Revelstoke             |
| J. Lazzarotto | – Grievor, Revelstoke                       |

### **AWARD OF THE ARBITRATOR**

**BACKGROUND**

1. On January 8, 2021 at 0500 Locomotive Engineer Justin Lazzarotto was called for service from Field, BC to Revelstoke, BC, with Conductor Matthew Wojak. While operating Train 101-05 on the South main at mile 117.8 on the Mountain Subdivision the crew noticed a yellow flag.

2. At approximately 1245 hours, Trainmaster Kyle Gauld and Road Foreman Rob Miskiman were conducting an efficiency test of rule 44(e) by placing a yellow flag on the north side of the North main at mile 117.8. At approximately 13:00 the crew of train 101-05 noticed the yellow flag. The crew did not have a TGBO (Tabular General Bulletin Order) for the yellow flag. The train crew did not slow down to 10 mph or contact the RTC to report the flag. The crew was not informed of the E-test until they got off their train at Revelstoke.

3. On January 18, 2021, the Grievor received a Notice of Investigation in connection with:

Your tour of duty on train 101-05 called at 0500 on January 8th, 2021 out of Field BC; more specifically the alleged passing of a yellow flag that was not on the Mountain Subdivision TGBO.

4. The investigation was held on January 20, 2021. During the investigation the Grievor acknowledged passing the yellow flag, without adhering to Rule 3.8. The Rule states:

**No GBO**

If signals are encountered for which you do not have a GBO, you must:

- reduce to 10MPH;
- immediately communicate with the RTC; and

-be governed by instructions received.

5. The Grievor was subsequently dismissed on January 29, 2021. The Union filed a Step 1 grievance on March 8, 2021. The Union alleged, that the discipline is excessive, unwarranted and contrary to the principles of progressive discipline. No response was provided by the Company. A Step 2 grievance was filed on July 2, 2021. Again, no response from the Company at that time. The Grievor was unilaterally reinstated by the Company on July 24, 2021 without resolving the grievance. CP Labour Relations responded to the grievance after the reinstatement denying the grievance on August 31, 2021.

6. The Union takes the position that, in effect, the Grievor's dismissal was converted into a 511-day suspension. The Grievor has remained in active service from June 2022 to the date of this hearing.

## **ANALYSIS AND DECISION**

7. There are three central issues to this matter:

- (i) Was there a Rule violation?
- (ii) If so, is a 511 day suspension without pay appropriate in these facts and circumstances?
- (iii) If a 511 day suspension without pay is not appropriate, what discipline is appropriate in the circumstances?

### **Was there a Rule violation?**

8. The Company takes the position that the Rule clearly does apply, as there was no GBO for the yellow flag. CP maintains that it is immaterial which side of the track the yellow flag was placed, as the Rule is clear that when a yellow flag is passed for which the crew has no GBO, reducing speed to 10 MPH, calling the RTC and abiding by the instructions is imperative.

9. The Union takes the position that the Grievor did not "encounter" a yellow flag, as he had permission to proceed on the South track, while the flag applied to the North track. It says there is ambiguity to the expression "encounter". The Union claimed that this particular test was set-up and fully intended to entrap this crew into making an error. The Union submits that even if some form of discipline is warranted, the decision to terminate Mr. Lazzarotto's employment is excessive and contrary to the principles of progressive discipline.

10. In addition to violating the rule, I find that the evidence established that the Grievor discussed the applicability of the rule with his Conductor. He did not, however, do anything further. Rule 2.2 notes a guiding principle with respect to the safe operation of movements:

Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.

11. I find the safe course, regardless of the Union's alleged ambiguity or what the Grievor believed to be applicable to his train, would have been to reduce speed to 10 MPH and call the

RTC. In the simplest of terms, he saw the yellow flag, whether it applied to him or others, he did not have a GBO relating to the flag. The RTC should have been called immediately.

12. I find that there was a Rule violation in these facts and circumstances. There is no dispute that he clearly saw the yellow flag on the North track for which he did not have a GBO. He discussed it with Conductor Wojak and concluded that it did not apply to their movement. He did not report it to the RTC or reduce speed thereby violating the rule.

### **Was a 511 day suspension without pay appropriate in the circumstances?**

13. It is trite law that discipline is intended to be progressive. As such, I am obliged to consider the seniority and discipline record of the Grievor. At the time of the incident, he had a little more than nine years of seniority. During that time, the Company imposed, a 5, 7, 40 and 45 day suspensions without pay. In previous matters before me I have taken note of this Grievor demonstrating a propensity for taking the easiest, rather than the safest course of action as well as a lack of situational awareness. I find no evidence in this case that Grievor has addressed those shortcomings.

14. The Company refers to the present incident as the third Major Life Threatening Incident, which warrants the significant discipline imposed. The Union claims this was a set up designed for to entrap the Grievor. It contests that this was a Life Threatening Incident, as it happened within the context of Efficiency Testing, where a failed test is not intended to lead automatically to discipline.

15. The Union has claimed that this particular test was fully intended to entrap this crew into making an error. As previously noted Proficiency testing of employees (or Efficiency test) is rooted in Transport Canada's Safety Management System Industry Guideline.

16. The Company operates in a safety critical industry. The very nature of the work performed by unsupervised train and engine employees requires a high degree of trust. The Company maintains that the incident marks the third Major-Life Threatening Offense the Grievor had violated. In accordance with the Company's Hybrid Discipline and Accountability Guidelines, effective November 1, 2018, CP submits that dismissal was appropriate, warranted and progressive under the circumstances.

17. It is also not disputed that employees engaged in the operation of trains and are in safety critical positions. They are required to have regular rules testing with a pass grade of 90%. Clearly, Efficiency Testing can be an effective tool to raise awareness of the proper understanding of rules which may fall in the 10% not passed category or not encountered in normal circumstances. In this case the Union raised concern for what, in their opinion, is a lack of understanding relating to encountering a yellow flag with no GBO on an adjacent track.

18. In my opinion this rule, and in the unusual circumstances set up by the Company officers, is an appropriate rule for Efficiency Testing. It could have been a nonthreatening and effective tool to educate and coach employees who may have that lack of understanding in unusual circumstances. To that end, the Yellow Flag placed by Trainmaster Kyle Gauld and Road Foreman Rob Miskiman on January 8, 2021, could have been left in place to observe, monitor

and E Test every crew, on every passing train, in the normal performance of their duties as they passed the yellow flag that day. The results could have been brought to the attention of every crew and published in a Bulletin to raise awareness of the rule. Whether the train was on the North or South track the rule remains applicable. Trains on either track could have been advised of the application after passing the flag on the track they were operating on and thereby raising awareness of the rule. The application of the rule on the South track could have been raised to those on the North track as a matter of information.

19. Unfortunately, only one crew was tested. The test was not one of observing the crew in their normal duties. I find the Officers added the unusual circumstances and contributed to the increased possibility of rule failure. The Grievor's train was unnecessarily crossed over near the end of their assignment which started at 0500. No matter how minimal the added safety risk or delay, I can find no necessary reason for Company Officers to add unusual circumstances to an E test as in this case. Such unusual circumstances can be addressed in off train simulation training without risk or delay.

20. The Union claims it was all part of a set up designed to entrap this Grievor. During the Grievor's investigation, the investigating officer suggested facts not found in any evidence:

Q 28. Although most often not a regular occurrence, do you understand that an Engineering Services Foreman may put out a flag for a condition requiring protection, and may have forgot to issue a GBO?

A. Yes I am aware

Union objection: This question poses a hypothetical situation that was clearly not the situation that was outlined in appendix A. The employee is here to answer questions related to the alleged passing of a yellow flag no within their TGBO.

Company Officer: The purpose of this set-up test is to simulate the exact situation posed in question 28.

21. He also asked:

Q 29. Do you understand that the company conducts these **set-up tests** to confirm their employees are vigilant in recognizing **unusual circumstances** at any given time while operating anywhere on CP property?

A. Yes.

**Emphasis Added**

22. Throughout the investigation, the investigating officer made repeated references to facts and circumstances not found in the investigation material provided to the Grievor at the outset of the investigation. This in spite of the fact that the Grievor's Union representative had requested disclosure of all evidence in possession of the Company.

23. Trainmaster Gauld described his actions in a memo setting out what occurred on June 8, 2021. There is no mention of how the test was set up. Indeed, there is no mention of unusual

circumstances or that train 101-05 was crossed over to the South track, thereby creating the unusual situation. The memo was the only evidence provided regarding what was set-up by the Officers doing the testing. It stated:

On January 8th Road Foreman Rob Miskiman and I conducted a proficiency test rule 44(e) out at Mile 117.8 on the Mountain Subdivision. A yellow flag was placed at mile 117.8 on the north side of the north main.

Around 1300 train 101-05 went by the flag that they did not have a GBO for. 101-05's Train crew did not slow to 10 Mph or contact the RTC to report the flag at mile 117.7 E

Locomotive Engineer Justin Lazarotto and Conductor Matthew Wojack were informed once they got off their train that the test was performed.

24. I have difficulty with the reference to a set-up test and unusual circumstances referred to by the investigating officer. No such references were contained in Trainmaster Gauld's memo. The Company does not dispute that the Grievor met with Superintendent Templeton on arrival at Revelstoke. The Grievor was informed by him of the E- Test failure as well as requiring a substance test. No memo was provided by Superintendent regarding his conversation with the Grievor.

25. No mention was made in Trainmaster Gauld's memo of train 101-05 operating on the South Track. There is no reference was made to any document indicating what was meant by the investigating officer to the unusual circumstances and set-up test.

26. The Crew had been on duty since 0500. The E-test took place after they had been on duty over seven hours. The investigating officer's questions and comments indicate that the crossover of train 101-05 was arranged by the Train Master and Road Foreman as part of the unusual circumstances and set-up described by the Investigating officer.

27. The facts are that the Grievor's train was crossed over from the North to the South track before the yellow flag. I was given no reason that the test of the rule could have been conducted while leaving the train operating on the North track or in classroom simulation.

28. The evidence established that the train operating on the Mountain Subdivision that day was, on the balance of probabilities, deliberately and unnecessarily crossed over from the North to the South track as part of a set-up test. I find that inconsistent with the Company's commitment in the E test provisions. I note the comments of Arbitrator Moreau in AH 695 with respect to the purposes of Efficiency testing:

An efficiency test is a planned procedure to evaluate compliance with rules, instructions, and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action. Efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required depending on the frequency,

severity and the employee's work history, education and mentoring will often bring about more desirable results.

In my view, Efficiency Testing is a key component in ensuring that employees and the public stay safe in the movement of trains. It is not sufficient to have occasional certification, or re-certification, in order for employees to remain sharp with respect to the proper and safe application of the Rules. E-testing must be used often, but primarily as an educational and training tool and only exceptionally as a reason for discipline.

29. In reviewing the Company's Proficiency Test policy, Arbitrator Moreau also commented as follows:

Proficiency testing of employees (or Efficiency tests) is rooted in Transport Canada's Safety Management System Industry Guideline. It is a tool used to evaluate an employee's compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action. From the Company's perspective, the corrective action can take the form of verbal counselling through to disciplinary action. The Company also notes that these proficiency tests are often conducted randomly without the employee's knowledge.

30. Arbitrator Sims addressed efficiency tests as a basis for discipline set out in CROA 4580 stating:

This policy [cited above], while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage. To the extent it might be assumed that this licenses formal discipline any time an efficiency test is failed, any such assumption would be wrong. The exception should not replace the rule, and not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline.

31. I find that when accusations of entrapment are put forward by the Union, as in this case of E-testing, it is necessary to consider culpability in relation to methods and purpose of the Company Officers conducting the E-test. That is, did the Officers methods clearly contributed to the rule violation? Or, were the Officers observing the employees normally performing assigned duties given by other supervising Company Officers not involved in the E Testing process.

32. It is also necessary to consider whether the violations occur in a safety context or not. While a violation of the rule in a non-test situation can be Life Threatening, in this E-test case it was not. I recognize that in either context Employee's cannot be allowed to bring their own



judgment to bear on the need to comply with safety rules and procedures in a safety critical environment.

33. Clearly, the yellow flag was only on the North track, not the South Track. The rule applied on the North track on which train 101-05 was originally operating. However, the rule also applied on the South track even though there was no yellow flag placed adjacent to the South track. There was still the requirement to report seeing the yellow flag on the North track. There was no GBO for the flag and the rule applied. By crossing the train over to the South track an unusual circumstance was set up thereby increasing the potential for violation of the rule. In this case the Grievor was dismissed after an investigation.

34. The concerns raised by the Union Representative at the investigation were ignored by the investigating officer. The Company regarded the violation of a Life Threatening rule in the E-test. However, it was in a controlled and set-up E-test. I find that Company Officer's addition of unusual circumstances of moving the train to the South track increased the possibility of rule failure.

35. The crew was not removed from service at the time and the violation of the Life Threatening rule was not brought to the attention of the crew until arrival at their destination. The Crew was subsequently substance tested. The tests were negative. I find that any reasonable person would view the set-up as entrapment.

36. I find that E testing employees late in a shift (1300) after a 0500 start time in this set-up inconsistent with building trust or credibility of such testing. The possibility of additional delay to a train by an unnecessary crossover movement at the late time in the Grievor's tour is also concerning. That is not to say that 100% rule compliance should only be expected early in a tour.

37. Given the Grievor's past and unenviable discipline record, I recognize the legitimate reason for the Company to pay particular attention to this Grievor. Attention can be given by training, coaching and mentoring without set-up tests of unusual circumstances such as this. I take notice that classroom and simulator tests of unusual circumstances are possible to ensure familiarity with such rules. Doing so eliminates delays and the risk to service, equipment or employees.

38. Another crew member, the Conductor, was drawn into a set-up test of unusual circumstances. Again, this was the only train crew subject to this test on the date in question.

39. In this case, the Grievor chose to exercise his own judgment as to whether the yellow flag required him to take any action when the correct procedure would have taken mere minutes. The Grievor's explanation demonstrated a fundamental misunderstanding of the importance of safety and the critical role of the overriding rule that: when in doubt, the safest course must be taken. In this case there is no evidence the Grievor was frustrated or otherwise distracted when he made the decision not to call the RTC.

40. The Company has previously imposed, progressive suspensions without pay of 7, 5, 40 and 45 days. It was not an arbitrary and confusing mix of demerits and suspensions sometimes used by the Company with no reasoning. The Grievor ought to have known his job was in jeopardy. There is no evidence that he sought additional rules training after multiple violations.

41. Discharge is not an automatic response, even for significant safety violations, as such an approach lacks a contextual consideration and may not be proportional. This case did not occur in the theoretical life threatening example suggested by the Investigating Officer and objected to by the Grievor's Union Representative. Jurisprudence broadly accepts that for certain safety violations, steps in a progressive approach may not be followed, due to the severity of the misconduct, even for an isolated incident, depending on the circumstances in each case and the nature of the particular breach.

42. Significant and serious misconduct may occur in safety-sensitive workplaces such as railways. Due to the nature of the workplaces safety systems that are put in place in to ensure a safe operation. I find that E testing is recognized as an effective system when properly used.

43. In this E-test the evidence established:

- i. The Company officers conducting the E-Test where not observing duties and the operation of the train as directed by the RTC for normal efficient train operation purposes.
- ii. The Company officers conducting the test set-up unusual circumstances.
- iii. The unusual crossover to the South track where there was no yellow flag increased the potential for error and violation of the rule. No other crews were tested in the set-up.
- iv. Such addition of unusual circumstances can potentially add delay and risk.
- v. The rule violation was not brought to the immediate attention of the crew.

44. In view of the all of foregoing facts and circumstances I find that a 511 day suspension for this infraction is too severe.

### **What Discipline is Appropriate in the Circumstances?**

45. In CROA 4688, Arbitrator Hornung upheld an 81 day unpaid suspension for an employee who had ignored a Clear to Stop signal, although there was some ambiguity about the signal. The Arbitrator pointed out that if there had been doubt, contact should have been made with the RTC for clarification. While the employee had a clean disciplinary record, the failure to act in a safe manner warranted the imposed penalty.

46. Arbitrator Hornung recognized that railroading is an inherently dangerous occupation. Keeping employees and the public safe requires all employees to have safety in the forefront of their minds at all times. The Rules and common sense require that Rules must be followed, and if there is any doubt about the application of a Rule, the safest course of action must be taken.

47. In this case the Grievor was dismissed on January 29, 2021. A grievance was filed on March 8, 2021. The Company did not respond. On July 2, 2021 a step 2 grievance was filed, again with no response from the Operations officer. The Grievor was reinstated on June 24, 2022

in accordance with a last chance agreement letter from Superintendent Brad Templeton. The letter was the first correspondence copied to the Union regarding the grievance.

48. In the letter Superintendent Templeton stated:

I will be available to meet with you further should you require any support to achieve the expectations of your role going forward.

I have every confidence in your ability to deliver the performance and behaviour required above in order to maintain your employment relationship at CP.

49. I find that one of the most important mitigating factors is that relating to the probability of whether a Grievor will repeat the same offence. A primary consideration of repeat violation of a safety rule in a Safety Critical position such as Locomotive Engineer is whether the breach resulted from an intentional and deliberate action in contrast to a momentary aberration, or from carelessness or negligence. I defer to the confidence of Superintendent Templeton, a front line senior officer in that regard.

50. Notwithstanding the confidence in the Grievor expressed by Superintendent Templeton in the reinstatement letter of June 24, 2022, the Company in its written submissions of May 18, 2023 before me questioned his rehabilitative potential. CP submitted that a plain reading of the Grievor's statement demonstrates that there is a clear lack of accountability on the Grievor's part. At no point did he acknowledge any wrongdoing or show any remorse for his actions. Significantly, and in contrast to the position of Superintendent Templeton, the Company also submitted that the Grievor has proven that his prospects of rehabilitative potential are non-existent as he has shown no remorse or accountability for his actions.

51. I take notice of the importance of safety in the railway industry to the government regulator, the public, the Company, its customers as well as the Union. Safety is widely recognized as the foundation necessary to meet the mutual needs of both Company and Union. In my opinion safety cannot be achieved without communication. Labour Relations is in fact based on relationships developed with effective communication. I find the necessary communications between these parties lacking in relation to those I find in other safety critical situations and labour management relations. Above all I find communications regarding safety between these parties inconsistent, often adversarial and overall concerning.

52. I find no evidence or communications between the parties that would indicate an understanding that E-tests would be conducted by Company Officers in the manner found in this case. That is, Officers who are conducting the E-test and having the authority and ability to inject unusual circumstances into normal duties assigned and directed by others such as Rail Traffic Controllers. Such injections as part of a set-up can increase the potential for violation of the rule and be regarded as entrapment.

53. Adding to the communications concern is that Grievances, as in this case, are filed and routinely receive no response from front line officers. Accusations of bad faith are common. I find the accusation of entrapment and Efficiency Testing used by the Company to dismiss employees without sufficient cause alarming. Similarly, the Union is accused by some of withholding support

for 100% compliance with safety rules and supporting employee utilization of rest rules as messaging for frustration. All together I find there is little or no trust evident in meetings between these parties. In some cases, I find the overriding atmosphere is often one of contempt.

54. I find the number of grievances unanswered at the front line officer levels alarming. It raises concern for a lack of integrity in the Grievance process. Grievances are taking over two years to reach arbitration. In my opinion, it is time for the parties to recognize the need for a change in direction. Such direction should be based on a new foundation of the effective communication necessary for reaching mutual goals. Compliance with operating rules, safety policies, the collective agreement, the grievance process and commitment to safety are the underpinnings of a working relationship in a safety critical workplace. Such compliance is based on effective communication. In my opinion, all are in need of review and restoration by these parties in order to achieve the 100% rule compliance sought by the Company.

55. In this case the Grievor was reinstated without resolution of the relief sought by the Union in the Grievance. Here, the Grievor did not comply with the rule. Given his discipline record he should have clearly know to take the safest course. He did not. He failed to reduce speed and call the RTC as required. The Grievor's discipline record reflects a propensity for taking the easiest course rather than the safest course of action. However, in light of the foregoing facts and circumstances of this particular E-Test, I find dismissal excessive and it cannot be upheld.

56. After careful consideration of the Grievor's past discipline record, I find a significant suspension is appropriate. The Company was aware of all of the information in connection with the E-Test that I have considered when it received the Step 2 grievance on July 2, 2021. In my opinion this E- Test need not have occurred in the manner it did and the resulting grievance should have been resolved by a review from front line officers during the grievance process. All of the facts necessary for resolution were known to the parties on July 2, 2021.

57. In view of all of the foregoing the period of unpaid suspension will be reduced to reflect a suspension from January 8, 2021 to July 2, 2021. The Grievor will be compensated for lost wages and benefits accordingly.

58. I retain jurisdiction with respect to the implementation of the decision.

June 16, 2023



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TOM HODGES

ARBITRATOR