

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

CASE NO. 4837

Heard in Edmonton, June 22, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 40-day suspension assessed to Locomotive Engineer D. Kessler.

THE JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Kessler was issued a forty-day suspension described as:

“For exceeding the limits of your TGBO from mile 22.36 Windermere Subdivision to SNS Fairmont, while working as the Engineer on train 883-067 on March 23, 2022. A violation of Rule Book for Train and Engine Employee Items 3.5 Tabular General Bulletin Order (TGBO) and Train and Engine Safety Rule Book T-0 Job Briefings.”

Union's Position:

Throughout the investigation Mr. Kessler remained honest and forthright and expressed that there was no intent to be defiant. Engineer Kessler acknowledges he was culpable for a rule violation, more specifically not having the appropriate TGBO limits.

The assessment of discipline by the Company that amounts to an excessive fine is unnecessary and provides no additional prohibitive value in this instance. The Union asserts that the level of discipline meted to Engineer Kessler is excessive and unjustified and perpetuates the grievance process.

The Union requests that the Arbitrator expunge the forty-day suspension issued to Engineer Kessler and that he be made whole for wages and benefits lost with interest or in the alternative as the Arbitrator sees fit.

Company Position:

The Company maintains that following the investigation, the Grievor was found culpable for the reasons outlined in his form 104. The Company maintains that culpability was established and there was just cause to assess discipline to 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.

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

Failing to have the proper TGBO and travelling outside the limits without authority has the potential for catastrophic consequences.

For the foregoing reasons, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:
(SGD.) G. Lawrenson
 General Chairperson LE-W

FOR THE COMPANY:
(SGD.) L. McGinley
 Director, Labour Relations

There appeared on behalf of the Company:

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| R. Araya | – Labour Relations, Officer, Calgary |
| L. McGinley | – Director Labour Relations, Calgary |
| D. Guerin | – Managing Director, Labour Relations, Calgary |

And on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| G. Lawrenson | – General Chairperson, LE-W, Calgary |
| C. Ruggles | – Vice General Chairperson, Calgary |
| B. Plant | – Local Chairperson, Cranbrook (via Zoom) |
| D. Kessler | – Grievor, Cranbrook (via Zoom) |

AWARD OF THE ARBITRATOR

Background

- [1] This Award addresses the appropriateness of a 40 day suspension issued to the Grievor for exceeding the limits of his Tabular General Bulletin Order (TGBO).
- [2] For the reasons which follow, the assessment of a 40 day suspension to the Grievor for this error was not just and unreasonable in all of the circumstances. A 20 day suspension is substituted as a just and reasonable response for this violation.

Facts

- [3] The Grievor is a Locomotive Engineer. He entered the service of the Company on September 8, 2008. At the time of the infraction, the Grievor had fourteen and a half (14.5) years of service.
- [4] For the first part of his career, the Grievor only had low levels of discipline, mainly related to his availability for work. However, between October of 2019 and this incident in March of 2022 – a period of 2.5 years – he received 15 demerits for failing to clear a crossing; a 30 day suspension for failing to stop short of a signal (Rule 439 violation); and this 40 day suspension for exceeding the limits of his TGBO. The last two violations are “Major Life-Threatening Offences” under the Company’s Hybrid Discipline and Accountability Guidelines.

- [5] The TGBO is the paperwork that governs the movement specific to a particular train. It notes any particular issues in the territory through which a train passes, such as a slow track order. In Dark Territory, there are no signals which govern the movement of trains. Radio Traffic Controllers (RTCs) must rely on radio communication and paperwork to know where a train is.
- [6] It was not disputed that operating a train without the proper TGBO was a violation worthy of discipline. It is also not disputed the Grievor operated his train for 30 miles outside the limits of his TGBO, in Dark Territory.
- [7] How the Grievor found himself in this situation is significant to the issue of the appropriate level of discipline. On the date in question, the Conductor had printed out the TGBO that the Grievor then reviewed. The Grievor did not realize that the Conductor had only printed out one part of the TGBO, which related to the *first* of two subdivisions through which they were to travel that day. The Conductor mistakenly did not print out the TGBO relating to the *second* subdivision. The Train therefore did not have the appropriate limits for its anticipated travel.
- [8] The Grievor reviewed this abbreviated version of the TGBO, did not realize it was in error and initialled his documents. The Conductor likewise did not notice the error.
- [9] The Grievor's error was in failing to read and notice that his limits were incorrect, prior to beginning his trip, and then to operate his train into Dark Territory 30 miles past those limits. The Conductor's error was in failing to print out the appropriate TGBO *and* failing to notice the same error.
- [10] The Grievor acknowledged he had become distracted by speaking with another crew about unrelated matters at the time he was reviewing the documentation. Due to this distraction, he did not notice the error that was there to be seen in his paperwork.
- [11] The error was discovered when the Grievor was contacted by the RTC and advised he was in possession of the *wrong* TGBO limits for his train. At that point, the Grievor had traveled over 30 miles without TGBO coverage.

- [12] It is not disputed between the parties that a violation occurred and that discipline was warranted. What is disputed is the level of discipline imposed.
- [13] The Company urged that both the Grievor as Locomotive Engineer and his Conductor were responsible for the safe operation of the train. It argued that this is a serious violation; that the Grievor was in a unique position of trust; and worked largely unsupervised; that without the proper TGBO, the Grievor would not have known of potentially serious issues along his route, such as slow train orders, or engineering track protection; that the Grievor crossed three sidings, two spurs and 13 road crossings without the appropriate TGBO in those 30 miles, without knowing if one of those crossings was defective, which was described as a “recipe for disaster; that significant discipline was warranted on the facts of this case; that the Grievor admitted he was distracted; initialled the incorrect limits; and did not have limits to cover his route; that occupying a track without authority was a Major Life Threatening Offence under the Company’s Hybrid Discipline and Accountability Guidelines and that this was the Grievor’s *second* major rules violation in one year.
- [14] The company relied on **CROA 2936, 4781, 4004, 4232, 4354, 3900, 3781, 4473, 4595, 4583** and *Sheet Metal Workers’ International Association, Local 473 v. Bruce Power LP* 2009 CanLII 31586
- [15] The Union argued that 40 days was grossly excessive; that the Conductor received only a 20 day suspension for the same infraction; that the Grievor had his discipline “doubled” due to one previous infraction in his discipline record, which it argued was not reasonable; that the Company has not brought forward any evidence of what the second half of the TGBO would have entailed to demonstrate there was some type of danger of which the Grievor was unaware that could have occurred on the route; and that the Company’s cases can be distinguished on their facts: in **CROA 4232**, the Grievor was dismissed for operating after an RTC had advised there was no authority; in **CROA 4595** there were four incidents, two of which involved failing to have the correct TGBO and there was also an attempted cover-up and in **CROA 4473**, there was a long history of safety-related incidents; in **CROA 4583/4584** there were a number of failures, including failing a drug test; and failing to report; that

there was nothing in the Grievor's record relating to a prior TGBO incident; that the Grievor did not try to deflect blame and was very candid; that in **CROA 4354** a 10 day suspension was given for not having the correct TGBO; that the Grievor had a similar disciplinary record; and that a 20 day suspension would be just and reasonable.

- [16] The Union relied on **SHP595**; *ad hoc* decisions between the parties dated December 23, 2022 (Hodges) (**D'Ulisse Grievance #1**); and **D'Ulisse Grievance #2**.

Analysis and Decision

- [17] There are three questions an arbitrator must ask in determining discharge and discipline cases: a) is there cause for some form of discipline; b) whether the discipline imposed was excessive; and c) if so, what is an appropriate level of discipline.¹
- [18] In this case there is no dispute there is cause for discipline. The issue between the parties is what is reasonable. There are various factors to be considered in conducting an analysis of the second and potentially third questions from *Wm. Scott*. The types of factors listed in that decision are not exhaustive. Those factors include the nature of the violation and its seriousness; the length of service; the discipline record; if the incident was isolated in the employment history; whether the Company rules have been consistently enforced; circumstances which negative intent (such as the grievor misunderstood an order given); the candor and forthrightness of the grievor; the grievor's remorse and whether the grievor apologized; whether the incident was provoked; whether the circumstances create economic hardship for the grievor; and "any other circumstances which the board should properly take into consideration"². While precedents can be helpful, no two fact situations will ever be the same so precedents are limited in use. Where two employees are involved in the same incident – as in this case – it is relevant how each is disciplined, as that

¹ *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. 98, at pp. 6 forward

² At p. 7

can lead to allegations of discriminatory discipline. Each case must turn on its own facts.

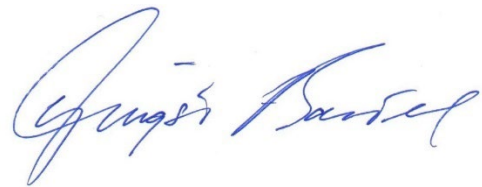
- [19] As an initial observation, it must be recognized that there are a variety of suspensions that are possible in unionized industries. Suspensions can range from one day, to 3 days, 5 days, 10 days and up. Unlike demerits, suspensions have a financial impact on a Grievor. Longer suspensions are reserved for more serious violations. As an experienced arbitrator, I consider I can take notice of the fact that 40 days is a very serious disciplinary response. A 40 day suspension imposes significant financial hardship on an employee, as he loses two months' worth of pay. It is also a significant disciplinary event to have on a discipline record. Such a significant response should be reserved for the most serious of cases.
- [20] I do not find *this* case has facts which would cause it to be one of the most serious cases of a TGBO violation. While I accept that a Locomotive Engineer who is traveling without the appropriate TGBO in Dark Territory commits a serious and significant violation in this industry – which warrants correspondingly significant discipline – I am also satisfied that there are several significant mitigating factors that should have informed the Company's response and acted to mitigate the discipline assessed.
- [21] I am also satisfied there was discriminatory discipline as between this Grievor and the Conductor which was not reasonable in all of the circumstances.
- [22] The Grievor's actions in this case did result in a violation and he did proceed past his limits in Dark Territory. However, there are factors which negative intent. This is not a case where the Grievor was reckless or disregarded an order, or covered up his actions, as in certain of the jurisprudence relied upon by the Company. In this case, the initial error was due to someone *e/se's* actions in not having the appropriate limits printed out for the Grievor's trip. The Grievor's actions were to be a "double check" that this paperwork was correct, and in this case that "double check" was not performed. The Grievor has an explanation for this event. He stated that he became distracted by other employees at the time that he was reading through his limits and should have noticed the error.

- [23] While the Grievor should not have placed himself in a situation to *be* distracted, this circumstance does act to negative intent. He did not just “miss” the information that was there to be seen by reading quickly or not carefully, for example, or just “skim” the information. There were outside influences acting. When the Grievor went back to consider the information after his conversation, he did not notice the error in the paperwork and turned the page to continue his review. I accept this can happen when an individual becomes distracted.
- [24] A second issue in this case is the different disciplinary treatment given to the Conductor.
- [25] The Union noted the Conductor was given a 20 day suspension for the same incident. The Company argued that was because this was the first major rules violation for that employee. If that is the case, the Union has argued that the Grievor’s discipline has “doubled” by 20 days because of one incident, 10 months before, that did not involve a TGBO violation, and that this was not a reasonable assessment.
- [26] I am drawn to the same conclusion.
- [27] In this case, the Grievor and the Conductor both had responsibility for the safe operation of this train. Both employees were liable for the same violation. The Company failed to consider that while the discipline records of the two individuals may have been different, that was only one factor to be considered. That difference was not cause to “double up” the Grievor’s disciplinary treatment, when it should have been an *aggravating* factor for the Conductor that he was the individual who printed out the incomplete documentation, and a mitigating factor for the Grievor that he did not.
- [28] The Union argued the Grievor acknowledged his error and was honest and forthright during the Investigation process. The Grievor answered the questions put to him. I did not see evidence of level of remorse, however. I find this to be a “neutral” factor.
- [29] Considering next the Grievor’s length of service, the Grievor is what I would describe as a “middle service” employee. His length of service is somewhat mitigating,

although not as great as if he were a long-service employee. I also consider this factor to be “neutral”.

- [30] The Grievor’s discipline record is mixed. While it does not demonstrate a particular concern with inadvertence, the Grievor’s disciplinary issues have been increasing in severity in the past 2.5 years and it is reasonable that this record has given the Company cause for concern.
- [31] Under *Wm. Scott*, there must also be consideration of the significant financial hardship that is worked on the Grievor from a 40 day suspension. This is effectively a further month’s pay than the Conductor was assessed for the same event.
- [32] Considering all of these factors, I find the penalty imposed to be excessive. I consider that this is an appropriate case to exercise my discretion to reduce that penalty.
- [33] I consider that a penalty of 20 days suspension takes appropriate account of the seriousness of the violation but also gives credence to the mitigating noted above, including the disciplinary treatment given to the Conductor for the same incident.
- [34] The 40 day suspension is to be vacated and a 20 day suspension is to be substituted. The Grievor is to be made whole for the difference between the two suspensions and his disciplinary record is to be adjusted accordingly.

August 17, 2023



**CHERYL YINGST BARTEL
ARBITRATOR**