CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4858

Heard in Montreal, August 10, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of dismissal to Locomotive Engineer David Kessler of Cranbrook BC.

THE JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Kessler was dismissed from Company service scribed as:

"Please be advised that you have been DISMISSED from Company Service for the following reason(s):

For leaving cars on the main track at Sparwood, BC without authority and providing a track release without confirming the entire movement was clear of the location, while working as the Locomotive Engineer on RS1 on October 29, 2022. A violation of Rule Book for T&E Employees Item 11.5.

Notwithstanding the above-mentioned incident warrants dismissal in and of itself, based on your discipline history – including the prior Major- Life Threatening & Conduct Unbecoming Offences, this incident also constitutes a culminating incident warranting dismissal."

Union's Position:

The Union asserts that Engineer Kessler was working under multiple clearances making multiple moves which led to the confusion when the RTC requested a track release. The crew was handling a locomotive with seven coal cars from a derailment on the Fording Sub and were tasked with placing these cars and locomotive in the Storage Track. The on-site manager requested that the cars be placed in a sequence that required the Locomotive to be on the east end of the cars. As the locomotive was on the west end of the movement the crew had to run around the coal cars. This required the cars to be tied down in OCS protected by the proceed clearance number 155 "8812 West from West Cautionary Limit Sign Sparwood to West Yard Switch Sparwood". The crew also received another clearance as they would now need to go west of the West Yard Switch Sparwood in order to back into the yard with the locomotive and

run back to the east end in order to come back onto the east end of the seven cars. The second clearance was from "West Yard Switch Sparwood to SNS Olson" The requirement was unusual and required three clearances on two subdivisions as well as travelling through CTC and Cautionary Limits all in a short distance.

The Union submits that Engineer Kessler did not intentionally provide an incorrect track release but rather, it was an oversight on his part during a very complicated and unusual circumstance. There was no damage or injuries in the brief moment of unprotected equipment on the main track. The RTC immediately caught the error and there was no chance of further incident regarding the error.

The Union further contends the harsh penalty of dismissal is unjustified, unwarranted, and excessive. During the investigation Engineer Kessler was honest and clearly explained in detail what took place and what was the cause of the incorrect track release. At the time of the incident, he was confident their cars were protected by their remaining clearance. He made no attempt to mislead the investigation in anyway.

For the foregoing reasons the Union requests that the Arbitrator reinstate Engineer Kessler without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

The Company disagrees with the Union's positions and denies the Union's requests.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

The Company maintains that leaving cars on a main track without authority and providing a track release before being clear of the location are considered major rule violations as outlined in the Hybrid Discipline Guidelines and as such this incident is a culminating event warranting dismissal. In addition, the Grievor's discipline record at the time was extensive and included multiple major violations.

For the foregoing reasons, 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 or benefit is appropriate in the circumstances.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Lawrenson	**(SGD.) F. Billings**
General Chairperson	Assistant Director, Labour Relations

There appeared on behalf of the Company:

J. Bairaktaris	– Director Labour Relations, Calgary
L. McGinely	– Director Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, Calgary
C. Ruggles	– Vice General Chairperson, Calgary
R. Finnson	– Vice President, TCRC, Ottawa
B. Plant	– Local Chairperson, *via Zoom*
D. Kessler	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

A. Background

1. The grievor is a thirty-seven (37) year old Locomotive Engineer. He had some fourteen (14) years of seniority at the time of the incident, with roughly twelve (12) years of experience as an Engineer.

2. The Union argues that the grievor has "significant service", while the Company argues that he does not have "long service".

3. As the Company points out in their Reply submission, perhaps both parties are correct. With fourteen (14) years of service, the grievor clearly has at least significant service.

B. Culpability Not In Issue

4. The Company submits that it has clearly established culpability by the evidence and testimony contained in the investigation record. The grievor admitted (Q and As 27-33 in the investigation, Tab 5, Company documents) that he had improperly released clearance No. 155, thereby leaving seven (7) cars on the main track without required protection from other rail traffic.

5. The Union does not dispute that an error was made and that the cars were left briefly on the main line without protection.

C. Discipline Record

6. A copy of the grievor's discipline record is found at Tab 4 of the Company documents, pp. 16-18.

7. The Company submits that his record shows three Major Offenses in the last 17 months, culminating in the current dismissal. It notes that as a result of the three previous incidents, the grievor is subject to 100 days of suspension.

8. The Union points out that 70 of the 100 days of suspension are currently the subject of grievances, one of which is also before me.

9. Since the time of the Hearing, Arbitrator Yingst Bartel has decided the grievance based on the 40 day suspension. In her decision, she found that the grievor had committed a serious error, but there were mitigating circumstances. Based on these findings, the Arbitrator determined that the 40 day suspension should be reduced to a 20 day suspension.

10. Since the time of the Hearing, I have heard and decided the 30 day suspension. I found that the employer had established a positive oral swab and urine test, with 3 ng/mL detected in the swab test. The grievor admitted the consumption of cannabis some 18 hours before he reported for duty and some seven (7) hours before he was "subject to duty". However, I found that the Company had not established impairment and preferred to wait for the outcome of the scheduled hearing on the new screening and confirmation levels.

11. Based on these two latest decisions, the grievor now has an amended discipline record of a total of 50 days of suspension.

D. Is this a Culminating Incident?

12. In the termination letter, the Company "Notwithstanding the above-mentioned incident warrants dismissal in and of itself, based on your discipline history-including the

prior Major-Life Threatening and Conduct Unbecoming Offences, this incident also constitutes a culminating incident warranting dismissal" (see Tab 1, Company documents).

13. The Company pleads that I should view this current Rule violation as a culminating incident, as the grievor was assessed discipline for four (4) Major Offenses in a mere seventeen (17) month period. It points to **CROA 4579**, where Arbitrator Sims found the latest Rule infraction to be a culminating incident, in light of the grievor's multiple and serious recent infractions.

14. The Union argues that the grievor's record, particularly for Cardinal Rule violations is not sufficiently negative to justify treating the current issue as a culminating incident.

15. The Union cites *Canadian Lukens Ltd. v. USWA*, (1976) OLAA No. 93 at para. 7:

> In many awards, arbitrators have spoken of a "culminating incident" triggering the record's significance.5 But it seems clear to me that there is no special "doctrine of culminating incident" separate from ordinary principles developed to govern disciplinary grievances. In all cases where a grievor challenges discipline imposed as the immediate result of alleged particular conduct arbitrators proceed this way: If they find the conduct not established by the evidence or, if established, not warranting a penalty, they allow the grievance and grant the fullest remedy.6 But, if they find the conduct established and warranting some penalty, they examine the grievor's total record, both good and bad, to determine in the light of all the circumstances whether the particular penalty the employer levied fits the wrong and, if not, the nature of penalty fitting better.7 The record's significance in the determination was clear to many respected arbitrators8 before the Supreme Court decided *Port Arthur Shipbuilding Co. v. Arthurs et al.* *(1968), 70 D.L.R. (2d) 693*, *[1969] S.C.R. 85*, and it has been confirmed by the enactment of what is now s. 37(8) of the *Labour Relations Act*, R.S.O. 1970, c. 232. In the arbitration of a challenge to a substantial penalty, where the established conduct alone warrants something akin to what was levied, arbitrators of course carefully examine the aspects of the record favourable to the grievor.9 And, where the conduct alone warrants something less serious, they focus on the unfavourable aspects.10 But the change in emphasis is merely a function of the arbitrator's job on the facts of particular grievances -- to measure wrong against penalty. Only where

> the conduct warrants minimal discipline may a single extra consideration enter, one necessarily absent on all other occasions: perhaps an employer should be barred from using the occasion of an employee's trivial offence to impose discharge.

16. In my view, the views in *Canadian Lukens* make good sense. As culpability has been established in the present matter, the grievor's total record, good and bad, will need to be examined to determine whether the penalty of dismissal fits the wrong and, if not, the nature of a penalty fitting better.

E. Is Dismissal Appropriate?

Submissions of the Parties

17. The Company highlights the critical importance the faithful adherence to Canadian Railway Operating Rules, particularly when train crews are operating within an Occupancy Control System territory, where the RTC cannot independently observe the location of the train.

18. It notes CROA has long acknowledged the importance of adherence to Rules, given the highly safety sensitive environment of railway operations. As Arbitrator Picher noted in **CROA 3900**:

> "I deem it important to recall the highly safety sensitive nature of railway operations. Simply put, railways are among the most highly safety sensitive industries in Canada….They operate in a system of complex signals and switches where alertness in the control of a train free of distractions is of paramount importance. Finally, they operate in unsupervised conditions, frequently hauling dangerous goods through various kinds of territory, including both environmentally sensitive countryside and densely populated areas."

19. The Company argues leaving cars unprotected on a main line is indefensible. It notes that the grievor does not dispute this.

20. It notes that the movement the grievor conducted was unexceptional, having worked at Sparwood for some 300 shifts in the last two years. It argues that the

movement was so unexceptional that the matter was not even raised during the investigation, only being raised later by the Union in their grievance and submissions.

21. It submits that the grievor has had three Major running offenses in the past 17 months, as well as a Major Offense relating to positive findings for drug use. It argues that previous discipline had not corrected the behavior of the grievor.

22. It argues that the jurisprudence supports dismissal in the circumstances. (See **CROA 4579** and **4485**).

23. Finally, it argues that I should not intervene to disturb the employer's decision without very good reason:

> "...the question arbitrators should ask themselves, when considering penalty substitution, is whether the penalty imposed by the employer is within the range of reason having regard to all the circumstances of the case.
>
> Arbitrators should not interfere with a penalty merely because, had they been the employer, they would have handled the matter somewhat differently."[1]

24. The Union submits that, while the Rule violation is admitted, the violation itself lasted for approximately one minute, before the error was detected by the RTC and corrected. There was no realistic possibility of actual danger being created for other train crew.

25. It notes that the grievor was completely forthright in his responses to the investigator, admitting a Rule violation through inadvertence.

26. It argues that the movement was indeed complicated, involving multiple steps (See Union Brief, paragraphs 15-23).

[1] Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586 (ON LRB), Arbitrator Gee of the Ontario Labour Relations Board.

27. It notes that the grievor had zero demerits in the three years prior to the incident and only 55 demerits over the course of his fourteen (14) year career.

28. It argues that the jurisprudence does not support dismissal in these circumstances. (See **CROA 4758, 4572**).

Decision

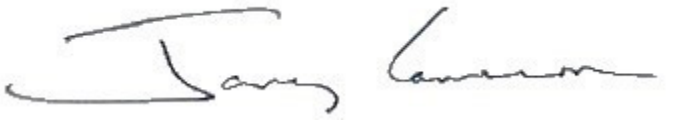
29. As I am required to do, I have considered the aggravating and mitigating circumstances concerning the actions of the grievor (see USWA, Local 3257 v. Steel Equipment Co. (1964), 14 LAC 356). I am very conscious of the fact that the grievor committed a cardinal rule violation, even if it was for a very short time and no damage ensued. I take into account that this was his third Major Offence in a short period of time, even if some of the penalties have been reduced. I am particularly impressed by the fact that the grievor was forthright with the Company and the investigator concerning the violation and his role in it.

30. I am conscious of the deference to be given to the employer's decision. However, the employer made this decision in light of the grievor's discipline record at the time. Recent decisions have changed that record. Instead of 100 days of suspension, he now has 50 days of suspension.

31. There is no doubt that the grievor is responsible for a Cardinal rule violation, which now includes three moving violations in seventeen (17) months. However, I believe that the grievor has learned a painful lesson from this experience. I believe that there can be a productive relationship between the Company and grievor. I find that dismissal is too severe a sanction, taking into account the multiple aggravating and mitigating factors. Accordingly, I replace the dismissal with a 40 day suspension without pay. The grievor's future actions will demonstrate whether he has in fact learned his lesson.

32. To this extent, the grievance is upheld.

33. I retain jurisdiction for all matters concerning interpretation or implementation of this Award.



September 18, 2023

JAMES CAMERON
ARBITRATOR