CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4866

Heard in Edmonton, September 14, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer C. Kouri, of Moose Jaw, SK regarding his dismissal.

JOINT STATEMENT OF ISSUE:

Following an investigation, the Grievor was dismissed described as:

Please be advised that you have been assessed Dismissed from Company service for the following reasons:

In connection with your tour of duty on November 2, 2022 while working as the Engineer on train 9E48-02 and failing to properly communicate with your Conductor during switching operations that the point was protected prior to shoving blind on the west leg of the wye towards the north passing track in Moose Jaw Yard.

A violation of:

- Rule Book for Train & Engine Employees, Item 4.2 - Communication Requirements
- Rule Book for Train & Engine Employees, Item 12.3 - Shoving Equipment

Union's Position:

The Union has conducted a further review of the facts of this case and cannot agree with the harsh discipline imposed as a result of an E-test failure. The Company's own manual states: "Proficiency 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 this case there was no frequency, no damage and no imminent danger that could justify the dismissal. The Union contends that the Company has engaged in an unreasonable application of the Proficiency Test Policy and Procedures, resulting in the discriminatory and excessive assessment of discipline. The Company has not provided any evidence that Mr. Kouri has a history of reoccurring E-Test fails for this type of incident. Arbitrator Simms in CROA case 4621 stated: "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." Further, Mr. Kouri was E-tested and allegedly failed but was never retested as per Company policy.

The Union provides that Engineer Kouri in Q&A 19 placed on the record that he clearly understood the point of the movement was being protected as he operated under the directions of his Conductor. Later in Q&A 20, both crew members confirmed that the track they were using was known to be clear. Mr. Kouri was working with a newly qualified Conductor with minimal experience. Mr. Kouri had recently returned from being off work for over 2 years and was still trying to navigate and familiarize himself with the procedures implemented since prior to his dismissal.

The Union asserts the Company was targeting Mr. Kouri and failed to provide a fair and impartial hearing. The Company performed Post Incident Drug Testing, when there was no incident, this amounts to random drug testing and further shows the Company was fishing to find fault with Engineer Kouri. Engineer Kouri did not display any signs of impairment and there was no incident regarding this circumstance. Further to the fair and impartial position taken, the Union asserts Engineer Kouri was disciplined in a different manner than that of the Conductor.

The Union asserts the Company has over asserted their authority by jumping directly to dismissal with Engineer Kouri for his first alleged non rule compliance a year and a half after reinstatement from wrongful dismissal. Engineer Kouri was forthright with his answers to the questions posed to him during the investigation, he did not attempt to conceal any information. Rather, he answered the questions honestly and as clearly as possible. The investigation established the crew was shoving only 12 cars and the Company failed to establish if the point was in sight regardless of where the Conductor detrained. The point was known to be clear. The Union contends that his dismissal is unfair, unjustified, and unwarranted.

For the foregoing reasons we respectfully request that the Arbitrator reinstate Locomotive Engineer Kouri without the loss of seniority and that he be compensated for lost wages with interest, and benefits for his time removed from service.

Company Position:

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation – the Company simply cannot agree with the Union's contentions to the contrary. Discipline was determined following a review of all pertinent factors, including those that the Union describe as mitigating as well as aggravating factors including the Grievor's employment history and discipline standing. The Company's position continues to be that the discipline assessed was just, appropriate, warranted and in no way discriminatory in all the circumstances.

The Union contends that the Company had an unreasonable application of its Efficiency Testing Policy and Procedures in this circumstance. The Company disagrees. The Company maintains its rights to utilize efficiency tests which it is mandated to conduct as part of its safety management program and assess discipline as required for failed tests.

The Union argues the Company required the Grievor to undergo "random drug testing", claiming there was no incident. The Company disagrees. As established in the fair and impartial investigation, the Grievor was found culpable of the incident that occurred as outlined in his Discipline Letter and was therefore tested in accordance with Company Policy.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:
(SGD.) G. Lawrenson
General Chair

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director Labour Relations

There appeared on behalf of the Company:

A. Cake	– Manager Labour Relations, Calgary
A. Harrison	– Manager Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Revelstoke
C. Ruggles	– Vice Gen Chairperson, LE-W, Revelstoke
K. Ingalls	– Local Chairperson *via Zoom*
C. Kouri	– Grievor, *via Zoom*

AWARD OF THE ARBITRATOR

Issues and Summary

[1] This Grievance concerns the dismissal of the Grievor. The Form 104 stated the Grievor was dismissed "for the following reasons":

> In connection with your tour of duty on November 2, 2022 while working as the Engineer on train 9E48-02 and failing to properly communicate with your Conductor during switching operations that the point was protected prior to shoving blind on the west leg of the wye towards the north passing track in Moose Jaw Yard.

[2] The issues are:

a. Was this a failed efficiency test (also referred to as an "E-Test")?

b. Was cause established for some form of discipline?

c. If so, was dismissal an excessive response?

[3] For the reasons which follow, the Grievance is allowed. The Company Investigated the Grievor for – and considered this to be – a failed E-Test. The Company has not met its burden to establish it had cause to discipline the Grievor for that failure, under the factors outlined in the Test Code.

Analysis and Decision

[4] In view of my findings, below, the Arguments need only be summarized briefly.

[5] The Company argued this was not a failed E-Test, but was an observation made by management during the course of duties, which appropriately attracted a significant disciplinary response, given the seriousness of the allegations. It argued cause was established for the Grievor failing to properly communicate with the

Conductor, failing to ensure the point was protected and "shoving blind", which was a significant safety violation. It argued the Grievor's employment was already in peril as a result of his reinstatement by arbitration decision **AH754**; that it had cause to discipline the Grievor and that the discipline was just and reasonable.

[6] For its part, the Union argued there was no E-Test failure, as the Grievor did not shove blind, the point was protected, and the track was "known to be clear" as was required by the relevant rules, as noted in the JSI. It argued there was no basis for discipline, even if there was a failed E-Test, as the Company had not established it had cause for discipline under the appropriate factors.

Analysis and Decision

[7] The first question in an analysis under *Re Wm. Scott & Co.*[1] is whether "cause" for discipline is established. The Company bears the burden in establishing that cause exists.

[8] The "Efficiency Test Codes and Descriptions for Train & Engine Employees", revised September 3, 2019 (the "Test Code") is a Company policy, which is based on a Transport Canada mandatory requirement to conduct efficiency testing.

[9] It is well-established that a policy must be reasonable to be enforceable: *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd*[2]. It is also self-evident that to be reasonable, a policy must be followed.

[10] The Test Code states:

> An efficiency test is a planned procedure to evaluate compliance with rules, instructions, and procedures, with or without the employees 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 noncompliance 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.

[11] It has been accepted by Arbitrators in this industry that failed E-Tests can form the basis for discipline: **CROA 4580**; **CROA 4621**; **AH691** and **AH860**.

[1] [1976] B.C.L.R.B.D. 98.
[2] 1965 CanLII 1009 (ON LA); 16+ nat 85

[12] As noted in the Test Code, an E-Test is a "*planned*" procedure to test compliance. This is distinct from an observation which is made by management personnel who happen to notice an infraction: **AH860.** For example, the placement of a yellow flag to observe a crew's response to that flag, when there is no reason for a yellow flag, is an E-Test. That flag was placed in a "planned procedure" to test a crew's compliance with an unexpected yellow flag. Likewise with management who direct a rail traffic controller to protect a crossing when there is no reason to do so. That is also an E-Test, as there is an element of "planning" in setting up a procedure to test rules compliance.

[13] In **CROA 4621**, the arbitrator expressed a general concern with a disciplinary response for E-Test failures. He stated "not every efficiency test failure should be considered a candidate for discipline" (at p. 5).

[14] While providing early guidance, that decision did not go on to describe the types of situations when discipline *would* be appropriate for such failures and when it *would not*, or how that determination was to be made.

[15] In **AH691**, a different the arbitrator noted that efficiency tests were:

> …[P]lanned procedures used to evaluate compliance with the rules and are not intended to be disciplinary tools. This makes sense as employees like the grievor are required in their every day duties to follow a multitude of rules with a view to maintaining safety at all times. Corrective action involving re-testing employees to ensure they understand the proper procedures is an effective method of ensuring a safe workplace (at p. 6).

[16] In upholding a disciplinary response in **AH691** for three E-Test failures, the arbitrator noted the incident at issue was a *repeat* of the same offence that had resulted in a lengthy suspension and that it occurred when the Grievor had been back to work after that suspension for only a month. The incident itself was riding inappropriately on a hopper car.

[17] Recently in **AH860**, this Arbitrator noted that there is a line of analysis apparent in the Test Code itself for determining if "cause" for discipline for a failed E-Test has been established, or if coaching/education/mentoring is the more appropriate response. This framework is consistent with this earlier jurisprudence.

[18] This analysis arises from the factors referred to in the final two sentences of the Test Code:

> 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 (emphasis added)

[19] I am prepared to find from the use of the conjunctive "and" in the Test Code that all *three* factors of "frequency", "severity" and "work history" are relevant when determining if cause for discipline is established. The first and third factors relate to the Grievor's conduct and bring into play both the E-Testing records and the discipline record of a grievor, while the second factor of "severity" relates to the situation itself. It must be acknowledged there are many rules in this highly safety-sensitive industry which are safety-related and which could result in catastrophic injuries or damage to equipment if not respected.

[20] Applying the framework to this case, the first question for a discipline analysis under *Re Wm. Scott & Co.* is whether cause for discipline is established. In determining this question, it must first be determined whether this was an E-Test failure.

[21] The Company argued in the hearing that it was *not* conducting an "E-Test" – as the Grievor was observed during management's regular duties. I find I cannot agree with this characterization.

[22] The Investigation transcript states the Grievor was being Investigate "In connection with: Your tour of duty on November 2, 2022 in train 9E48-02, *more specifically the alleged E-test failure* recorded by Assistant Trainmaster James Boyle" (emphasis added). Part of the evidence the Company relied on was Memoranda of Mr. Boyle, who stated that himself, Trainmaster Jason Ross and Assistant Superintendent Leafloor were "out in the truck doing joint testing". The Union filed the Grievor's E-Testing Record, which will be discussed further below. Two "fails" appear on that "Testing" record from November 2, 2022 from this incident: for "shoving blind" and for radio communication.

[23] While enforcing safe practices is a key and important concept in this industry, fair process is as well. I therefore cannot agree it is open to the Company to suggest at

this point the Grievor was *not* guilty of an E-Test failure, but rather was only observed during the course of management's duties (consistent with the requirement recently outlined in **AH860**), and so would not be constrained by the wording of its own policy for discipline for E-Tests. The evidence filed does not support that conclusion. I am prepared to accept that this incident *was* considered by the Company to be observed as part of E-Test as demonstrated by the evidence; and that it was considered a failure of two E-Tests: "shoving equipment on non-main track" and "proper radio communication procedure identification" as noted in the E-Testing record of the Grievor.

[24] I am prepared to conduct the remaining analysis assuming – without deciding – that all of the facts alleged by the Company can be established. This is because – even were that to be the case – I do not find the Company has met its burden of proof.

[25] I am satisfied that both the E-Testing record and the Grievor's discipline record are relevant to the factor of "frequency" and "work history". Considering first the factor of "frequency", the Union filed the Grievor's E-Test record since 2013. It shows 144 E-Tests conducted, for various situations. Not counting the failure on November 2, 2022, the Grievor's record at the time of this discipline stood at 136 passed and 8 failed, which is an efficiency rate of 94%. Even adding in the Nov. 2, 2022 incident, his record would have been at 10 failed out of 146 total tests, which is an efficiency rate of 93%. The Grievor's record of testing for rules compliance is strong.

[26] A further relevant fact is that none of the few E-Test failures noted prior to November 2, 2022 were for radio communications or "shoving blind". This is a consideration when assessing whether coaching/mentoring/education would have been effective for that behaviour, or whether "cause" for some discipline was established.

[27] Looking at his discipline record, in 2019, the Grievor had a lengthy suspension imposed as a result of reinstatement by arbitration decision **AH754**. The discipline in that case had been imposed for failure to perform a pull-by inspection, in the context of a previous 30 day suspension that same year for leaving a switch reversed. In the previous year (2018) he had a 20 day suspension for filing to ensure a switch was aligned with his movement. His next previous discipline was a 7 day

suspension for an unrelated infraction in 2016. He also had a 5 day suspension for improper train handling in 2015.

[28] In this case, the Company has argued a pattern of "rule violations" is established by the Grievor's record. While I agree that argument is persuasive when considering the *measure* of a disciplinary response under the second *Re Wm. Scott & Co* question (as either aggravating or mitigating in nature) I do not find it persuasive when considering whether *cause* for discipline has been established, under the first question. The two analyses are distinct.

[29] When considering "cause", the contrast must be made with the use of coaching/mentoring/education as an option to ensure rules compliance versus discipline in a particular case, given the various factors. As noted in **AH691**, an employee must comply with multiple rules as part of their daily duties. To make a distinction between the impact of these two responses – disciplinary or instructive – calls for a nuanced consideration of the three specific factors in the Test Code.

[30] The Company did not provide any evidence that the Grievor had demonstrated a frequency of failed E-Tests for "shoving blind" or for not communicating appropriately over the radio. While it is acknowledged the Grievor has significant suspensions on his record, the type of behaviour cited in the E-Test failure is not behaviour for which he has been previously disciplined, such that a conclusion could be drawn that education/mentoring/coaching would not have been effective in this case to change behaviour and establish rules compliance.

[31] Arbitrator Hodges held that the discipline that he would find appropriate relating to this Grievor in **AH754** was to demonstrate to the Grievor "that his job remains in peril if he does not demonstrate a commitment to rule compliance". However, it must be emphasized that Arbitrator Hodges did *not* place the Grievor at a particular place on the disciplinary hierarchy of the Company when he reinstated him, as he could have done had he intended that action to continue acting towards future circumstances, beyond its consideration as part of he overall discipline record. He chose not to do so.

[32] The Company has also argued this was a “culminating incident”. To apply that doctrine, the final incident itself must provide cause for some form of discipline.

[33] While I accept the allegations of failing to communicate regarding protecting the point and shoving blind are significant and serious if established, without evidence of frequency and a work history that combines with that reality to demonstrate that education/coaching/mentoring of this Grievor would *not* have been effective to achieve rules compliance, cause for discipline for what the Company considered to be a failed E-Test has not been established.

[34] It must be emphasized this Award is not a licence for not complying with important rules that exist to ensure safe workplaces. Rather, it flows from how the offence was characterized and Investigated by the Company and the specific stipulations of what must be considered under the Test Code, to establish cause for discipline for E-Test failures.

Conclusion

[35] As cause has not been established for discipline, the Grievance is upheld. The Grievor is to be reinstated and made whole for any losses.

[36] I retain jurisdiction for any issues relating to the implementation of this Award, and to correct any errors or omissions necessary to give it the intended effect.

January 2, 2024

CHERYL YINGST BARTEL
ARBITRATOR