

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

**CASE NO. 4886**

Heard in Calgary, November 15, 2023

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Locomotive Engineer S. Cawdell of Cranbrook, BC.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

Following an investigation, Engineer Cawdell was dismissed from Company service described as: "For failing to acquire written authority before entering the limits of a TOP at North Cautionary Limits Sign Fort Steele on the Windermere Subdivision while working as the Engineer on Train 805-516 on November 30, 2022. A violation of the Rule Book for Train and Engine Employees Items 2.2(a),(c)(vi)(vii)(x)(xii), 15.2(c) and 15.5.

Notwithstanding, the above-mentioned incident warrants dismissal in and of itself, based on your discipline history – this incident also constitutes a culminating incident warranting dismissal.

**Union's Position:**

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

Engineer Cawdell was travelling Northward entering the Windermere Subdivision on train 805-516 November 30, 2022. Acting on clearance 428, with OCS authority from North Cautionary Limit Sign Fort Steele to North Yard Switch Fort Steele having an item #7 Protect against Foreman Louis Vansteinburg. A job briefing was completed to go over restrictions on clearance 428. The Conductor was on channel 7 taking the next OCS clearance from the RTC. Mr. Cawdell was operating the train through Cautionary Limits and ensuring switches were properly lined. It was immediately realized that the crew was about to enter the foreman's limits and the movement was immediately stopped. The incident was immediately reported to the RTC that they had entered the limits by around 14 cars. After advising the RTC the crew was told to stand by on channel seven. When the RTC came back to channel seven the crew was advised not to worry about the TOP as it was no longer applicable and issued another clearance Q&A 43.

The Union submits a momentary lapse while controlling his train and performing other tasks does not warrant the dismissal of Engineer Cawdell. Arbitral Jurisprudence confirms similar incidents have garnered far less discipline than that of dismissal.

The Union submits that the investigation, the information, and education presented during it have met the needs of the Company to address this situation. The assessment of dismissal by the Company amounts to an excessive fine in this instance. The Union submits the dismissal is excessive for a long-term employee with approximately 36-years of service.

For the foregoing reasons and those advanced through the grievance procedure we respectfully request that the Arbitrator reinstate Locomotive Engineer Steven Cawdell without the loss of seniority and be compensated for lost wages with interest in relation to his time removed from service. In the alternative, we request that the discipline be reduced to an assessment more commensurate to the offence and the circumstances indicated within the investigation as the Arbitrator sees fit.

The Company has denied the Union’s requests.

**FOR THE UNION:**  
**(SGD.) G. Lawrenson**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

- A. Harrison – Manager, Labour Relations, Calgary
- F. Billings – Assistant Director, Labour Relations, Calgary
- S. Arriaga – Labour Relations, Calgary
- R. Araya – Observer, Labour Relations, Calgary

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- G. Lawrenson – General Chairperson, Calgary
- C. Ruggles – Vice General Chairperson, Calgary

**AWARD OF THE ARBITRATOR**

**Background, Issue & Summary**

[1] The Grievor is a long-service employee of thirty-six years of service. At the time of his dismissal, he was an experienced Locomotive Engineer, having qualified in 2003. Prior that time – between 1988 and 2003 – he worked as a Conductor. The Grievor’s service was not unbroken. The Grievor entered Company service in 1988, had his employment severed in 1992; was rehired in 1997; was dismissed in July 2011 and reinstated without compensation on January 2013 by **CROA 4169** (resulting in a two year suspension); was dismissed again in January 2014 for accumulation of demerits and reinstated again without compensation in February 2018 (resulting in a four year suspension) by **CROA 4397-S**.

- [2] This was the second Grievance heard at the November CROA session involving the Grievor. In the first Grievance<sup>1</sup>, the Company was found justified to impose a disciplinary suspension of 30 days for the Grievor's failure to stop at a switch that the crew was instructed to align, with a resulting entry of the train into a siding.
- [3] This Grievance addresses the Grievor's dismissal on December 14, 2022 for "failure to acquire written authority before entering the limits of a TOP [track occupancy permit]..." on November 30, 2022, which was a violation of the Rule Book for Train and Engine Employees, items 2.2(a), (c)(vi)(vii)(x)(xii), 15.2(c) and 15.5.
- [4] The facts are not in dispute.
- [5] On November 30, 2022, the Grievor was called as the Engineer on Train 805-516, from Sparwood to Golden, with restriction 428. That gave the crew authority from the North Cautionary Limit Sign Fort Steele to North Yard Switch Fort Steele, with an item seven to Protect against Foreman Louis Vansteinburg North Cautionary Limit Sign Fort Steele and North Yard Switch Fort Steele.
- [6] As the Grievor operated through the Cautionary Limits, it was realized they had entered the Foreman's limits and the movement was brought to a stop.
- [7] The Grievor indicated in his statement that while he and his Conductor job-briefed clearance number 428, he does not know why he entered the limits of the foreman named in item 7 of that clearance.
- [8] A report was made to the RTC – whom they were in discussion with – that they had entered the limits by approximately 14 car lengths. The crew were instructed to pull the train down to the north yard switch and tie it down.
- [9] Culpability is not in issue in this Grievance. The only issue between the parties is whether the discipline of dismissal was an excessive and unwarranted response that should be reduced by exercise of this arbitrator's discretion.

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<sup>1</sup> CROA 4885

[10] Dismissal was not an excessive or unjust response in all the circumstance of this case. This is not a case where the arbitrator's discretion to reduce that penalty is appropriately exercised. For the reasons which follow, the Grievance is dismissed.

### **Analysis and Decision**

[11] The arguments of the parties will be addressed within this analysis, rather than set out separately.

[12] *Re Wm. Scott & Co*<sup>2</sup>. provides the framework for determining whether a disciplinary response is justified or excessive. It sets out several factors to be considered in making that determination, although the list is not "closed".

[13] An important factor is the seriousness of the offence.

[14] It has been acknowledged in multiple cases from this Office that exceeding the limits of an authority is a serious and significant offence in this industry. When that occurs, the train is occupying a section of track where it is not allowed to be; where it has no permission to be. The potential for serious consequences is recognized in the jurisprudence, as is the serious and significant nature of the discipline which appropriately follows.

[15] The Union has argued the issue in this case is whether the incident warrants the outright dismissal of the Grievor. The Union argued the instance case should be viewed as a "single infraction" when determining appropriate discipline.

[16] *Re Wm. Scott* indicates that the disciplinary *record* of a Grievor is a relevant factor that must be considered in assessing appropriate discipline. A poor disciplinary record is an aggravating factor and a good disciplinary record is a mitigating factor. This is consistent with the principles of progressive discipline, which recognize that further and more significant discipline should follow, especially when – *but not only limited to* – offences of the same nature are repeated.

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<sup>2</sup>[1976] B.C.L.R.B.D. 98

- [17] It is therefore appropriate and necessary – both under *Wm. Scott* and under the principles of progressive discipline – to view the infraction within the context of the Grievor’s disciplinary past. However, I do accept that when assessing the discipline of discharge, a “searching” assessment must be made by an arbitrator to determine if the offence at issue is one that can support that result, especially for long service employees.<sup>3</sup>
- [18] The broader record of the Grievor demonstrates a poor disciplinary history. That record is significant for several serious violations.
- [19] The Grievor has been reinstated twice by arbitral award, however neither provided any compensation for the intervening time period, resulting in significant time off work without compensation in both cases.
- [20] Even only considering the Grievor’s record after his most recent reinstatement in February of 2018, between that date and his dismissal (almost five years later in December of 2022), he carried suspensions on his record of 30 days for failing to stop short of his authority (upheld in **CROA 4885** during this same CROA session); and a 45 day suspension in January of 2021 for his train occupying the main track without authority. He was reinstated subject to a Last Chance Agreement on December 3, 2021, following a non-negative post-incident test after the same incident which resulted in the 45 day suspension.
- [21] Both are infractions where the Grievor failed to operate his train appropriately within his clearances.
- [22] It is well-accepted in arbitral jurisprudence that when an infraction is repeated, the Company is given significant cause for concern that the previous discipline has not reached its mark to change behaviour, and that a change in behaviour will not occur. This is especially the case where – as here – the Grievor has been given two reinstatements, which should have brought home to him the importance of diligence, care and attention to the requirements of his job; and the reality that his job was in jeopardy if that care and attention was not shown.

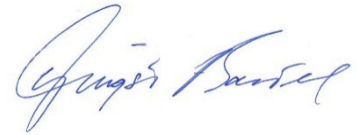
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<sup>3</sup> At para. 14.

- [23] Under the principles of progressive discipline, a further and more significant penalty is appropriate, up to discharge.
- [24] Like in **CROA 4689**, in this case the Grievor has not provided any excuse or explanation for his conduct. His actions were careless and negligent regarding a key and important aspect of his work.
- [25] The Union argued there was no “overt dereliction” of duties, or “wilful or intentional misconduct” in this case. However, dismissal can result even where negligent conduct is not wilful or intentional, especially if the same type of conduct has occurred previously and the Grievor has not changed his behaviour in response to discipline. This is especially the case where there is no explanation or excuse offered for that conduct.
- [26] I also cannot agree with the argument of the Union that there are equities acting in the Grievor’s favour, as in **CROA 4250**, **4583** and **4584** and that those cases are helpful in guiding the exercise of my discretion in this case. Just because there is no allegation of a cover-up is not reason to provide a third reinstatement to this Grievor.
- [27] The Union noted **CROA 2588** and **4600**, where 30 demerits was substituted. That amount would be half-way to dismissal for a Grievor who has *no* demerits on his record, demonstrating the seriousness with which CROA arbitrators consider occupying territory without authority.
- [28] **CROA 4419** is distinguishable. In that case a seven year employee was not found “beyond redemption”. In that case, the grievor had an explanation that he believed the route ahead was clear and the sightlines sufficient to protect the point during the reverse movement. Further, it was not clear from that decision whether the individual had *any* discipline record at all.
- [29] I have carefully considered the factors and jurisprudence, including the serious nature of this offence. Had this been an offence of a minor nature, the result may be different. It was not.

- [30] The Grievor has been given two reinstatements in the past to demonstrate his commitment to following the requirements of an engineer's work. Considering the aggravating factors of the Grievor's disciplinary record and the repeat – and serious – nature of this offence without any explanation offered, I am not inclined to provide a third opportunity to the Grievor to maintain his safety critical employment.
- [31] Despite the Union's able argument on the Grievor's behalf, the Grievance is dismissed.
- [32] I remain seized to address any issues with the implementation of this Award and to correct any errors or omissions to give it the intended effect.

March 1, 2024



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**CHERYL YINGST BARTEL  
ARBITRATOR**