CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5000-M

Heard in Calgary, September 10, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's probationary release of Conductor Powar.

JOINT STATEMENT OF ISSUE:

Conductor Powar commenced his employment with CN on June 27th, 2022. Upon successful completion of the theoretical portion of the Conductor Training Program, he began the practical portion of his training within the terminal of Toronto South. He became qualified as conductor on January 27th, 2023.

On August 15th, 2023, Conductor Powar was ordered to be present at the MacMillan Yard Dual Tower where he was given CN Form 780 dated August 11, 2024, indicating that he had been assessed discharge for, "Circumstances surrounding your involvement with run thru switch at BIT yard while working assignment 0700 YBTS01 on July 24, 2023."

He was also given another letter dated August 10th, 2023, informing him that effective August 10, 2023, he is being discharged from the CN Conductors Training Program for failure to meet the established standards and expectations.

The Union's Position:

It is the Union's position, however not limited hereto, that the Company's actions are contrary Article(s) 58, 65A, 85, 85.5, Addendum 123 and 124 of Collective Agreement 4.16, Arbitral Jurisprudence and the Canada Labour Code, when Conductor Powar was issued the ultimate penalty of discharge for an alleged run through switch, within yard limits, while working the 0700 BIT yard assignment, following a Formal Employee Statement.

The Union further asserts that running through a switch, especially within yard limits, and immediately advising the proper Officer of the Company prior to any additional damage, does not attract the ultimate penalty of discharge.

The Union's position is that the discipline ought to be declared "void ab initio" on the basis that the Company violated Article 82.1 of Collective Agreement 4.16 when Conductor Powar was held out of service pending the rendering of a decision in an attempt to prevent him from surpassing the ninety (90) probationary tours of duty.

The Union contends that this was done in bad faith and the discipline assessed was excessive, unwarranted and unjustified.

The Union submits that once the Company invokes the disciplinary proceedings under Article 82, they are now bound by that process and the provisions of Addendum 124 apply.

The Union is also of the view that the Company cannot simply discharge an employee twice, as was done in this case. Once under Article 58.1 and additionally under Article 82, by issuing a CN Form 780 indicating an outright discharge for an alleged CROR 104 violation.

The Union argues that this was breach of Conductor Powar's substantive rights under the Collective Agreement to a fair and impartial investigation and therefore it should render the discharge void ab initio.

The Union, as result of the violations, requests that Conductor Powar be reinstated with full redress, without loss of seniority and submits that a remedy in the application of Addendum 123 of Collective Agreement 4.16 is appropriate.

Company's Position

The Company disagrees with the Union's position in its entirety. The decision to release Mr. Powar was in no way excessive, unjustified or arbitrary. Further, the decision was due to unsuitability for the position of Conductor Powar, specifically due to performance deficiencies and the fact that he has multiple CROR violations related to rule and safety infractions.

Mr. Powar was not discharged twice. The issuance of CN Form 780 was an administrative error, and the employee was released under Article 58.1 – probationary period.

The Company denies the Union's argument that Mr. Powar was discharged solely for running through a switch, within yard limits. The Company submits that is well within its rights to release Mr. Powar during his probationary period, contrary to the Union's grievance. It has previously been recognized in the jurisprudence that the standard of proof required to establish just cause with respect to the release of a probationary employee is substantially lighter than that of a permanent employee.

The Company denies Union's argument pertaining to the investigation not being fair and impartial. The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or that a Remedy under Addendum 123 is applicable.

For the Union:	**For the Company:**
(SGD.) J. Lennie	**(SGD.) A. Borges**
General Chairperson	Labour Relations Manager

There appeared on behalf of the Company:

A. Borges	– Manager, Labour Relations, Toronto
R. Singh	– Manager, Labour Relations, Vancouver

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Hamilton
G. Gower	– Vice General Chairperson, CTY-C, Brockville
E. Page	– Vice General Chairperson, CTY-C, Hamilton

AWARD OF THE ARBITRATOR

Background, Summary and Issue

1. This Grievance concerns the dismissal of a probationary employee. The governing agreement is Agreement 4.16 (Eastern Lines).

2. The Grievor qualified as a Conductor on January 27, 2023, and began a probationary period with the Company. The probationary period consisted of 90 tours of duty. On August 10, 2023, the Company terminated the Grievor's employment. He had approximately 14 months of service, at the time of his dismissal and had completed 88 of his 90 tours of duty.

3. At the time of his termination, the Grievor had two instances of discipline on his record (a written reprimand and 15 demerits) and had run through a switch shortly before, on July 24, 2023. The Grievor was given both a Form 780 and a Termination Letter, which the Union has alleged improperly discharged him "twice" by issuing him multiple penalties.

4. These documents were prepared by two different people. The Form 780 was prepared by Transportation Manager White and is dated August 11, 2023; the Termination Letter was drafted by Superintendent Maltby and is dated the day before, on August 10, 2023.

5. The Form 780 stated the Grievor was discharged for "…circumstances surrounding your involvement with run through switch…on July 24, 2023. The termination letter found the Grievor to be "unsuitable" as a probationary employee, under Article 58.

6. The issues between the parties are:

    a. Was the Company entitled to consider this as dismissal for unsuitability of a probationary employee given the wording of the Form 780?

    b. Did the Company act either in bad faith or arbitrarily when it

        i. held the Grievor out of service; and/or

        ii. determined he was unsuitable?

7. For the reasons which follow, the answers to these questions are "yes" "no" and "no". The Grievance is dismissed.

Analysis and Decision

8. The Grievor was a probationary employee who was in the late stages of his probation.

9. Under this Collective Agreement, the Company is given latitude to assess a probationary employee over 90 tours of duty to determine "suitability". Article 58.1 states:

> An employee will be considered as on probation until he has completed 90 tours of service under this Agreement. If found unsuitable prior to the completion of 90 such tours, an employee will not be retained in service and such action will not be construed as discipline or dismissal, but may be subject to appeal by the General Chairperson on behalf of such employee.

10. It has been well– established in arbitral jurisprudence that the standard for review for the termination of a probationary employee for "unsuitability" is significantly lower than for an employee who is protected under a "just cause" standard. This Arbitrator has written several decisions over the past 18 months which recognize the applicability of that well–accepted standard, to this industry: **CROA 4823**; **CROA 4859**; **CROA 4831**. As noted in **CROA 4823**, "suitability" does not provide the Company with "carte blanche". As the Company is exercising discretion, it must not make that decision in an arbitrary or discriminatory fashion, or with "bad faith", which is the standard of review. Arbitrators respect that standard for good reason. Once the probationary period is served, an employee gains "just cause" protections, which are subject to a more robust standard of review. Arbitrators do not have the expertise to make decisions on "suitability" but are charged with holding an employer to the standard to which it has agreed. This standard provides an employer with considerable latitude in assessing – and terminating – a probationary employee.

11. It must be first emphasised that it is not arbitrary or 'bad faith' behaviour for an employer to terminate a probationary employee late – or even very late – during their probationary period. While it can be understood that a probationary employee may start to take comfort the deeper he or she continues to work into that period, that comfort may well be misplaced.

12. In this case - by the parties' own agreement - the Company was entitled to make its decision at any point before the completion of 90 tours of duty. That is their right, to which

the Union has agreed. The Company making its decision late in the process does not create “bad faith”. The fact that this Grievor was on his 88th tour of duty when he was terminated does not flavour this dispute with a nefarious or “bad faith” motivation, in and of itself.

13. While the Grievor qualified in January of 2023, between March and July of 2023, the Company records indicate several instances of concern by the Company and also instances of discipline, including a written warning, 15 demerits and finally a run through switch in late July of 2023.

14. The investigation interview into the run through switch was completed on August 3, 2023. The Grievor was not merely brought in to be investigated in this instance because of his crewmate’s actions, as was argued by the Company, but because of his *own* actions.

15. According to the investigative interview of Mr. Bucci, there was a job briefing that day, where the Grievor was told the switches were “against” the Grievor and he should watch out for them. Mr. Bucci pointed to the switches and told the Grievor he would be on the point with his trainee, and that the Grievor was in control of the movement, on the leading point.

16. The Grievor then confirmed in his own interview that he was operating engine CN4785, and had a job briefing to watch out for switches lined against him (Q/A 12 and 14). He admitted his movement was not in compliance with CROR Rule 104 as it ran through the switch. In Q/A 22 he was asked what caused him to miss the switch. His answer was that he “phased out” and was looking further down the route, instead of at what was in front of him.

17. It must be remembered that at this point in time, the Grievor was almost finished his probationary period, having worked 88 tours of duty. That he had no explanation other than “phasing out” understandably raised concerns to the Company regarding his suitability, at that stage in his training and given the context of the very recent reminder he had been given to watch out for switches lined against him.

18. On August 10, 2023, the Grievor received both a Form 780 and a termination letter. Both documents indicted his employment was at an end.

19. The Company argued the Form 780 which “discharged” the Grievor for an incident in July of 2023 was issued in error and that he was dismissed under Article 58 as he was “unsuitable”. It argued this was the appropriate standard, given his probationary status. It noted it had identified several shortcomings during the Grievor’s probationary period, including the last run through switch, which together made the Grievor unsuitable to continue. It pointed out it had responded to the Grievor’s shortcomings with a combination of discipline and coaching, over he probationary period.

20. Those issues included: failing to maintain 50 feet of separation between equipment; PPE issues (safety boots undone; not wearing safety glasses while shoving); leaving switches out of correspondence; and failing to line a switch, resulting in a run through switch, which was the July 24, 2023 incident. The Company argued it was entitled to assess the Grievor’s suitability during his probationary period and that it had properly done so. It argued its decision of unsuitability was supported on the facts and was not discriminatory, arbitrary, or taken in bad faith. It argued its decision should not be disturbed. It also argued its decision to hold the Grievor from service for several days while making that assessment was not unfair, discriminatory, arbitrary or taken in bad faith.

21. The Union took issue with the Company’s actions on several bases, which it described as “technical”. First, it noted the Grievor was given a Form 780 for discharge for the July 24, 2023 run through switch, rather than a dismissal for “unsuitability” under Article 58. It argued the Company cannot now plead the Form 780 was an “administrative error”, or rely on “unsuitability” for its dismissal and that to dismiss the Grievor twice should render the discipline *void ab initio*. It argued that as the Company chose a disciplinary route to support the dismissal rather than an “unsuitability” route. The Union argued it must be held to that choice. It further argued that discharge was not supported for a run through switch, in this industry, and the discharge was excessive. Further, as the Company chose a disciplinary route, the Union argued it could not then hold the Grievor out of service: Article 82. It argued to do so was improper and artificial and was a decision taken either in bad faith or arbitrarily, to prevent the Grievor from completing that probationary period in the next two shifts and obtaining “just cause” protection.

22. The Union focused on the difference between the Form 780 – stated the Grievor was discharged on July 24, 2023 – and the termination letter, which took the position the Grievor was unsuitable under Article 58. It argued this constituted “multiple penalties”.

23. While arbitrators take a dim view of the imposition of two different penalties with the more “severe” penalty being imposed later by a higher level of management at a later date, this is not a case where multiple penalties were imposed, or where senior management imposed a more “severe” penalty. Rather, in this case, there were multiple reasons for the ***same*** penalty and the more senior management’s termination letter was created *before* that of Ms. White.

24. The Company provided the Grievor a termination letter on August 10, 2023. That letter was authored by K. Maltby, the Assistant Superintendent. That letter is dated one day ***before*** the date on the Form 780, which was authored by Ms. A. White, who is the Transportation Manager. That letter is quite detailed in its reasoning. The termination letter notified the Grievor he was being released for “failure to meet the established standards and expectations.” Mr. Malby did not state in the termination letter that the Grievor was being released solely for the run through switch, although that is included in he detailed reasoning he provided for his decision.

25. That termination letter went on to discuss that a review was conducted of the Grievors “…progress to date” and “work performance”, and noted the decision was being made under Article 58.1 of Agreement 4.16, which was quoted. The letter noted there had been “multiple coaching sessions” during the Grievor’s probationary period, “regarding your failure to comply with various rules”. It also noted that “[s]ome of these rule violations have resulted in damage to equipment and discipline assessed to yourself”. He noted a discussion held on December 9, 2022 regarding 50 feet of separation and his failure to speak up when a crew member had less than 50 feet of separation, and that despite that coaching, the Grievor had then on March 6, 2023 been observed “crossing between equipment with less than the required 50 ft of separation”. It also pointed to the Grievor’s “failure to follow instructions” resulting in a “side swipe collision” after shoving “without proper point protection” and the Grievor’s failure on July 1, 2023 to restore cross over

switches. The run through switch was also mentioned, which had occurred on July 24, 2023.

26. The Company has argued the Form 780 was issued as an "administrative error" taken by Ms. White. The Union expressed frustration, given that this was not Ms. White's first "administrative error" and the Union questioned how many errors she should be entitled to. Had there been no termination letter produced - or had it not been prepared before the Form 780 - the Union would have a stronger case against the Company's position regarding the basis for its decision. However, in this case, that termination letter does exist, and it is a detailed document. It was also written by an individual senior to Ms. White, *before* the Form 780 was prepared. Given the detailed termination letter and its timing, I am inclined to agree with the Company's assessment that the Form 780 was issued in error and was not the basis for the Company's decision. I am satisfied Ms. White's position as Transportation Manager is lower on the organization Chart than the Assistant Superintendent and that it was not Ms. White but Mr. Maltby who made the decision to terminate in the termination letter.

27. I am also satisfied the Grievor was advised that he was being terminated by the Company because he was found "unsuitable", under Article 58. He was not "left in the dark" as to the reasons he was found unsuitable, which reasons were in fact were more detailed than in several of the decisions filed by the parties. I can find no prejudice to the Grievor in having received two documents, or any basis on which to find this resulted in an unfair or impartial investigation (which had already been concluded at that point in time), or rendered the discipline to be *void ab initio*. The decision by the Company to issue discipline or even discharge during a probationary period does not – and cannot – change the *underlying status* of an employee as a probationary employee, who is subject to a lowered standard of "suitability" by virtue of Article 58. This is because under Article 58, an employee's status is not determined by what disciplinary approach or choice is taken by the Company during the probationary period, but by whether an employee has completed 90 tours of duty. That is the "touchstone" agreed upon by the parties.

28. The Union also relied on Article 82. That Article states:

> ARTICLE 82 Discipline
> 82.1 Employees will not be disciplined or dismissed until the charges against them have been investigated. Employees may, however, be held off for investigation not exceeding 3 days and will be properly notified, in writing and at least 48 hours in advance, of the charges against them. Investigations, as contemplated under article 82.2, will only be scheduled to start between 0800 and 1700 hours, where the employee being investigated normally reports for duty, or as otherwise if mutually agreed upon between the Local Chairperson and the Company.
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> 82.2
> a) Employees may have an accredited representative to appear with them at investigations, will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility. Questions and answers will be recorded and the employee will be furnished with a transcript or audio recording of the statement taken at the investigation. At an investigation, the investigating company officer or the employees shall have the right to record, at their own expense, the investigation proceedings on a recording device. This provision will not be used to delay or postpone the investigation proceedings.
> b) An employee under Company investigation and/or his/her accredited representative shall have the right to attend any company investigation, which may have a bearing on the employee's responsibilities. The employee and/or their accredited representative shall have a right to ask any questions of any witness/employee during such investigation relating to the employee's responsibilities. At the outset of the investigation, the employee will be provided with all evidence the Company will be relying upon, which may result in the issuing of discipline. The Company will provide sufficient time for the employee and his representative to review the evidence.
> c) When the Local Chairman of the union requests a copy of the discipline history of an employee who has a pending investigation, the discipline history shall be provided.
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> 82.3
> (a) Unless otherwise mutually agreed, employees must be advised in writing of the decision within 28 days from the date the employee's statement is completed. If a decision is not rendered within 28 days, the employee will be considered to be exonerated. When a request for an extension in the time limit is made, concurrence will not be unreasonably withheld.
> (b) If not satisfied with the decision, employees will have the right to appeal in accordance with the grievance procedure. On request, the General Chairperson will be shown all evidence in a particular case.
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> 82.2 In case discipline or dismissal is found to be unjust, employees will be exonerated, reinstated if dismissed, and paid as follows:

(i) Employees who were assigned to a Traffic Coordinator/Yard/Road Switcher/CSA position(s) will be paid five (5) days per week (or six (6) days if applicable), or portions thereof - prorated, at the basic rate of the respective position held at the time the discipline or dismissal was assessed.
(ii) Employees in all other Road Service will be paid 4300 freight miles per month or portions thereof - pro-rated, at the basic rate of the respective position held at the time the discipline or dismissal was assessed.

82.3 When employees are to be disciplined, the discipline will be put into effect within 30 days from the date investigation is held.

82.4 It is understood that the investigation will be held as quickly as possible, and the layover time will be used as far as practicable.

82.5 Employees will not be held out of service pending rendering of decision except in cases of dismissible offenses.
(Refer to Addendum 49)
82.8
(a) Employees will not be taken away from their home terminal for investigation except when the situation renders such action unavoidable.
(b) An employee who is instructed to report for investigation at a location other than his home terminal whether or not responsibility in the matter under investigation is subsequently attached, i.e., subject to discipline, shall nevertheless be paid for actual time spent travelling hour for hour, up to a maximum cumulative total of 8 hours in each 24 hours, at a rate per hour of 1/8th of the daily rate for passenger service.

29. The Union's argument relating to Article 82 assumes that the provisions of Article 82 overtake that of Article 58; that it is an 'either/or' situation. It argued the Company made a "choice" and must now treat the Grievor in a different "stream" and can only withhold him as provided in Article 82.

30. I am not persuaded by that argument. While Article 82 provides to the Company certain abilities to hold a Grievor out of service for disciplinary purposes, its existence does not preclude the application of Article 58 or serve to displace the Company's ability to assess the Grievor for "suitability", as a probationary employee. The two purposes served by those provisions are distinct; the one does not overtake the other. If the Union were correct that Article 82 overtakes the assessment process under Article 58, probationary employees would then be incentivized to be disciplined during their probationary period, so they cannot otherwise be briefly held out of service later in that process as part of a

"suitability" determination. That certainly cannot have been the parties mutual and objective intention in drafting Articles 58 and 82.

31. The Grievor was a probationary employee at the time his employment was brought to an end. The employer's decision is subject to a lowered standard.

32. Acting in bad faith towards an employee is a serious allegation. The question in this case is whether an elements of "bad faith" or "arbitrariness" have been established. The issue of a discriminatory decision was not in issue.

33. As earlier noted, bad faith or arbitrariness is not something that can be "assumed" because the Grievor was closing in on 90 tours of duty. This not a "race" to the end of the probationary period where the Grievor seeks to outrun the Company's assessment and make it across home plate before he can be called "out". The probationary period is meant to allow the Company to determine and try to address any shortcomings and make a determination of whether he or she should continue in employment, achieving "just cause" protection. This is a key element in a highly safety sensitive industry where an inability to follow instructions and safety rules can result in catastrophic and fatal consequences.

34. Considering all the facts and context – and Agreement provisions – I am unable to conclude that the Company acted in "bad faith" or in an arbitrary or discriminatory manner when it both held the Grievor out of service briefly and determined he was not suitable to continue as a Conductor, and when it determined he was unsuitable.

35. Reviewing the facts in this case, other than Article 82, the Union was unable to point to a any provision which would prevent the Company from holding the Grievor briefly out of service as part of its assessment of that individual's "suitability", as that employee neared the end of his or her probationary period. The fact that the Company's ability to withhold an individual from service is specifically limited in Article 82 supports the corresponding argument that – without that type of provision – the Company *can* act to withhold a probationary employee from service, in order to make its assessment under Article 58, *so long as it is not acting in bad faith or arbitrarily in doing so.*

36. While this Award is not to be interpreted as a licence to the Company to start holding probationary employees out of service unnecessarily, the assessment of the Company's

decision do so will always be made on the particular facts. It remains to the Company to make an assessment of suitability regardless of its discipline choices.

37. Whether or not an employer has acted in “bad faith” in making its assessment will always be factually dependent. It is not unreasonable that this assessment would be complicated by a disciplinary event which has occurred in close proximity to the end of a probationary period. In this case, a disciplinary event occurred during the time period in question that directly involved the Grievor; the time out of service in this case was very brief; and the Company was coming up on the 90th tour of duty for this Grievor and was required to both assess the very recent discipline and then make a global decision regarding his continuing employment; in a short order of time. It must be recalled this brief time out of service followed an investigation into the Grievor running through a switch, with no other explanation other than that he “phased out”. It would not be unreasonable for the Company to have had significant concerns that at 88 tours of duty - and with a reminder to watch for a switch that was not lined - the Grievor was not focusing on what was in front of him but rather “phased out”.

38. Given the detail of the termination letter that was ultimately drafted; the depth of the Grievor’s service (at 88 tours); and the Grievor’s very recent disciplinary investigation on August 3, 2023, I accept that it was necessary for the Company to conduct a thorough global and comprehensive assessment as to whether the Grievor was suitable, under Article 58, considering the very recent issues relating to switches. The letter of August 10, 2023 demonstrates that type of assessment was in fact undertaken between August 3, 2023, and when it was written on August 10, 2023. That letter could not have been written without that comprehensive and global review of the Grievor’s probationary record. It was not unreasonable to hold the Grievor out of service, briefly, to make that assessment of his suitability, given the most recent events. Doing so does not result in “bad faith’ or ‘arbitrariness’.

39. Given these factors, I can find no support for the Union’s argument that the Company’s decision that he was unsuitable was one tainted with either bad faith or arbitrariness. The Company has demonstrated the basis on which the decision was made and that it was not made in either “bad faith” and it was not “arbitrary”.

40. The Union also argued that – assuming the Form 780 was the relevant document - a "run through" switch does not support discharge in this industry, so that discipline was excessive.

41. Even were I to agree with the Union that the Company must be held to its Form 780 reason for discharge – which I do not, as noted above - that would not resolve this Grievance in the Union's favour. That would only raise the question of whether a probationary employee can be discharged for a "run through" switch. A probationary employee is not judged by a "just cause" standard; a probationary employee is judged on a lower "suitability" standard. Therefore, what establishes "cause" for dismissal for an employee under a "just cause" standard in this industry would be different than for an employee subject to a "suitability" standard. The two standards are distinct.

42. Given the latitude given to the Company to assess probationary employees on the standard of "suitability", had it been necessary, I would have determined the Company did not act in bad faith or arbitrarily when it considered the Grievor was unsuitable for continued employment when ran through a switch on his 88th tour of duty, given the reminder given to him in the job briefing; the depth of his probationary period; and considering the concerns raised by his probationary record as a whole.

43. The Grievance is dismissed.

I reserve jurisdiction to correct any errors and to address any omissions to give this Award its intended effect.

October 25, 2024

CHERYL YINGST BARTEL
ARBITRATOR