

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

CASE NO. 5002

Heard in Edmonton, February 14, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 30 demerits and subsequent dismissal issued of Conductor V. Sergeant ("the Grievor") of Calgary, AB.

JOINT STATEMENT OF ISSUE:

Following a formal investigation Mr. Sergeant was assessed 30 Demerits on December 17, 2020 for the following:

"In connection with your tour of duty while working as the Conductor on Train C59-14 on November 15, 2020. More specifically the derailment that occurred while shoving cars over a crossing on the Red Deer Subdivision while attempting to spot a customer; a violation of GOI Section 1, Item 32.11 Train Handling – General".

Mr. Sergeant was dismissed on the same date for the following,

"Please be advised in light of your December 17, 2020, assessment of 30 (Thirty) Demerits, you are hereby DISMISSED from Company Service for accumulation of 60 Demerits under the Hybrid Discipline and Accountability Guidelines".

Union Position

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union further contends that the investigation was conducted in an arbitrary, biased, and discriminatory manner. For these reasons, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Sergeant be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above. The Union further contends the discipline assessed is discriminatory, unjustified, unwarranted, and excessive in all the circumstances, including significant mitigating factors evident in this matter.

The Union requests that Mr. Sergeant be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees and denies the Union's request.

The Company maintains the burden of proof has been met and that the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union.

In regard to the Union's contentions that the investigation was not conducted in a fair and impartial manner, the Company cannot agree. The Company maintains that the requirements under the Collective Agreement were met, and the investigation had the essential elements of a fair and impartial investigation.

The Company maintains the discipline assessed was appropriate, warranted and just in all the circumstances. Accordingly, 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.) D. Fulton

General Chairperson CTY-W

FOR THE COMPANY:

(SGD.) F. Billings

Assistant Director, LR

There appeared on behalf of the Company:

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| D. Zurbuchen | – Manager Labour Relations, Calgary |
| A. Harrison | – Manager Labour Relations, Calgary |
| F. Billings | – Assistant Director, Labour Relations, Calgary |

And on behalf of the Union:

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| K. Stuebing | – Counsel, Caley Wray, Toronto |
| J. Hnatiuk | – Senior Vice General Chairperson, Vancouver |
| D. Fulton | – General Chairperson, CTY-W, Calgary |
| L. Inverarity | – Local Chair, Moose Jaw |

AWARD OF THE ARBITRATOR

Background, Issue and Summary

[1] The Grievor was employed by the Company as a Conductor, based out of Lethbridge. He was hired on September 10, 2018.

[2] This Grievance arises from actions taken on November 15, 2020, when the Grievor was called on a familiarization trip on Train C59-14 on the Red Deer Subdivision.

This was his first familiarization trip on this Subdivision. The other members of the crew were Locomotive Engineer (“LE”) Schnurr and Conductor Singh.

- [3] On that date, Train C59-14 derailed while going over a crossing at 49th Avenue in Innisfail (the “Crossing”). The Grievor was the employee who was positioned at the Crossing when the derail occurred.
- [4] An Investigation of the Grievor took place on November 24, 2020. The Grievor was assessed 30 demerits and dismissed for accumulation of demerits. LE Schnurr was not disciplined. Conductor Singh received a Formal Reprimand.
- [5] This Grievance was filed against that decision.
- [6] The issues in this Grievance are:
- a. Was there just cause to discipline the Grievor for this derail? If so,
 - b. Was the discipline imposed just and reasonable? and, if not,
 - c. What other discipline should be substituted by the exercise of this Arbitrator’s discretion?

Analysis and Decision

- [7] There are hazards created to the movement of trains due to the presence of snow and ice, *particularly at crossings*, as noted in item 32.11 of the GOI, s. 1, ss. 32, “Train Handling, General Instructions”, which reads:

When snow and ice conditions are such that they are building up in yard tracks, elevator tracks, industrial tracks and **particularly on crossings** within such tracks, the locomotive must be run through the tracks prior to cars being set out, lifted or moved.¹

- [8] I am satisfied that – as described by the Company in its Brief at paragraph 11 – flanged wheels and the weight of railway equipment keep it on the track. If anything interferes with the flange’s ability to remain inside the track, a derailment may occur.

¹ Emphasis on this phrase is in the Form 104 Letter dated December 17, 2020.

Empty cars which are lighter weight have a higher probability of derailment in these circumstances. Where the railway tracks and public roadways cross, there is a desire to keep the asphalt smooth and level for the public, while still maintaining an adequate gap for the functioning of the wheel flange. In winter, the spaces between the asphalt and the track at these crossings can fill up and build up with compacted ice and snow.

- [9] Item 32.11 has a “built in” discretion placed on a train crew to assess if ice and snow has “built up” at a particular crossing, requiring the locomotive to first “cut” the crossing before a shoving movement can occur. If so, the heavier locomotives are to be run through the crossing to break up the ice and compacted snow, prior to shoving rail cars over the crossing.
- [10] The issue raised by this Grievance is who bears the responsibility for that assessment, in these circumstances.
- [11] On November 15, 2020, Train C59-14 was being crewed by LE Schnurr and Conductor Singh. The Grievor was on a familiarization trip.
- [12] I am satisfied that a familiarization trip is an opportunity for the Grievor to learn the Subdivision and its operating requirements, and that this was the Grievor’s first trip on this Subdivision. However, I am also satisfied that the hazards caused by ice and snow are not limited to the Red Deer Subdivision.
- [13] On that date, the Train left Calgary with 136 cars, 130 cars were to be set off at Bowden, with the remaining six empty grain cars to the Innisfail Central Transload Facility. The Power was then to be tied down at Bowden. While the crew was approaching Innisfail traveling Northward, the evidence of the Grievor is that a job briefing was performed, including switching requirements, spotting of the empty grain cars, and the crossing at 49 Ave. in Innisfail (the “Crossing”). According to the Grievor’s Investigation evidence, it was LE Schnurr and Conductor Singh who determined how the work was to be performed that day:

Conductor Singh and Locomotive Engineer Schnurr discussed how they were going to spot the six cars and conductor Singh was going to get off to get the derail and they asked me to get the mainline switch to get into the storage pad and then walk back to the crossing. **They decided that they were going to back the**

movement up over the crossing real slow. I was informed by Locomotive Engineer Schnurr to let him know when the leading car had cleared the crossing and that while I was at the crossing they would be shoving back real slow.²

- [14] When the Grievor was asked “what tasks where [sic] being carried out prior to the “minor derailment” over the crossing...”, he replied, in part:

As we arrived at Innisfail, conductor Ravinder Singh and Locomotive Engineer Schnurr discussed how they were going to do the spot. **It was observed that the crossing had some build up and Locomotive Engineer Schnurr said he would come back real easy once the switch was lined.** They Told [sic] me to line the mainline switch while Conductor Singh lined the switch to the storage track and took off the derail...³

- [15] When the Grievor was asked if there was any discussion about the weather, or how it would have influenced “switches or crossings that your movement may encounter”, the Grievor stated “Yes as per the job briefing that was discussed. *Hence the movement was planned to shove slowly over the crossing*”.⁴

- [16] At Q/A 27 the Grievor stated he did not recall any job briefing that “...your movement should have cut the crossing first with the engine...as described in item 32.11” of the GOI.

- [17] Neither LE Schnurr nor Conductor Singh were interviewed by the Company. While their statements were taken, neither statement referred to how the job briefing proceeded on that day. Neither were interviewed as part of the Grievor’s Investigation.

- [18] From those statements, I am satisfied a decision had been to shove the cars across the Crossing “nice and easy” in the words of Conductor Singh; and “really slow so crew could watch car at crossing” according to the LE, given the presence of ice and snow.

² Q/A 17 and 18, emphasis added.

³ QA 20, emphasis added.

⁴ Q/A 19, emphasis added.

[19] The only evidence relating to the job briefing discussion was given by the Grievor. I am satisfied of the following facts;

- a. The plan for performing the work of Train C59-14 was developed by LE Schnurr and Conductor Singh; which is consistent with the fact the Grievor's run was for familiarization purposes;
- b. The job briefing was performed by LE Schnurr and Conductor Singh and the Grievor offered to help carry out the plan that was developed;
- c. There was no assessment planned for whether there was ice/snow build-up of the Crossing which could hinder a safe movement; rather, the "plan" for that work was to *assume* if the shoving was made "nice and easy" and "slowly", it would be safe, given the state of the Crossing.
- d. According to the LE's statement, he had asked the Grievor to let him know when the first axel cleared the Crossing.
- e. The Grievor's position at the Crossing was for a specific purpose: To advise the LE when the first set of wheels were all the way through the Crossing.
- f. In the Interview, the Company Officer referred to this as a "minor" derail.

[20] I am also satisfied the LE and Conductor Singh had no expectation of the Grievor to assess the state of the Crossing, as *by that point*, that assessment had *already been made* by LE Schnurr and Conductor Singh, who had determined it would be safe to shove cars across the Crossing, if it was done "nice and easy" and "slowly".

[21] Conductor Singh was dropped off at the Transload Facility to line the customer switch and removed the derail. This was approximately 200 feet from the crossing. LE Schnurr then proceeded ahead and dropped the Grievor off at the main line switch. The Grievor positioned himself at the Crossing.

[22] The Grievor was asked at Q/A 23 if he had any concerns with the movement safety going over the crossing, and he answered "No". Superintendent Roseberry indicated

the Grievor said the crossing was not “concerning” and the Grievor confirmed that advice in the Investigation.

- [23] LE Schnurr then backed up slowly. The Grievor said “first wheel is over then immediately called stop”, as the car he was watching derailed at the crossing.
- [24] The Grievor’s statement was that the LE stated to him “I’m coming back nice and easy, let me know once the first set of wheel[s] is clear of the crossing”. He indicated he said “we are clear, then I immediately said stop as the wheel had popped off at the end of the crossing”.
- [25] In the words of Conductor Singh – 200 feet away – the wheel “popped off” the rail and the movement stopped. He indicated he walked back to the Crossing to see what had happened. The LE also joined Conductor Singh and the Grievor and it was decided to pull ahead to see if the issue could be fixed, which was done according to the LE, but the issue was not fixed.
- [26] While both LE Schnurr and Conductor Singh came back to look at the Crossing after the derail, as neither was interviewed, they were not asked their assessment of the Crossing after that derail or – as already noted – about the job briefing.
- [27] Shortly after the derail occurred, Superintendent Roseberry came out to view the situation. The Superintendent described the Crossing to be in “very concerning shape, to the point that it needed cleaning by three company officers, and the crew itself with lining bars to deem it safe to shove over”.
- [28] It was also Superintendent Roseberry’s evidence that he was told by the Grievor that the “entire crew job briefed the crossing, and it was decided to take it slow over it” and that the Grievor stated the crossing “did not appear to be in concerning shape”.
- [29] At Q/A 29, the Grievor was asked if it would not be concerning if it took the effort described by Superintendent Roseberry to clear the crossing? An Objection was taken to this question, as not eliciting facts, and the Company Officer clarified he wanted an answer to the question with regards to the build-up of debris in the crossing that was present which caused the first car that was shoved over it, to

derail. The Grievor answered that question as “[t]here was soft snow over the rails that looked to be fine to go over”.

The Consequences and Issue

- [30] As noted above, LE Schnurr and Conductor Singh were not interviewed regarding the job briefing. Conductor Singh was issued a Formal Reprimand. No evidence was filed as to the basis for that assessment. LE Schnurr was not issued any discipline.
- [31] The Grievor was assessed 30 demerits and dismissed for accumulation. The discipline assessed to the Grievor was for violation of Item 32.11 of the GOI, relating to Train Handling.
- [32] The issue raised by this case is whose responsibility it is to make the determination required by Item 32.11 of whether the locomotive should first be “run through” prior to shoving equipment in this circumstance. The factual issue in this case is also *when* that determination was made.

Arguments

- [33] The Company argued that whether or not the Grievor was familiarizing on the trip, the Grievor retained a responsibility when assisting the crew to act as a Conductor, and that as a Conductor, he would be required to assess the condition of the Crossing to determine whether the shoving movement would be safe, as required by Item 32.11. It argued that assessment was not dependent on whether the subdivision was one the Grievor was not familiar with, as that requirement was not specific to the Red Deer Subdivision, but to all Subdivisions which had a crossing. It argued the Investigation was fairly conducted, and that the Grievor answered the question as formulated after the Union’s objection.
- [34] The Union disagreed. It argued that the Grievor was only on a familiarization run, and that it was up to the crew of the train – LE Schnurr and Conductor Singh – to make the plan and the assessment required by Item 32.11. It noted that LE Schnurr

was not even investigated, nor was he given any discipline. It also noted that Conductor Singh was given a Formal Reprimand (with an Admission of Responsibility waiver); and did not have a formal Investigation. It also argued the Investigation was biased, as the Company Officer was biased in asking Q/A 29.

Analysis

[35] The Company bears the evidentiary burden of proof to establish both cause for – and reasonableness of – its discipline.

[36] The questions to be asked under the *Re Wm. Scott* framework⁵ in assessing that discipline, are:

- a. Has the employee given just and reasonable cause for some form of discipline?
- b. If so, was the employer's decision to discipline an excessive response in the circumstances? and, if so
- c. What alternative measures should be substituted as just and equitable?

[37] It is well-established that discipline cannot be discriminatory when more than one employee is involved in an incident. Discriminatory discipline by an employer could properly be considered as an “excessive” disciplinary response.

[38] The first question that must be assessed is whether cause existed for some form of discipline of the Grievor.

[39] As noted in item 32.11 of the GOI (“Train Handling”), in circumstances where snow and ice is building up in tracks, particularly on crossings, the locomotive must be “run through the tracks prior to cars being set out, lifted or moved.

[40] The question in this case is whether the Grievor failed in his responsibility to make that determination, for which he was disciplined with an assessment of 30 demerits.

⁵ *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. No. 98, at para. 13.

- [41] The only direct evidence regarding the job briefing which is before this Arbitrator is that of the Grievor, who stated the job briefing for this work was performed by LE Schnurr and Conductor Singh. This evidence is consistent with the fact that it was those individuals had been *assigned* to that work, with the Grievor along for a familiarization run.
- [42] Put another way, if the Grievor was not on that Train, the work would still have been completed by those two individuals, in the manner in which they chose to do it.
- [43] Further, as this was the first time the Grievor was on this run – and his purpose for being on the run was familiarization – the deference he stated in his evidence that he gave to the determinations made by LE Schnurr and Conductor Singh for how best to perform the work would not only be understandable, but reasonable.
- [44] I am satisfied the plan for completion of this work included a determination by that crew – *before the Grievor was asked to stand at the Crossing* – that the Crossing did not have the requisite ice/snow build up that would require using the locomotive to cut the Crossing before shoving the empty cars. This is not a case where the Grievor was dropped off to first assess the Crossing, so a plan could then be made for the best manner in which to complete the work.
- [45] That said, I am satisfied that the Grievor would have had a broad obligation as a Conductor to ensure the movement was safe. However, that obligation is also equally imposed on LE Schnurr and Conductor Singh. As the Grievor was the employee who was ultimately positioned at the Crossing, he did have the last and best opportunity to view its condition.
- [46] I am satisfied the Crossing was in “concerning shape” as noted by Superintendent Roseberry and that the Grievor should have noticed that condition as unsafe. He was the employee in the best position to see the Crossing before the plan was put into place.
- [47] I am satisfied the first question is answered as “yes” – there is cause for some form of discipline.

- [48] Turning to the second question, it must be determined whether the discipline imposed was excessive. I have been drawn to the conclusion that it was.
- [49] The discipline in this case was discriminatory, and as such would be considered as not only excessive, but also unreasonable and unfair.
- [50] I am satisfied that any responsibility for this shoving action – and the resulting derail – was not only the responsibility of the Grievor for failing to recognize ice/snow build up, but also of LE Schnurr and Conductor Singh, whose plan to perform this work did not first *require* that determination be made. Those employees were satisfied the ice/snow build up was not of a level requiring that cut.
- [51] I am satisfied it was LE Schnurr and Conductor Singh who *took responsibility to make a determination under item 32.11*, and that this was done before the Grievor was even asked to stand at the Crossing. This is not a case where the crew was unsure of the state of the Crossing and dropped the Grievor off to make that assessment. As such, those employees shared in the responsibility for this ultimate derail. According to the evidence, by the time the Grievor was asked to stand at the Crossing, LE Schnurr and Conductor Singh had already determined that it was safe to shove the equipment across that Crossing, so long as it was done “nice and easy” and “slowly”. The Grievor was asked to stand at the Crossing to carry out that plan, not to determine if it was appropriate given the state of the Crossing. LE Schnurr and Conductor Singh had already made what they felt was a satisfactory assessment regarding the state of the Crossing.
- [52] That said, the Grievor as a Conductor would *also* be expected to know and understand item 32.11 and to assess the Crossing while he was standing next to it, and communicate if it was unsafe. He does bear responsibility for that action, and cause has been determined for that failure.
- [53] The Company bears the burden of proof to establish its discipline is fair and reasonable. I accept that imposing discipline involves not just to the *assessment* of the amount of discipline, but also the *process* of assessing that discipline⁶ and

⁶ See **CROA 4237** for an example of a process issue.

whether that discipline is *discriminatory*, when an incident occurs where more than one employee shared in the decision-making process.

- [54] When multiple employees are involved in an incident – and when there is evidence that the decision-making which led to the incident was not confined to one grievor – it would be expected that the Company would interview the other employees to understand that decision-making and determine if responsibility for an incident is shared. It would also be expected that if the discipline record of those individuals impacts that assessment, that record would be filed as evidence to support that differential discipline.
- [55] It is not clear why LE Schnurr and Conductor Singh were not interviewed by the Company to determine if discipline was appropriate for the plan which the Grievor gave evidence about in his Investigation, and their decision that the shoving movement could be completed if done “nice and easy” and “slowly”. There is jurisprudence where employees have been disciplined for the failure to conduct a proper job briefing: **CROA 2949**.
- [56] There was also no explanation offered why Conductor Singh – who was off the Train but 200 feet from the Crossing – was given a Formal Reprimand, but LE Schnurr was not given any discipline at all, or why they were both not investigated if the Company’s position – as noted in Superintendent Roseberry’s Memorandum – was that the plan was determined by *all* of the crew members. The best evidence for determining that issue is from those crew members themselves, but they were not interviewed.
- [57] While I have determined the Grievor had a responsibility to properly assess and communicate regarding the condition of the Crossing, as in **AH803**, this Record has not disclosed a sufficient explanation for the differential treatment of the Grievor by assessment of 30 demerits, when LE Schnurr was not disciplined for his part for what I have determined was a faulty job briefing relating to Item 32.11 – and a determination that it was appropriate to shove the movement if done “nice and easy” and “slowly”. It is not clear why Conductor Singh – who was 200 feet away from the Crossing – was disciplined.

- [58] I am satisfied that the Company's decision to discipline this Grievor with 30 demerits; to not discipline LE Schnurr *at all* for his part in that decision-making which led to this incident; and to not file evidence regarding the basis for the differential treatment of these employees has resulted in discriminatory discipline as against the Grievor.
- [59] The Company has therefore not met its burden to establish the discipline which it assessed against this Grievor was reasonable. It discriminated as against his Grievor; offered no evidence from the other employees; and offered no evidence regarding its disciplinary process regarding those other employees. In particular, I find the imposition of discipline against Conductor Singh and the Grievor but not as against LE Schnurr to be confusing.
- [60] The next question is if the discipline cannot stand under the second question, must it be reassessed, or set aside as unreasonable?
- [61] The Company's discipline under the second question must not be "excessive", under the conceptual framework of *Re Wm. Scott*. Discriminatory discipline does not relate to the assessment of the amount of discipline; rather, it cuts to the heart of reasonableness. Discipline which is discriminatory is not discipline which is reasonable. It is also not discipline which fits neatly into the *Re Wm. Scott* framework.
- [62] I was not provided any jurisprudence regarding the impact of discriminatory discipline, beyond **AH803**, which found the discipline to be discriminatory and then determined what level of discipline which should have been imposed on all employees. On the Record which is before me, I do not have sufficient information to make that same determination.
- [63] As an experienced labour arbitrator, I am aware there is jurisprudence establishing the doctrine of discriminatory discipline, which – when found – allows an arbitrator to reduce the discipline down to the discipline imposed on the other employees involved in the incident⁷. As this discipline was found to be discriminatory, I am

⁷ See for example the recent mention of this doctrine in *Fujitec Canada Inv. v. The International Union of Elevator Constructors, Local 130, Calgary Alberta* 2024 CanLII 4119, at para. 70.

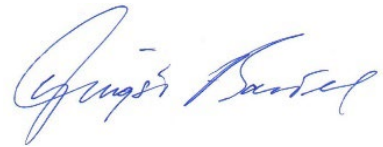
prepared to exercise my discretion to reduce the discipline assessed against the Grievor to that assessed to Conductor Singh, being a Formal Reprimand.

Conclusion

- [64] The Grievance is allowed, in part. The discipline assessed to the Grievor is reduced to a Formal Reprimand. His discipline record is to be amended accordingly.
- [65] The Grievor is to be reinstated and made whole for any lost compensation and benefits, which amount is remitted to the parties for their determination. That amount would consider deduction for mitigation by the Grievor in the interim.
- [66] Should the parties be unable to agree, I reserve jurisdiction to resolve that question, by reference of that issue to this Office, as a stand-alone question.

I reserve jurisdiction as noted above regarding remedy, and I further reserve jurisdiction to correct any errors and/or address any omissions, to give this Award its intended effect.

April 2, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**