CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5033

Heard in Calgary, April 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Yard Service Employee A. Jolicoeur.

THE JOINT STATEMENT OF ISSUE:

Mr. Jolicoeur was outright dismissed as shown in his CPKC Form 104 as follows, *"Formal investigation was issued to you in connection with the occurrence outlined below:*
"your alleged failure to secure a cut of cars while working 231-16 on April 16, 2023 as observed by TM Zach Colasimone."

Formal investigation was conducted on May 5, 2023 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that, investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- *T&E Safety Rule Book T-14 – Handbrakes*
- *GOI Section 4 – Securing Equipment*
- *System Bulletin – Revision to GOI Section 4 Item 6.0*

In consideration of the foregoing, please be advised you are hereby dismissed from company service effective May 22, 2023.

Notwithstanding that the above mentioned incident warranted dismissal in and of itself, based on your previous discipline history; this incident also constitutes a culminating incident which warrants dismissal.

As a matter of record, a copy of this document will be placed in your personnel file."

Union Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted and will be relied upon, the Union contends the Company's outright dismissal of Mr. Jolicoeur was excessive in all circumstances.

Mr. Jolicoeur took responsibility for what happened and explained why. This of course does not free him of responsibility but the educational process that took place should also be considered. The purpose of the investigation is to find out the facts, provide education so the incident will not happen again, it is not solely about punitive discipline on an employee which the Company uses as their educational component, and in this case outright dismissal.

Mr. Jolicoeur was forthright in what happened and the mistake that he made. The Company was in position to assess if required a much lesser form of discipline.

The Union further looks at the length of time this employee has been working. From his qualification to a Conductor to this incident was a matter of weeks. This was an opportunity to provide further mentoring and education, it is plain to see that maybe the qualification of this employee was premature as the TSB has provided in other circumstances (this RCLS crew between them had literally weeks of qualified service).

Mr. Jolicoeur believed the testing of handbrakes was correct in how it was performed, by providing further education on the process this newer employee would have a better understanding of the full process of such.

The Union believes this employee with more experience provided and the use of mentoring/education instead of punitive discipline/dismissal will become a better employee given the opportunity.

As per the facts presented within our grievances as well the investigation, the Union requests that the Mr. Adam Jolicoeur be reinstated forthwith and be compensated all loss of wages 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 relies on its replies.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation. The Union does not question whether the incident occurred, only the quantum of discipline assessed.

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 discipline record. The Company's position continues to be that the discipline assessed was just, appropriate, warranted in all the circumstances.

The Company disagrees with the Union's vague claim of piling on of alleged violations as there is no evidence of piling on of alleged violations.

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 and dismiss the grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) F. Billings**
General Chairperson	Asst. Director Labour Relations

There appeared on behalf of the Company:

A. Harrison	– Manager Labour Relations, Calgary
E. Carriere	– Manager Labour Relations, Calgary
R. Araya	– Labour Relations Officer, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
A. Jolicoeur	– Grievor, via Zoom, Toronto

AWARD OF THE ARBITRATOR

Background and Issue

[1] The Grievor was employed as a Conductor. He entered Company service on August 8, 2022, and became qualified as a Conductor in January of 2023.

[2] This Grievance is filed against his dismissal on April 16, 2023 for violating several safety rules relating to handbrakes and securing equipment. On that date, The Grievor failed to properly secure 28 cars, which rolled down the track on their own momentum.

[3] Culpability for the Grievor's conduct is not at issue. The issue between the parties is whether discharge was the appropriate discipline, given all of the facts of this case.

[4] For the reasons which follow, the Grievance is dismissed. While it is the ultimate and most extreme form of discipline, discharge was an appropriate and reasonable response to the facts and circumstances of this case.

Facts

[5] While culpability is admitted, the facts of what occurred on April 16, 2023 are relevant to a determination of the appropriate quantum.

[6] On April 16, 2023, the Grievor was acting as a foreman on an RCLS assignment on train HT02-16. As of that time, he had been employed by the Company for approximately 8 months. Six of those months were training and for approximately two of those months he was a qualified Conductor. On April 16, 2023, he was acting as a Foreman on a two person crew, for yard switching duties. Such duties are regularly performed by Conductors.

[7] While carrying out his assigned duties, the Grievor switched out 18 cars and added them to track FT13, which already held 10 cars. The new total was then 28 cars. He then removed the three handbrakes that had been securing the 10 standing cars, added the 18 cars and then applied three handbrakes to the new total of 28 cars. It is not clear why the Grievor felt three handbrakes would be sufficient when 18 cars had just been added to that track, as he had added 1519 tons to FT13. He stated that he always "applied a

minimum of three brakes” and that he’d had three brakes hold more tonnage before in F Yard.

[8] That number of handbrakes proved insufficient

[9] The Grievor believed the handbrakes were effective, as he tested the handbrakes, However, the Grievor failed to appropriately test the securement, as he did not allow that the RCLS system had its own safety feature which would apply an independent brake on its own, at speeds under .5 MPH, and so give a false securement test.

[10] The Grievor did not recall the speed he reached, or seeing the independent brake apply, but he acknowledged that the download demonstrated a speed of under 0.5 MPH and that it did apply an independent brake. The time of the test was six seconds, which the Grievor noted during the Investigation was a time he believed was appropriate on that date, but he had learned through this event that “it clearly is not”. The Grievor also failed to notice that the slack in the train was not “bunched”, which should have also demonstrated to him the handbrakes were not effective. The Grievor stated he had a “lapse in judgment” in not recognizing this. The Grievor acknowledged he did not comply with GOI Section 4, item 2.2 on testing the effectiveness of hand brakes. The Grievor was also aware the grade was initially a downhill one, west to east.

[11] The Grievor assumed the cars were secure. They were not. The Grievor cut the locomotive away from the cars, which left them unattended. Almost immediately, the 28 cars began to roll eastward, on its own momentum.

[12] The Grievor’s crew mate had been proceeding down the track, with his back to this uncontrolled movement of cars.

[13] It is not disputed another crew noticed this uncontrolled movement and radioed the tower, who instructed the Grievor to go back with his locomotive, couple onto the cars and secure them. The Grievor was able to catch the uncontrolled movement with his locomotive and bring it to a stop, and to spot them back into track FT13.

[14] The cars had proceed approximately five car lengths on its own momentum.

[15] In re-spotting the cars, the Grievor then failed to remove the three handbrakes he had previously applied. He indicated he was not sure why he did not remove these

handbrakes, and stated in explanation that he was “so happy that I caught the cars that I didn’t think of removing the handbrakes” (Q/A 63). He applied three more handbrakes and tested the effectiveness. He waited five seconds to ensure they were secure.

[16] In his Investigation, the Grievor stated he would “change how I effectively test the handbrakes” going forward. He also stated he “believed at the time I was being vigilant and following all the rules up until the incident” (Q/A 67), which statement was echoed when questioned regarding the various actions/inactions which took place that day, leading up to this incident. He stated that he was a

> …new employee and I am learning every day. I want to have a long successful career with CPKC. I understand the severity of this situation and how the outcome could easily been a lot worse and moving forward, I will be a lot more vigilant when securing equipment. I plan to go the rest of my career with any further incidents.

[17] During his short employment, the Grievor had been assessed discipline twice before. On January 24, 2023 he was issued a formal reprimand for lining his movement for an incorrect route resulting in a run through switch and a one car derailment; and on February 24, 2023, he was issued a 20 day suspension for improperly lining a switch, failing to point and observe and failing to protect the point, which resulted in a collision with another movement and a derailment. That discipline was grieved and upheld as reasonable in **CROA 5032**[1],

Arguments

[18] The Company argued the Grievor failed to follow multiple safety rules for application of handbrakes and sufficiency of handbrakes, which resulted in a failure to properly secure equipment. It argued this is a significant and serious violation in this industry. He also failed to remove the three handbrakes he had put on, prior to re-spotting the movement, after it had rolled.

[19] It argued the discipline was not excessive, given the implication of the Grievor’s failures, which resulted in cars rolling toward his crewmate, uncontrolled. It argued the factors in this case are aggravating for discipline, and outweigh the Grievor’s acceptance

[1] Heard during the same CROA session as this Grievance.

of discipline, which is the only mitigating circumstance. Given the Grievor's short service, and this being his third safety-related incident during that time period, it argued the discipline was not excessive and the Company appropriately considered this a culminating incident, capable of supporting discharge.

[20] For its part, the Union noted the Grievor took responsibility for what happened, explained why he did what he did – or did not – do; and that he believed he was correct. The Union argued for more education and experience, as opposed to a punitive response. It argued the appropriate discipline for a failure to apply handbrakes would be a written caution to a seven day suspension, or if aggravating circumstances, then 10 to 20 demerits.

[21] It argued there were mitigating factors, including the lack of sufficient training by the Company, as the Grievor had only a few weeks' training on RCLS, which the Union argued was an institutional problem, as there was a lack of "traditional breaking-in periods". It argued discharge was grossly excessive.

[22] In Reply, the Company argued the Union has expanded its remedy by seeking to have the remedy expunged, which was not put into issue in the Grievance correspondence or the JSI. It argued the Grievor's record was appropriately considered in determining if discipline was warranted. In response to the Union's comments regarding training, the Company noted the Grievor was a qualified RCLS Conductor, and that the Union's statements regarding training are just that – statements. It noted there was both classroom and on-the-job training overseen by an instructor, and a test that must be completed. It argued the Arbitrator must not rule or comment on training issues, which are beyond the scope of this dispute and this Arbitrator's jurisdiction, and have been tabled at bargaining. It argued the jurisdiction of this Arbitrator is the quantum of discipline. It also distinguished the Union's cases.

[23] In its reply, the Union argued the discipline record of the Grievor only shows two prior incidents, one of which is under Grievance this session (**CROA 5032**). It noted that the Grievor was instructed to perform a dangerous move in catching cars "on the fly". It noted the Grievor believed he was completing all his tasks correctly and that this is precisely the type of incident which could be avoided with mentoring, noting that "green

vests" are worn to show that the individuals are "still learning" and should be mentored and educated. It again raised issue with the training provided by the Company on RCLS operation, and argued the Grievor was not aware of how the RCLS unit worked or that the speed would not allow for the locomotive engine brakes to release fully, due to a lack of training. It relied on a report of the Transportation Safety Board and asked the Arbitrator to consider the significance of the reduction in training.

[24] While the Union recognized this Arbitrator could not address this systemic issue in this Grievance, it argued it should be a factor which precludes the Company's imposition of harsh discipline to new hires. It noted the Grievor had no demerits so this was an 'outright dismissal'. It distinguished the Company's jurisprudence.

Analysis and Decision

[25] The issue raised in the JSI is the appropriate quantum of discipline, for this Grievor. The framework for that analysis is as set out in *Re Wm. Scott & Co.*[2]

[26] As was found in **CROA 5032**, "[i]t is beyond this arbitrator's jurisdiction to address the systemic issues of training raised by the Union". Like in that case, in this case there is no evidentiary basis to consider the training of the Grievor, as an appropriate factor.[3] Statements and arguments by parties at arbitration are not evidence; and the TSB Report is not specific to this Grievor. As the Union recognized, it is not this Arbitrator's role to address any systemic issues which are alleged surrounding training. This Arbitrator's role is to assess the appropriate quantum of discipline for this qualified Conductor's actions.

[27] The Union argued the culminating incident doctrine was not properly relied upon in this case. That doctrine provides that – even if the ultimate incident is not one which supports discharge – that result can flow from consideration of the overall record of an employee.

[2] [1976] B.C.L.R.B.D. 98
[3] See also the comments made on this issue in **AH641**.

[28] That doctrine is not applicable in this case, as this incident *is* an incident which itself can support discharge when the *Re Wm. Scott & Co.* factors are reviewed, as reasoned below.

[29] Turning to a consideration of those factors, no two cases will ever share the same factual context, which limits the use of precedents when assessing the second question of the *Re Wm. Scott & Co.* analysis. However, such cases do provide the general "scaffolding" on which discipline rests.

[30] While the list of factors is not "closed", any factor which a party argues as relevant must be supported by appropriate evidence.

[31] One of the important factors in this case is the nature of the offence. In **CROA 4471** an LE was disciplined for being part of a crew that failed to apply hand brakes. In that case, the arbitrator stated that the matter of "properly securing equipment remains of the utmost importance"[4] noting that a safety critical designation is given "because of the grave consequences that can result from potential errors or negligence"[5]. In that case, one handbrake was applied instead of two to several cars, and there were no free-rolling cars.

[32] The arbitrator in **CROA 4471** also noted she "agreed with the Company's assessment of the importance of safety rules for the train industry, especially in regard to proper brake testing of equipment left unattended". In that case, the arbitrator found the LE's actions to be "highly irresponsible" as he "failed to properly check the effectiveness of the handbrakes by forgetting to release air brakes during testing" and he did not verify with his Conductor whether two handbrakes were applied.

[33] The arbitrator noted the Conductor in that case was dismissed for the incident, but that no jurisprudence supported the discharge of the LE in those circumstances. She set a suspension of 40 days as punishment which was "just short of discharge".

[34] The case before me *does* involve a Conductor who made the actions/inactions that led directly to this event. The Grievor's actions led to 28 cars rolling uncontrolled in the

[4] At p. 5.
[5] At p. 5.

Toronto Yard for five car lengths, which is no doubt a serious and significant offence in this industry. None of the cases provided by the parties involved the movement of this many unattended cars. Most cases involve either single cars, or one or two cars. While one runaway car presents a greater level of significance than does no movement of cars, 28 runaway cars is very significant and serious indeed.

[35] Only one case, **CROA 4564,** involved the movement of a "double digit" number of cars due to lack of sufficient handbrakes. It is the closest fact situation in the offered jurisprudence. In that case, the arbitrator described as "serious" an incident where 18 cars that were left inappropriately secured started to move downhill. In that incident, the cars were not caught and a sideswipe also occurred, which stopped the cars. Both the LE and the Conductor were dismissed. The Conductor did not grieve that decision. In that case, there were other contributing factors to the runaway occurring, so the LE was reinstated, but without compensation, leading to a lengthy suspension.

[36] While the Union argued that case was more severe given that a collision occurred, it also involved 10 *less* cars than were unsecured in this case, and the Conductor's dismissal was not grieved. It was the *LE's* conduct that was considered in that case, and he did not fail to set the handbrakes.

[37] In this situation, it is fortunate a collision did not also occur, as it could have. There is no doubt that this type of incident has potentially fatal consequences for those working in its proximity; and that the Grievor's crewmate was potentially in harms way had a derailment occurred. There is no dispute he was walking with his back to those cars at the relevant time.

[38] In both **CROA 4464** and **4682**, both arbitrators noted the importance of deterrence for serious offences. In **4682** there was one runaway car, which rolled down the track for a mile.

[39] Turning to the Grievor's actions/inactions, like in **CROA 5032,** this was not a "one action/inaction" event of failing to apply a hand brake. There were several points at which the Grievor's actions/inactions could have prevented this serious incident, had he followed the safety rules. His rule violations compounded on themselves, as was also the case in **CROA 5032.**

[40] The Union argued that the appropriate discipline was a written caution to a seven day suspension, or perhaps 10-20 demerits. With respect, I cannot agree with that assessment of the jurisprudence. The Union relied on several cases which can be distinguished as involving grievors with more extensive service, or in different roles, with stronger disciplinary records, or arising from proficiency testing, which all can be distinguished: **CROA 4622** (discipline of an LE, who did not have the role of securing handbrakes, where the only issue was the testing of the handbrakes; and there were a number of incidents at issue which caused the incident); **CROA 4834** (one car with a faulty handbrake had rolled back and made contact with another car); **CROA 3938** (discharge of a twenty-six year employee arising from an efficiency test for failure to test the handbrakes, in a situation where the proper number of handbrakes *were* applied); **AH448** (dated decision where a formal caution was grieved for an LE who did not confirm that handbrakes were set); **CROA 4239** (a defective handbrake and a grievor with 26 years' service who had only been previously disciplined twice in her entire career); **CROA 4341** (a 25 year Grievor whose discipline record stood at only 10 demerits and a roll of three cars and a 20 demerit discipline); **CROA 4381** (proficiency test evaluation for failure to apply a handbrake and failure to perform a pull by inspection); and **AH720** (an 11 year grievor with three separate terminations for collisions in two different months; the first incident involved a proficiency test for not applying a handbrake on one bad order car and no roll).

[41] Several of the Employer's cases also shared a similar lack of factual consistency, such as **CROA 4171** (an LE assessed 50 demerits and dismissed for accumulation when he failed to report a lack of securement of which he was advised by the Conductor, which allowed a car to roll free (caught by another crew who put their own locomotive in motion to couple to it; carelessness found for no real attempt to secure the flat car).

[42] In **CROA 3655**, filed by the Employer, the arbitrator noted the Grievor was "ambivalent" about his responsibilities, which the arbitrator found had no place in this dangerous work environment. In that case, the Grievor had accumulated 25 demerits for a safety violation less than a year earlier than the one at issue in that case.

[43] While I do not find an ambivalence in this case, there is a confusing lack of measured attention and carelessness shown for the essential tasks of a Conductor's work. The Grievor was a qualified RCLS operator. While his errors were combined with an acceptance of responsibility after each event, that does not appear to translate to an increased vigilance on his part towards those important duties.

[44] Like ambivalence, a level of careless is a significant issue in this safety sensitive rail industry. I agree with the arbitrator in **CROA 3655**, who held that "with more effort and attention, the grievor…could have avoided his precarious employment situation"[6], which has resulted from a third safety violation in a short time period.

[45] The seriousness and significance of the failure to apply sufficient handbrakes; the failure to test those handbrakes; and then a failure to remove and reapply those handbrakes is established on the evidence, as is the poor disciplinary record of this employee, and his repeated commitments to improve his safety rules compliance, after each event.

[46] In this case, the Grievor does not have a significant level of service to place against the aggravating factors. He is qualified to perform the duties of a Conductor, but has shown an inability to put those skills into practice consistently. While the Grievor expressed his remorse and his commitment to improve his vigilance, that commitment rings somewhat hollow, given that same commitment was also made in response to the last event, which occurred less than two months earlier, in February of 2023.

[47] In *Re Wm. Scott & Co.* Chair Weiler stated the following, when assessing a discharge response:

> [I]t is the statutory responsibility of the arbitrator, having found just cause for some employer action, ***to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant level of service with that employer, should actually lose his job for the offence in question.***[7]

[6] At p. 3.
[7] At para. 13, emphasis added.

[48] Regrettably for the Grievor, I am drawn to the same conclusion as the Company, that the Grievor's acceptance of responsibility is not sufficient to outweigh the significant aggravating factors in this case. The bond of trust that the Grievor is capable and able to perform his safety sensitive tasks appropriately and correctly has been irrevocably broken by the Grievor's conduct. I can find no basis on these facts to disturb the reasonable discipline of discharge, assessed by the Company.

[49] The Grievance is dismissed.

I remain seized for any questions regarding the implementation or application of this Award. I also remain seized to correct any errors and address any omissions, to give this Award its intended effect

June 14, 2024

CHERYL YINGST BARTEL
ARBITRATOR