CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5053

Heard in Edmonton, June 12, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 10-day suspension assessed to Conductor J. McDonald of Kenora, Ontario.

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. McDonald was issued a 10-day suspension on July 17, 2017, described as:

> "For using improper radio communication while working on 119-27, a violation of Rule book for Train and Engine Employees Section 4.1 (c), CROR General Notice, CROR General Rule A (i) (iii) (vi) (xi)."

The Union's Position

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding the allegations outlined above. In the alternative, the Union contends that Mr. McDonald's 10-day suspension is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. McDonald is made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position

The Company disagrees and denies the Union's request.

Contrary to the position advanced by the Union, the Company maintains that no mitigating factors alleged by the Union alleviated the Grievor's responsibility of performing his duties in a safe and proper manner.

Regarding the alleged unreasonable application of Proficiency Test policy and procedures, the Company maintains that an alleged rule violation observed through the course of an efficiency test remains an alleged rule violation. There is nothing on which the Union relies that prohibits the assessment of discipline for a rules infraction where an employee has also failed an E-test.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation.

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

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

For the Union: **For the Company:**

(SGD.) D. Fulton **(SGD.) L. McGinley**

General Chairperson, CTY-W Director, Labour Relations

There appeared on behalf of the Company:

S. England	– Manager, Labour Relations, Calgary
A. Harrison	– Officer, Labour Relations, Calgary
L. McGinley	– Director, Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, CaleyWray, Toronto
J. Hnatiuk	– Vice General Chairman CTY West, Mission
B. Wiszniak	– Vice General Chairman CTY West, Regina
J. Rousseau	– Local Chair Div 535, via Zoom, Kenora
J. McDonald	– Grievor, via Zoom, Kenora

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Grievor was employed as a Conductor. He entered Company service on March 5, 2012. He began his career in Wilkie, Saskatchewan, and had been based out of Kenora, Ontario for the 5.5 years previous to this Grievance.

[2] This is the first of four Grievances heard in the CROA June session, which involved this Grievor.

[3] The facts are straightforward and not in dispute.

[4] On June 29, 2017, the Grievor worked train 119-27 into Winnipeg, as Conductor. While performing switching tasks, the Grievor asked on the radio "…if we were going to lift another track going against the collective agreement", referencing the limitations for Conductor Only work.

[5] The Grievor's evidence in the Investigation was he was then told by the Trainmaster to "keep the radio communication to the task at hand". The Grievor stated that he "felt the communication was the task at hand" (Q/A 19).

[6] At the time of the incident, the Grievor had one assessment of discipline on his record, being a Formal Reprimand for releasing the handbrake on a loaded lumbar car from above his shoulders, while on the ground. This incident had occurred on January 9, 2017, six months before. While a 7 day suspension had initially been issued and served, that had been reduced to the Formal Reprimand.

[7] The Grievor was assessed a 10-day suspension for "using improper radio communication", in this case.

[8] This Grievance was filed against that suspension.

[9] There are two issues between the parties:

a. Is formal discipline appropriate for this conduct, given the circumstances of a failed Efficiency Test? and
b. If so, is a 10-day suspension a just and appropriate disciplinary response?

[10] For the reasons which follow, the Grievance is upheld. The Company has not met its burden of proof to establish that discipline was the appropriate response for this failed Efficiency Test, for improper radio communication.

Arguments

[11] Given the finding that culpability for discipline has not been established, it is not necessary to outline or address the parties' arguments regarding the appropriate level of discipline for improper radio communication. Only those arguments relating to culpability will be summarized.

[12] The Company argued that radio communications are to be "brief, to the point and contain only essential instructions or information while performing work…".[1] It argued that

[1] Company submissions, para. 35

Trainmasters regularly observe employees and listen to yard conversations while switching, as those officials go about their duties, as that is part of their job. They also perform efficiency testing which observes employees to provide a measure of compliance. It noted that while E-Testing was not a discipline tool, discipline was not foreclosed from an incident observed via E-Test, and depended on the frequency and severity of particular rules violations, and the employee's work history. It pointed out that discipline and E-Testing failures are not mutually excusive.

[13] It argued that in this case, discipline was a just, appropriate and warranted response, as was the level of discipline. It argued the Grievor's comments were not brief and to the point but rather raised issues with the violation of the Collective Agreement. It noted the radio is shared and such an interruption could become amplified if someone were to respond to the inappropriate communication and the Grievor should have waited and discussed any concerns with the work assignment after that work was finished. The Company argued the Grievor was well aware of the possibility of a suspension for a rules violation, noting he had been assessed a suspension just six months before (reduced to a Formal Reprimand). It argued that errors and mistakes which flow from inattention and carelessness are disciplinable**: CROA 4636.** It also relied on **SHP595** that safety is not negotiable and that safety rules must be complied with 100% of the time.

[14] It further argued that while a reference to the failed E-Test appeared in the Notice of Investigation, it had not in fact disciplined the Grievor for a failed E-Test, but for violating the Rule Book for Train and Engine Employees, in making an improper radio communication.

[15] It argued in Reply that E-Testing and addressing offences were both part of the Company's rights and obligations and that the Company properly chose to implement discipline as its corrective action in this case. It pointed out that the Grievor had an active 7 day suspension on his discipline record at the time that discipline choice was made, which the Company argued was a key point. It also argued that a 94% efficiency test rate was a "bad" statistic, as it translated to six failures every 100 days. It argued the Grievor may well have used improper radio communications previously and not been caught.

[16] For its part, the Union argued the Company is unable to meet its burden of proof that there is any cause for discipline.

[17] It argued the framework for discipline for an E-Test - as outlined in **AH860** has not been satisfied, and that the same finding as in that case should be applied here. It argued the Company did not follow the educative purpose of E-Testing by disciplining the Grievor; that the only discipline on the Grievor's record is a Formal Reprimand; that the Grievor had 111 passes and 7 fails on his Efficiency Test Record, in 5.5 years of service, and no fails for radio communications. It noted the Grievor was re-tested 25 minutes later and passed. It pointed out that the extra switching which the Grievor inquired about would have resulted in a Conductor Only violation[2]. In noted that in the Grievor's opinion, his question was valid, as "we should at least ask to ensure they know they are breaking the collective agreement" (Q/A 30). It argued this question was related to the "task at hand". It also noted that at no time did the Grievor refuse to perform any work.

[18] The Union argued that the monitoring by the Trainmaster was "surreptitious", "under the guise of efficiency testing", which was conducted in a fashion which departs from the purposes set out in the *Code.* It argued the matter could have been handled informally, and did not need to be investigated and argued there was an 'anti-union focus' on the Grievor. It pointed out the Grievor was provided verbal coaching by the Trainmaster, which should have sufficed for the minor alleged violation. It argued that 10 days is a severe penalty for a "innocuous and uneventful" efficiency test. this allegation and the discipline is discriminatory and unfair and the Grievor was unfairly targeted.

[19] In Reply, the Union pointed out the single Formal Reprimand on the Grievor's disciplinary record. It also noted the current incident was not a "serious offence" as maintained by the Company. It argued the Grievor had three passes for radio communications on his E-Test record, and only this one fail. There is no allegation of any "unsafe" actions as a result of these radio communications. It noted the Grievor has been made whole for the seven day suspension and this was reduced to a Formal Reprimand. It disputed how the Grievor could have been made aware of the possible consequence of a suspension of 10 days for an isolated E-Test failure for radio communication. It also noted there was no

[2] Of Article 67.02(4)

evidence of any interference with other operations from this communication which took seconds and that there was a “chilling” effect from this harsh punishment

[20] Each party distinguished the other’s jurisprudence.

Analysis and Decision

[21] The first issue to be determined is whether cause for discipline has been established for this failed E-Test. If no cause is established for discipline, that resolves the Grievance.

[22] Radio communications are to be brief, to the point, and to contain only essential information. I am satisfied the radio communications of the Grievor did not meet this standard. Radio communications are not for employees to provide commentary or to question if assigned tasks complied with the Collective Agreement. If the Grievor had any doubts whether his assignment was in compliance with the Collective Agreement, that could be raised with his Union, after the work was completed. Whether or not the Grievor disagreed with the work or the anticipated work that was to be performed, the radio was not the place to have that conversation. His reference was not relevant to the “task at hand”. If the Grievor had issues with the task assigned, he was to “work now, grieve later”.

[23] While the Grievor’s conduct could establish culpability for violating the Rule Book for Train and Engine Employees, Section 4.1(c) – and the question remaining would relate to the measure of discipline under the analysis outlined in *Re Wm. Scott & Co.*[3] - in this case, the Grievor was overheard while the Trainmaster was conducting an Efficiency Test (“E-Test”). That is a relevant circumstance.

[24] In this industry, employers are required to perform Efficiency Testing. As described in **AH695**, this is rooted in Transport Canada’s Safety Management System Industry Guideline and is a “tool used to evaluate an employee’s compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action”. The Company is correct that discipline and failed E-Tests are not mutually exclusive. It is established in the jurisprudence that the corrective action for

[3] [1976] B.C.L.R.B.D. 98

failing an E-Test can range from verbal coaching, education and mentoring, *up to* discipline.

[25] While **AH695** provided some guidance to the parties, the framework for determining whether discipline was – or was not – appropriate for a failed E-Test remained in issue between the parties, after that Award.

[26] In **AH860**[4], this Arbitrator further analyzed this issue and developed a framework which is based on the "Efficiency Test Codes and Descriptions for Train & Engine Employees" document itself (the "*Code"),* to determine whether discipline or education, coaching and mentoring are the appropriate response to a failed E-Test. **AH860** was also a case involving improper radio communications.

[27] In **AH860**, it was established that the three factors which are specifically listed in the *Code* must be considered to determine this question: the frequency of the conduct; the severity of the conduct; and the employee's work history. While there is some overlap between these three factors and those used to assess the *appropriateness* of the level of discipline under the second question in *Re Wm. Scott & Co.*, the *reason* the factors are considered is distinct. For a failed E-Test, the factors are viewed to determine *which* type of response is appropriately applied. If those factors support discipline, then the second question under the *Re Wm. Scott & Co.* analysis is applied. If not, then the Company has not met its burden of proof to establish culpability.

[28] Whether or not listening to radio communications was or was not part of the Trainmaster's role, in this case, I am satisfied the Trainmaster *was* listening to the Grievor in the yard *because* he was conducting Efficiency Testing. I cannot agree with the Union that listening to these communications was either "surreptitious" or conduct "under the guise" of E-Testing. Rather, the Trainmaster was conducting an E-Test – as he was required to do - to follow the requirements of Transport Canada.

[4] See also **CROA 4866**, which traces the history in the jurisprudence, prior to the development of this framework.

[29] This can be distinguished from the situation where the Grievor was speaking to the Trainmaster on the radio and made a comment which was inappropriate, for example, which would not be misconduct discovered during an E-Test.

[30] In this case, the violation of the Rule Book was discovered as a result of an E-Test. The Company's position that the Grievor was not disciplined for a failed E-Test but for violating the Train & Engine Rule Book regarding radio communications is a matter of semantics. The Trainmaster was conducting an E-Test; he failed the Grievor for his improper radio communications, and the Grievor was investigated *for that conduct.* The Grievor's E-Testing Record demonstrates that he "failed" this E-Test.

[31] The factors relating to a failed E-Test must therefore be considered to determine if cause for discipline existed.

[32] Considering first the factor of frequency, the Union filed the Grievor's E-Test record, which indicated that in the past 12 months, he had passed 100% of his E-Tests. His record was at 94% since 2013. The current incident was the only failed E-Test since 2013 for improper radio communications.

[33] The Company has argued this is a "bad" statistic. I cannot agree. For the 12 months immediately preceding this incident, the Grievor in fact had a 100% pass rate. Further, the Grievor had three previous tests for radio communications, which he passed. This is his only fail for that issue. It makes no logical sense for the Company to suggest "he could have had further failures that were not caught". The E-Test record is the E-Test record and is the objective evidence for his E-Test failures.

[34] Considering next his work history, an arbitrator must consider the discipline record as it exists to determine if discipline is warranted. If the 7 day discipline was reduced, that is a relevant factor for an arbitrator to consider, as it means that discipline was not warranted at that level. That reduced discipline becomes a faulty foundation for further discipline and cannot support its weight. The Grievor's record is that he had one Formal Reprimand.

[35] That is not a "poor" work history that supports discipline. Neither does it demonstrate the Grievor had difficulties with following rules, whether generally or more specifically with understanding or applying appropriate radio communications. It has not been

demonstrated he would not benefit and change his behaviour from coaching, education and mentoring.

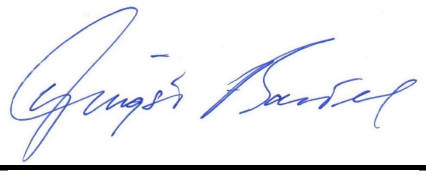
[36] Third, the severity of an improper statement made during a radio transmission – while inappropriate - is not on the severe end of the spectrum, in the broader sense of the types of misconduct which can occur on the railroad.

[37] Given the application of these factors, the Trainmaster's comments to the Grievor to keep the radio communications to the task at hand were a sufficient response of coaching and education, for this failed Efficiency Test.

[38] The Company has therefore not met its burden to establish there is cause for discipline, on these facts.

[39] The Grievance is upheld.

[40] The Company is directed to remove the 10 day suspension from the Grievor's discipline record, and to make the Grievor whole for any financial losses.



July 26, 2024

CHERYL YINGST BARTEL
ARBITRATOR