CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5059

Heard in Edmonton, June 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 40 day suspension of Conductor A. Cuthbert.

JOINT STATEMENT OF ISSUE:

Following an investigation Ms. Cuthbert was assessed discipline as noted in her Form 104 as follows:

> "Formal investigation was issued to you in connection with the occurrence outlined below:
> "Your tour of duty on H70-07 more specific the alleged failure to protect the point while shoving a movement as observed by Trainmaster Urbanoski on September 7, 2022 in Hagey Yard."

Formal investigation was conducted on September 29th, 2022 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation, it was determined the investigation record as a whole contains substantial evidence that you violated the following:

> • Rule Book for T&E Employees – SECTION 12 SWITCHING - 12.3 SHOVING EQUIPMENT

In consideration of the decision stated above, you are hereby-assessed with a time served forty (40) day suspension and a meeting with Superintendent Ross McMahon to be determined.

Your suspension will commence on October 12, 2022 13:21 for forty (40) days and you will return to duty on November 21, 2022 at 23:59.

As a result of the aforementioned incident, you are now required to serve the deferred portion of your twenty (20) day suspension stated on your Form 104 dated July 27th, 2022 in connection with:

> "Your tour of duty on H78-02 in Wolverton yard, more specific the controlling of a movement while inside the cab of a Kubota, as observed by Superintendent McMahon on July 2, 2022."

The twenty (20) day suspension will be served from November 22, 2022 at 0001 and you will return to duty on December 11, 2022 at 23:59

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

UNION POSITION

As submitted within our grievances, the Union's position is that any discipline assessed in this matter is excessive, punitive, and in violation of the Collective Agreement Article 39.05 as the Company has not met its' burden of proof in this instance.

As noted within our grievances the Union has outlined what the Company memo stated and what Ms. Cuthbert provided as her facts.

Ms. Cuthbert is investigated and the Company Managers who assessed her e-test fail provide memos to the statement which are provided below.

In the memo of Manager Urbanoski she states; "On September 7, 2002 at approximately 11:00. Conductor Cuthbert attempted to shove a movement into track five at Hagey yard. Her brakeman asked how much room was at the block as they required a set of wheels to get the last car in the clear. Conductor Cuthbert advised there was 50ft from the block the last time she checked. Assistant trainmaster Sullivan and I then witnessed Conductor Cuthbert running from the roadway between tracks one and two to try and get into position to take the room. As soon as this was observed conductor Cuthbert was instructed to stop what she was doing. I (Trainmaster Urbanoski), reviewed what was observed with conductor Cuthbert and the rule for protecting the point. Conductor Cuthbert watched the point from an obstructed position as an auto carrier in track four blocked her view of the point. The Conductor stated that she could see the point through the car and that she would have been in position had she not stopped running when instructed."

In the memo of Manager Sullivan he states; "At approximately 1100 on September 7, 2022 while testing at Hagey myself and TM Urbanoski witnessed Conductor Cuthbert running between track #1 and #2 (Hagey Yard), to attempt to get into position to protect a shove movement. Conductor Cuthbert was instructed to stop running and slow down. While walking towards track #5 she proceeded to tell the movement ok back for a set of wheels, however her view of the point of the movement was obstructed by an auto carrier in track #4. As soon as it was observed that she was attempting to protect the point from an obstructed position she was asked to stop was she was doing so a conversation could be had. When reviewing the rule with the employee she stated that she could see the point through the car that was in the way in track #4."

As can be seen by the highlighted portions Urbanoski says I told her to sop what she was doing and Sullivan states she was instructed to stop running and slow down. The Managers have different recollections although they were sitting together in a vehicle watching. As seen in the statement Ms. Cuthbert provides her rebuttals to these memos and provides her facts. Maybe the Managers should have gotten out of their truck to properly assess everything. We don't know how many hours later either Manager wrote their memo, but they like everyone have the ability to get the facts incorrect, Managers are human. Simply put it appears the Company Managers have contradictory information all of which Ms. Cuthbert rebuts.

In the end this comes down to a proficiency test and if in fact Ms. Cuthbert had failed (the facts as presented by Ms. Cuthbert do not show that she did) the process is to educate, retest and if needed then a formal setting.

The Company's own policy states, "A proficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure

proficiency (knowledge and experience) and to isolate areas of noncompliance for immediate corrective action. Proficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results."

In CROA Case No. 4621, Arbitrator Sims expressly warned that "not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline."

This was an alleged failed e-test which under the Company's own policy the purpose is to educate and re-test, instead we see the alleged fail then formal investigation with punitive discipline. Arbitrator Sims was clear in No. 4621 that not all cases were candidates for discipline.

Without prejudice to our above arguments that Ms. Cuthbert has been assessed discipline excessively and in violation of Article 39.05 where the Company has not met its' burden of proof thus any discipline should be void.

The Union further looks at the Company's Form 104 and assessment of (activation of) an additional 20 day suspension. The Form 104 issued on October 12, 2022 now sites an additional 20-day suspension from a previous incident that was investigated and for that incident she was assessed a 20 day deferred suspension months prior. The Company cannot as there is no such thing as a deferred suspension within the CBA assess further discipline beyond the mandatory 20-days provided in Article 39.05. Once the discipline is assessed and the 20-day time limit has expired the Company cannot go back and reassess discipline. In fact, CROA 4620, 4630, 4638 have all dealt with deferred suspensions.

The fact is the Company cannot now suspend Ms. Cuthbert as she has already been disciplined for that event (albeit in error) months later, this is no more than double jeopardy. The Company cannot circumvent the CBA and reassess discipline from an investigation months prior and now assess discipline as part of this investigation. The Union is not grieving the past event here but account the Company within this Form 104 have now in fact issued an additional 20-day suspension (total 0f 60-days suspension without pay) the Union is able to argue such improper assessment.

CROA Award 4620 the Arbitrator provides that a deferred a suspension is not in accordance with the Collective Agreement thus making the discipline null and void.

The Union requests that the discipline assessed to Ms. Abby Cuthbert be expunged and she be compensated all loss of wages with interest, no loss of benefits, seniority, AV and EDO accumulation.

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 disagrees with the Union's statement concerning the Memorandums provided by Company Managers and maintains that the Company Managers provided credible accounts of what they observed.

The Company disagrees with the Union's positions concerning efficiency test failures. Arbitral jurisprudence has held that the assessment of discipline for a rule violation identified through the efficiency test procedure does not void the discipline assessed. The Company maintains that discipline was assessed following a fair an impartial investigation and a review of

all pertinent and available factors, including those described by the Union. The discipline assessed was in line with the Company's Hybrid Discipline & Accountability Guidelines and the principles of progressive discipline.

The Company disagrees with the Union's allegations with respect to deferral of suspension days. The Company maintains that the 20 days were deferred following a previous incident and activation was in line with the Company's Hybrid Discipline Accountabilities Guidelines. The Company further submits that arbitral jurisprudence has supported the usage of deferral suspensions.

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: **For the Company:**

(SGD.) W. Apsey **(SGD.) F. Billings**

General Chairperson, CTY-E Assistant Director, Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager, Labour Relations, Calgary
L. McGinley	– Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, CTY-E, Smiths Falls
A. Cuthbert	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Grievor is a Conductor, with approximately three years of service at the time of this discipline.

[2] This Grievance was filed against the assessment of a 40 day suspension for actions taken by the Grievor on September 7, 2022, in Hagey Yard. As noted above, It was alleged that on that day, the Grievor was not in a position to protect the point, in contravention of Section 12.3 of the Rule Book for T&E Employees.

[3] The Grievor's actions were observed on that day by two Company officials, the Trainmaster ("TM") and the Assistant Trainmaster ("ATM"), who were conducting

Efficiency Testing (“E Testing”) from their vehicle. Both officials filed Memoranda into the Investigation and were also interviewed as part of that process.

[4] The Grievor’s discipline resulted in the activation of a previous 20 day suspension, which had been issued as part of the discipline to this Grievor for controlling a movement while inside the cab of a Kubota. That had occurred six weeks earlier, on July 28, 2022. That discipline was then “activated” when the Grievor was disciplined for the misconduct at issue in this Grievance.

[5] While the Union’s position was that the Company has not met its burden to establish cause for *this* discipline – which it maintained included the “activation” of the deferred discipline - the difficulty with this argument is that there was no deferred discipline imposed for the misconduct at issue in *this* Grievance. Rather, the discipline in this case served to “activate” *previously issued* discipline, which was assessed and applied for misconduct from July of 2022 *and deferred as part of that assessment*.

[6] There is therefore an issue of timing to grieve this deferred discipline. The *merits* of whether the Company had the *ability* to impose that earlier, deferred discipline would need to have been grieved *at the time the discipline was issued*, as part of a disagreement with *that* disciplinary choice, given that it was assessed as part of that disciplinary decision. The fact that it was “activated” by the misconduct in this case does not serve to “open up” that issue to once again be disputed as part of *this* Grievance.

[7] No jurisprudence was offered to support that proposition and neither does it make either logical or labour relations sense for dated discipline to be capable of being “resurrected” and subject to “reassessment” again at the time it is “activated”. It is the

discipline of a *40 day suspension* that is at issue in this grievance, and not the *20 days deferred* from July of 2022.

[8] Should the Union wish to challenge the Company's ability to impose deferred discipline, the facts must support that deferred discipline has been imposed for the misconduct which is grieved. That is not this case.

[9] The issues between the parties are:

a. Was the Grievor culpable for a breach of Section 12.3? and
b. If so, was the discipline just and appropriate?

[10] For the following reasons, the two issues are resolved as follows:

a. The Grievor was culpable for failing to protect the point; and
b. The discipline of a 40 day suspension was excessive, in all of the circumstances. Discretion is exercised to substitute a lesser form of penalty.

Relevant Provisions

Rule Book for T&E Employees

Section 12.3 SHOVING EQUIPMENT

(a) On non-main track, when equipment is shoved by an engine or is headed by an unmanned remotely controlled engine:

(i) unless the portion of track to be used is known to be clear, a crew member must be on the leading piece of equipment or on the ground, in a position to observe the track to be used and to give signals or instructions necessary to control the move. Employees are prohibited from engaging in unrelated tasks while providing shove protection, and from providing shove protection from within a vehicle; and

(ii) unless the unmanned engine is leading, and all rules applicable to public crossings for headlights, whistles and bells, are complied with at all crossings, such movement must not approach to within 100 feet of any crossing unless such crossings are manually protected until the crossing is fully occupied; or in the case of a protected crossing, a crew member is on the leading car to warn persons standing on, or crossing, or about to cross the track.

(b) In paragraph (a), "the portion of track to be used is known to be clear" only when a qualified employee:

(i) can observe the portion of track to be used and has radio contact with the locomotive engineer; and

(ii) sees the portion of track to be used as being clear and remaining clear of:

- equipment;
- a red or blue signal between the rails;
- track units; and
- derails and switches not properly lined for the movement.

(iii) sees the portion of track to be used as having sufficient room to contain equipment being shoved.

When a non-main track that has been seen to be clear and no access to that track is possible by another movement, the track may be considered as "known to be clear". When it can be confirmed that other movements are not on duty or will not be performing work in the non-main track to be used, the requirement of "known to be clear" of equipment can be considered to be fulfilled continuously.

Analysis and Decision

[11] The analysis in *Re Wm. Scott & Co*[1]*.* requires an arbitrator to seek the answers to three questions:

a. Was the action culpable?
b. If so, was the discipline assessed just and appropriate and therefore reasonable?; and, if not,
c. What discipline is appropriately substituted as just and reasonable?

[12] The Company bears the burden of proof to establish both culpability *for* discipline and that its disciplinary choice was just and reasonable.

[13] When the matter involves an E-Test, part of the question of culpability is whether discipline should have been imposed for the failure of that test, under the first question.

[1] [1976 B.C.L.R.B.D. 98

The First Wm. Scott Question: What Occurred and was it Culpable Behaviour?

[14] On September 7, 2022, the Grievor was responsible for protecting the point for a bunching of cars which was occurring in track 5.

[15] A bunching of cars is a shoving movement, which is governed by the Rule Book for T&E Employees, Section 12.3.

[16] As there is disagreement between the Union and Company as to what occurred, a credibility assessment is necessary. To make a credibility assessment, it must be determined which version is

> …consistent with the probabilities that surround the currently existing conditions…its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions.[2]

[17] While the Union has argued there are important inconsistencies in the observation which was made of the Grievor's behaviour, upon reviewing the facts and evidence on the above well-accepted standard, I cannot agree that those differences are significant. Rather, there are certain unexplained inconsistences in the *Grievor's* version of events, which are of key importance and which impact the assessment of her credibility.

[18] For the following reasons, the evidence of the two Company officials is consistent with the probabilities of what occurred and that recounting is preferred.

[19] I am satisfied the Trainmaster ("TM") and Assistant Trainmaster ("ATM") were in a truck at the south end block of 1 and 2, conducting Efficiency Testing. The evidence of the TM and the ATM is that the Grievor was seen running between tracks 1 and 2, to try

[2] *Foryna v. Chorny,* 1951 CanLII 252 (BCCA); at p. 357; see also the reference to this test in **AH783** at para. 14.

to get into position for the movement at track 5; that she was told to slow down and began walking to track 5; and that the shoving movement began *before* the Grievor was in position to protect the point on track 5, and her view was obstructed by a car on track 4.

[20] A picture of that obstruction was filed into evidence.

[21] When asked at Q/A 21 why she would choose to run from in-between tracks 1 and 2, the Grievor's answer was "[b]ecause I know I needed to be in position to take the room".

[22] Later in the Investigation, the Grievor maintained she was *not* running in between tracks 1 and 2 as the Company officials noted, but between tracks 3 and 4.

[23] The Grievor also maintained she was *already* in position to protect the point *prior to* the commencement of the shoving movement.

[24] I do not find that credible. First, I accept that until the Grievor was at track 5, her view was obstructed.

[25] Second, in Q/A's 34 and 35, the Grievor could not recall having a conversation with the crew to shove back *once she was in a position* to view the point in track 5, nor could she recall having that conversation *at the time she arrived* at the stop block in track 5.

[26] This lack of recall is significant and impacts the Grievor's credibility.

[27] If in fact the movement did not begin *until* the Grievor was in a position to protect the point, these would have been important – and memorable – conversations for her to recall, especially given what occurred with the Company officials at that time.

[28] While the Company bears the burden of proof, credible explanations must also be given for an employee's behaviour: **CROA 4638.** The Grievor gave no credible

explanation for her behaviour of running towards track 5, if – as maintained – the movement did not in fact occur until she was properly positioned.

[29] Combined with the Grievor's lack of recall for any communication with the crew to begin the movement *after* she was properly positioned, I am drawn to the conclusion that the Grievor was *not* in a position to protect the point before the shoving movement began, and that she was running to get into that position and "catch up".

[30] Neither did she have a sufficient viewpoint from track 4 to protect the point, given the car occupying that track.

What is the Impact of the E-Testing?

[31] The Grievor's behaviour in failing to be in place to protect the point *before* the movement began - and before she had an unobstructed view to protect the point - would ordinarily be considered to be culpable behaviour, being in breach of section 12.3 of the Rule Book for T&E Employees. The question of whether the Grievor's actions were culpable in this case, however, is complicated by the fact her actions were observed as part of an E-Test.

[32] As recently noted in **AH860** and **CROA 4866** while an E-Test can result in discipline[3], there are three factors that must be considered to determine whether discipline or "coaching, mentoring and education" – or discipline – is the appropriate response for that failure. Those three factors are frequency, severity and the employee's work history. While there is some overlap between these factors and those considered as

[3] **CROA 4621; AH695** and **AH811** also previously recognized this possibility.

part of the *Re Wm. Scott & Co.* framework for assessing the reasonableness of a disciplinary choice, the factors are considered for a different purpose under this analysis, as the question is whether a disciplinary response can be supported in the first place, and not whether the measure of discipline was just and reasonable.

[33] Considering first the Grievor's work history, this factor and the factor of 'frequency' are inter-related and will be considered together.

[34] These two factors are strong factors in favour of discipline. Key is that just a scant six weeks earlier, the Grievor had been disciplined for controlling a movement from the cab of a Kubota. Her discipline was assessed as "time served" ***and*** a 20 day deferred suspension, which suspension was the "activated" when this incident occurred. That was also in the context of an E-Test and was a "fail".

[35] A second failed E-Test for the *same* issue of failing to be in position to properly protect the point – occurring in the short span of six weeks – supports that a disciplinary response is now necessary to change behaviour, rather than a response of coaching, education and mentoring.

[36] Considering the final factor of 'severity', I am satisfied that failing to protect the point is at the more severe end of the spectrum in this safety sensitive industry. Collisions, property damage, injuries and fatalities can occur if the movement of trains is not properly protected by Conductors whose role includes that important function.

[37] In this case, I am satisfied the three relevant factors to consider if discipline is a reasonable choice for an E-Test fail have landed in the Company's favour.

[38] The Company has met its burden to support a disciplinary response for this failed E-Test.

The Second Wm. Scott Question: Was the Discipline Reasonable?

[39] That finding then moves this analysis into the second question of the *Re Wm. Scott & Co.* framework, which is whether the discipline was reasonable.

[40] Several factors are considered in determining an appropriate level of discipline under that framework. Those factors can have an aggravating, mitigating or neutral impact. Also relevant are the principles of progressive discipline.

[41] While these factors are not 'closed', they include the length of service of the grievor; the severity of the incident, the disciplinary record of the grievor, whether provocation occurred; and the level of remorse and responsibility shown by the grievor.

[42] At three years of service, the Grievor is a fairly short service employee.

[43] The severity of the incident has already been noted earlier in this Award.

[44] Considering accountability for behaviour and the level of remorse, the Grievor showed no remorse or responsibility for her breach of Section 12.3, as she maintained through the Investigation that there was no breach, which was not found to be a credible position. The factor of accountability, responsibility and remorse is therefore lacking in this case, which is an aggravating factor for discipline.

[45] The Grievor's discipline record to the date of the breach is also relevant. In this case, this is the second failure to protect the point which occurred in a six week period, the first being in July of 2022. Looking more broadly, the Grievor had a significant

discipline record for a three year employee, and was sitting at 30 demerits, which is halfway towards dismissal under the Brown System. Her record is an aggravating factor for discipline.

[46] Turning to the jurisprudence in this industry, each party relied on several cases. While all jurisprudence has been reviewed, not all will be mentioned. Discipline is a fact-dependant exercise, so precedents are of limited value. There are also distinguishing aspects. The Company relied on several decisions for its response:

a. **CROA 4351**: *30 demerits* upheld; shoving movement that caused cars to foul the lead, resulting in a sideswipe and a derailment.
b. **CROA 4577**: termination of a trainee conductor, with just over 18 months of experience, for a run-through switch from a car which had been left unattended by the grievor's crew; handbrake not being applied appropriately; *second* run through switch violation in 18 months of employment; record was described as "significant and related"; with 10 demerits each for two prior offences by the time of the hearing; termination replaced with a *60 day suspension.*
c. **CROA 3845**: suspension of a Conductor involved in a side collision, during the course of switching; relatively junior employee at the time of less than two years, with no discipline record; *15 day suspension*, upheld.
d. **CROA 4454**: dismissal of a yard employee who was operating a belt pack without pullback protection, resulting in a derailment, causing significant damage; serious incident and a short term employee; grievor was sorry and remorseful he had not followed the rules and did not try to minimize what had occurred; *reinstated without backpay* (a 9 month period without pay).

[47] The Union relied on **CROA 4620** which considered a 30 day suspension to a locomotive engineer for a run through violation involving a switch. In that case, the arbitrator noted that a 30 day suspension was "very serious discipline", and was found to be disproportionately harsh. The arbitrator set that discipline aside and replaced it with a 15 day suspension, with reference to the grievor's record in doing so. Unfortunately, the

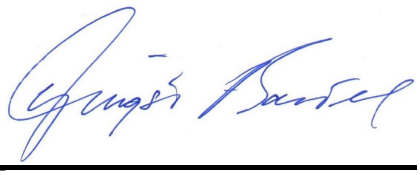
arbitrator did not set out what that record *was*, so it is difficult to determine if it was analogous to this case.

[48] Failure to protect the point – which can often result in a run through switch, a collision or a derailment – is serious and significant misconduct in this industry. Aggravating in this case is the Grievor's short service, lack of accountability and the existence of a similar offence a mere six weeks earlier. Balanced against that reality is the fact that a 40 day suspension is a very serious form of discipline. Like the Arbitrator in **CROA 4620,** I am satisfied that the Company's response in this case was "disproportionately harsh" .

[49] The Grievance is upheld, in part.

[50] The discipline of 40 days is set aside. Discretion is exercised to substitute a suspension of 30 days for the Grievor's *second* failure to protect the point in a six week time period. The Grievor is to be made financially whole for the difference.

I retain jurisdiction to address any questions relating to the implementation of this Award; and any remedial questions should the parties be unable to agree. I also retain jurisdiction to correct any errors and to address any omissions, to give this Award its intended effect.



August 2, 2024

CHERYL YINGST BARTEL
ARBITRATOR