

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

CASE NO. 5060

Heard in Edmonton, June 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 demerits and dismissal of Trainperson Abby Cuthbert of London, Ontario.

JOINT STATEMENT OF ISSUE

Ms. Cuthbert was assessed discipline in her Form 104 as follows:
“Please be advised that you have been assessed with 30 Demerits for the following reason(s):
“Your tour of duty on H78 more specific the alleged failure to properly notify engineer of intent to detrain moving equipment on June 23, 2023”. A violation of Train & Engine Safety Rule Book T-11 Entraining and Detraining Equipment.

Please be advised that you are hereby DISMISSED from Company Service for an accumulation of demerits under the Hybrid Discipline and Accountability Guidelines.”

UNION POSITION

For all the reasons and submissions set forth in the Union’s grievances the Union contends any discipline assessed in this matter is excessive, punitive, and assessed in violation of Article 39.05 and PIPEDA.

Ms. Cuthbert is investigated account of and as noted in the Superintendents memo “Re: **Efficiency Test** in Pender Yard – Abbey Cuthbert”. (emphasis added)

Within the following “Knowing they had 70+ multi-level cars I asked where the brakeman was as I hadn’t heard from them since the initial radio check. **At this point we pulled up the camera where we saw the** brakeman walking down the west side of the yard lead and west of the cars being shoved into the track.” (emphasis added)

Within the Terminal Trainmasters memo, she provides the following; “**From the camera, we could see** that an employee had detrained moving equipment at the north end of the yard, on the west side of the multi-level cars that H78-23 was shoving back.” (emphasis added)

It is clear that the Supt and Trainmaster immediately went to and used the camera for other than its’ purpose. There is no doubt that it had happened and is a normal practice of CP Management to use cameras to spy on its’ employees.

CROA 4362, 4363, and 4824 all provide that the Company’s use and conduct of relying on video surveillance was done in violation as well as violation of PIPEDA has taken place where the Company’s use of such camera does not meet standards required under PIPEDA 114.

The above cases were of cameras inside the Yard Office but that in itself does not give open season for the Company to use outside cameras in the manner they have. The cameras as shown by the Company's own Supt and Trainmaster were used immediately to spy on the employee, they were already in the vicinity and could have just continued to drive further down the yard to investigate. They chose willingly to do what they did instead of using other means as noted and provided those memos into the statement.

The Company continues to abuse its' Management Rights as provided in CROA 4825 where the Company in that case used LVVR footage to spy on its' employees.

The Union further looks to the objection placed by the Union into the investigation where it requested all evidence be put forth, the Investigating Officer advised everything had been put forth. The Union then objected stating,

"Union: Objects to this investigation and its entirety, as we believe that not all evidence has been provided to us.

Investigating Officer: Objection Noted."

The Union was well aware of what was provided in the Company memos about use of cameras.

All the above clearly provide that Ms. Cuthbert did not receive a fair and impartial process thus any discipline (dismissal) should be void as Article 39.05 has been violated.

Without prejudice to our above position the Union looks to the incident and subsequent discipline/dismissal.

As noted, the Managers were performing proficiency testing. 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."

The Union believes Ms. Cuthbert has been targeted as can be seen by this excessive discipline assessed of 30-demerits leading to her dismissal. Ms. Cuthbert failed an E-Test for not communicating to her Engineer that she would be detrain and again once she was safely detrained. That in itself should not bring forth the excessive discipline that she was assessed with.

As Ms. Cuthbert provided in her statement at Q&A 19 to 21 her reasoning for what happened. At Q&A 23 Ms. Cuthbert confirms what she should have done, this is the educational component that is promoted through the investigation process.

Ms. Cuthbert as per her Form 104 was disciplined for, "Your tour of duty on H78 more specific **the alleged failure to properly notify engineer of intent to detrain moving equipment** as observed by Terminal Trainmaster Kathleen Patemore on June 23, 2023" (emphasis added)

The discipline is clear that she was only assessed **for not communicating her intent to detrain** moving equipment.

The Company has unreasonably, excessively and in violation disciplined/dismissed Ms. Cuthbert. Both aspects should be void.

The Union believes that the privacy of its members was and continues to be violated by the improper use of the cameras and video evidence. The Union requests that the Company cease and desist from using the cameras for the purpose of determining and in support to discipline its employees. The Union requests that the cameras be used for their proper intent and no camera regardless of location be used for surveillance, monitoring, or used in disciplining employees, As per the facts presented throughout, the Union request that the 30 demerits be

expunged from Ms. Abby Cuthbert's record, and that she be reinstated forthwith, she be compensated for loss of all wages with interest, no loss of benefits, seniority, AV and EDO accumulation. And such other relief as the Arbitrator deems necessary in these circumstances. 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.

Within the grievance communication, the Union does not argue culpability and therefore culpability for the incident is not in dispute.

The Union focuses solely on the fact that this incident stemmed from an efficiency test and that this is against the Company's own policy is inaccurate and unsupported by fact. The Company maintains its rights to utilize efficiency tests, which it is mandated to conduct as part of its safety management program.

The Union also focuses on the use of a camera in the yard to see where the crew was but fails to provide the other pertinent information. While the cameras may have been used to see where the crew was, the managers were on the property efficiency testing employees, listening to the radio for proper communication and adherence to the rules. It was during the efficiency testing that it was discovered that Ms. Cuthbert failed to communicate her intent to detain.

The Company maintains that culpability was established, and that discipline was assessed following a review of all pertinent factors, including those that the Union describe as mitigating, as well as aggravating factors, including the Grievor's employment and discipline history.

The Company maintains the discipline was properly assessed in keeping with the Hybrid Discipline and Accountability Guidelines and arbitral case law. Furthermore, this assessment of discipline is in line with the principles of progressive discipline.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the arbitrator be drawn to the same conclusion.

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

(SGD.) D. Fulton

General Chairperson, CTY-W

(SGD.) F. Billings

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

Analysis and Decision

Background Facts and Summary

[1] The Grievor was employed as a Conductor. At the time of the incidents in dispute, she had approximately four years of service, having been hired in 2019.

[2] On June 23, 2023, the Grievor was working as a Brakeman on Train H78-23. She is alleged to have failed to notify the locomotive engineer with whom she was working, that she intended to detrain.

[3] This is the second of three Grievances which were heard during the June CROA session involving this Grievor. In the first Grievance, **CROA 5059**, the discipline of a 40 days' suspension was set aside, and a 20 day suspension was substituted, for the Grievor's failure to protect the point.

[4] The Union has raised a preliminary issue regarding the fairness of the Investigation. This alleged unfairness arises from the failure of the Company to disclose the video recording, which was viewed by the Company Officials and mentioned in their Memoranda.

[5] There were also several other arguments raised by the parties - including the ability of the Company to view the video footage in these circumstances, and whether or not discipline was warranted given this was an E-Test, as well as the proper measure of that discipline if so. However, the resolution of the issue relating to the fairness of the Investigation has the potential to resolve this Grievance, rendering those other issues moot, as it would render the discipline as *void ab initio* - or "from the beginning".

[6] For the reasons which follow, the Grievance is upheld. The Company's failure to provide to the Union the video recording evidence prior to the Investigation of the Grievor was fatal to the fundamental fairness of that Investigation process. As a result, the discipline is set aside as being *void ab initio*, or void "from the beginning". The Grievor is to be reinstated.

Facts

[7] The following facts apply to both this case and to **CROA 5061**.

[8] On June 23, 2023, Adam Smith, Superintendent and Katie Pattemore, Terminal Trainmaster, were observing the work of the Grievor's crew, conducting Efficiency Testing. Their evidence was they noticed the Conductor riding the cut of cars back into a track, and he was located on the east side. However, they had not heard anyone announce an intent to detrain over the radio, and in particular the Grievor did not communicate that intent to the locomotive engineer. Neither did the Company Officials hear any acknowledgement by the locomotive engineer, or that anyone had in fact safely detrained. They drove to the North end of the Yard, with an intention of talking to the other crew member (the Grievor) about the radio communication requirements to detrain.

[9] At this point, the Company Officials viewed camera footage of the Yard. The evidence was that – from that footage – they saw that the Grievor had detrained moving equipment at the North end of the yard, and on the west side of the multi-level cars that H78-23 was shoving back. When they approached the North end of the Yard, the Grievor was standing on the east side of the multi-level cars.

[10] Their evidence is that the Grievor told them she *had* communicated her intent to detrain and they must not have heard her. The Grievor was questioned both regarding her procedure used in detraining, and also which side of the train she had detrained upon. Her evidence was she had detrained on the side she was standing, which was the east side.

[11] The Conductor was also questioned – outside of the Grievor’s presence – regarding which side the Grievor had detrained upon, and how she could have ended up on the opposite side of the track, given the location of the equipment. The Memorandum filed by the Superintendent regarding his conversation with the Conductor was that the Grievor was riding the *west* side of the equipment. When asked how she could have gotten to the *east* side of the cars, the evidence was that the Conductor “dropped his head and stated she couldn’t”.

[12] The Grievor was asked which side of the train she detrained on, and she answered the side she was on, which was the *east* side. She was asked if she was “sure” of this information, because the Company believed she had detrained on the *west* side. She confirmed she detrained on the *east* side.

[13] The Grievor was subject to an Investigation. The Notification document for that Investigation listed five different Appendices she was provided (“A” to “E”), including three Memoranda filed by the Company Officials who were conducting the E-Testing (including a Memoranda of Superintendent Smith of his conversation with the Conductor). However, that Notification did not list the video recording.

[14] Neither was the Grievor nor the Union provided any link or information as to how to access that footage.¹

[15] At the Investigation itself, the Union representative stated:

The Union requests full disclosure of all evidence, photographs, voice recordings, audio video records, including any documentation....that has been utilized by, or is in the possession of the company, and which may have a bearing on responsibility”.

¹ As in **CROA 4622**

[16] While that request is usually placed on Investigation transcripts, in this case, the Union *a/so* stated that it “Objects to this investigation and its entirety, as we believe that not all evidence has been provided to us”.²

[17] I am satisfied that the Union raised this objection as it had not been given a copy of the video recording, which both Company officials referred to viewing.

[18] In the Investigation, the Grievor’s evidence was that she was on channel 67-67 to “tone the crossing”, and that by the time that she detrained, “I realized that I was on the wrong channel. But the speed seemed permissible because we were on the lookout for switches. And my conductor asked me to make the cut” (Q/A 19).

[19] When asked if she made an effort after toning and detraining to advise the engineer she had detrained, the Grievor said “Yes. But they were on 81-18” (at Q/A 20). She also said that she believed the Conductor visually saw her detrain, so she did not change channels from 67-67 to 81081 to advise the engineer she had detrained (Q/A 21). However, she also acknowledged that it was not safe practice to rely on the Conductor seeing her detrain and that she should have gone over to 81 to notify her engineer (Q/A 22, 23).

[20] She also stated she was “under a lot of stress at the time of the shove” and had “mixed up the sides I was riding on” and that she did not believe she provided misleading information to the Company (Q/A 24).

² At p. 2

[21] After that Investigation, she was assessed discipline of 30 demerits and dismissal for accumulation of demerits, for improperly detrainning. She was also assessed 30 demerits and dismissal for accumulation for improperly crossing equipment, which discipline is addressed in **CROA 5061**.

Relevant Provisions

T&E Safety Rule Book

T-11 Entraining and Detraining Equipment

1. When conditions are determined to be safe, employees are permitted to entrain or detrain moving equipment at a walking pace not exceeding 4 mph.
2. Always communicate the intent to the locomotive engineer (includes RCLS operator) prior to entraining or detraining moving equipment. The locomotive engineer must acknowledge only the intention of entraining or detraining the movement and then ensure speed is 4 mph (or less if requested) at the entraining or detraining location.
3. Always communicate to the locomotive engineer once you are safely entrained or detrained.
4. Never entrain or detrain moving equipment while in possession of a grip/bag or any item that would prevent the full use of both hands (Eg. SBU's, tools, water, switch broom)
5. Entrain and detrain clear of switch stands, bridge approaches, retaining walls, restricted/ close clearances, debris and other fixed objects.
6. Face the locomotive when entraining or detraining a locomotive stairwell.
7. Do not jump from any piece of equipment or structure to ground level or onto another adjacent equipment or structure except in an Emergency situation.
8. Use 3 points of contact on steps, ladders, railings, or handrails when entraining or detraining any piece of equipment or structure, maintaining a firm grip.
9. Entrain or Detrain moving equipment on the leading end of equipment.

Safe Work Procedure: Entraining moving equipment

Step 1: Communicate the intention to entrain to the locomotive engineer. Stand facing the approaching movement, clear of its path.

Step 2: Ensure that your entraining area:

- Will provide solid footing, and
- Does not have any object or condition that will cause you to slip or trip.

Step 3: Do not attempt to entrain if you think the equipment is moving too fast, reduce speed to a safe level.

Step 4: Grasp handrails with both hands and, in sync with the movement, step into the stirrup with the trailing foot (relative to the direction of movement) first and then the other foot.

Step 5: Communicate to the locomotive engineer once you have safely entrained.

Safe Work Procedure: Detraining moving equipment

Step 1: Communicate your intention to detrain to the locomotive engineer. When getting off equipment, always face the direction of travel. Visually select a safe area to detrain well in advance.

Step 2: Ensure that your detraining area:

- Will provide solid footing, and
- Does not have any object or condition that will cause you to slip or trip.

Step 3: When getting off equipment, always face the equipment that you are about to detrain and look where you are going to place your feet.

Step 4: As you get closer:

- Narrow your focus on a detraining spot, checking that it is free of tripping hazards.
- Drop your trailing foot (relative to the direction of movement) from the stirrup.
- Lower your trailing foot to the ground, lining your toes in the direction of movement and step away with the leading foot releasing your lead hand.

Step 5: Maintain a grip on the handhold with your trailing hand (relative to the direction of movement) until you are balanced on your feet.

Step 6: Once your balance is ensured, release your trailing hand from the handhold and step away from the track.

Step 7: Communicate to the locomotive engineer once you are safely off the equipment.

T&E Safety Rule Book

*Consolidated Collective Agreement**Article 39.01*

When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.

...

Article 39.04

The notification [of the Investigation] shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility...

....

Article 39.05

Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced...

Analysis

[22] The expedited arbitration regime of CROA depends for its validity on the integrity off two key components: the Grievance procedure and the Investigation.

[23] The Investigation – which is governed by Article 39 in this case – is intended to largely displace the fact-finding role of the arbitrator³, since witness evidence in this process is rare. The Grievance procedure also provides factual information and can serve to narrow the issues between the parties.

[24] Under the CROA process, with the Investigation transcript assisting the fact-finding process, multiple cases can be heard in one day, and decisions are written expeditiously. The trade-off negotiated by the parties, is that there are “...harsh consequences for actions, however innocent, which prejudice the [CROA] process”: **AH809-M**.⁴

[25] While **AH809-M** involved a failure of an issue to be included in a JSI, that statement also applies to substantive issues of fundamental fairness which may occur in the Investigation process. In order for this expedited regime to operate as intended, and to ensure the integrity of their decisions, arbitrators have been jealous to guard the integrity of the Investigation process, given their reliance on its findings. Where the failure of that process is substantive, discipline is set aside as *void ab initio*, which means “void from the start”, as being unfair “from the beginning”.

[26] I am satisfied there is such an issue in this case, that is capable of resolving this Grievance, in the Union’s favour, rendering the remaining issues moot.

[27] Article 39 of the Collective Agreement stipulates certain requirements to ensure fairness of the Investigation process as between these parties. One of those requirements is noted in Article 39.04: The “Notification” of the Investigation is to include “all available evidence”. Unlike in **CROA 4622**, there is no evidence in this case that the Union or the

³ Along with documentary evidence filed.

⁴ At para. 41.

Grievor were given any opportunity to view the video at any point *prior to* the Investigation taking place, even if they were not given a physical copy of the video. While the Memoranda may have stated what was seen in the video, the Union – and the Grievor – were entitled to view that video as part of the evidence gathered against her.

[28] While the Company maintains the video was only viewed to determine the Grievor was safe and where she was located, for questioning, the video was also used to demonstrate to Company Officials that the Grievor had detrained, and on which side of the Train that occurred. I am satisfied the video was a separate piece of evidence that was relevant to the issue of the Grievor's misconduct. It was also evidence which was specifically referred to in the Memoranda filed by the Company Officials conducting the Efficiency Test. That video should have been listed in the Notification by the Company, and it should also have been disclosed to the Union *prior to* the Investigation taking place, as part of that Notification process, to allow the Grievor to prepare for her Investigation and meet the evidence rallied against her.

[29] To fail to disclose the video evidence to the Union *prior to* the Investigation worked an unfairness on the Grievor that was in breach of Article 39.05 and was fundamental, substantive and fatal to the Investigative process. It negatively impacted the Grievor's ability to defend against the allegations made against her.

[30] The discipline must therefore be set aside as *void ab initio*.

[31] In view of this finding, it is not necessary to address the other arguments brought by the parties.

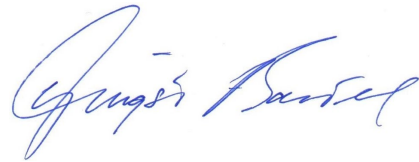
[32] The Grievance is upheld.

[33] The discipline is to be vacated. The Grievor is to be reinstated, with full compensation and benefits, less any amounts earned or received in mitigation of her damages. The calculation of the amount owing to the Grievor is remitted to the parties.

[34] The Company is also directed to remove all reference to this discipline from the Grievor's disciplinary record.

I retain jurisdiction to address any questions relating to the implementation of this Award, including any questions of remedy, should the parties disagree. 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**