CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5061

Heard in Edmonton, June 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Trainperson A. 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 a second dismissal from company service for the following reason(s):

"Your tour of duty & Engine on H78 more specific the alleged crossing over stationary multi-level cars on June 23, 2023". A violation of Train & Engine Safety Rule Book T-8 Crossing Over or Between Equipment.

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."

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.

It must be noted that this investigation was taken on the same day, and the subsequent dismissal was the same tour of duty that Ms. Cuthbert was already assessed 30 demerits/dismissal for where she did not communicate her intent to detrain 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 Supt. memo he provides 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 second dismissal when already having been dismissed and now being dismissed again all from incidents from same tour of duty.

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 continued excessive discipline (dismissal) she has been subject to. Ms. Cuthbert failed an E-Test for not properly adhering to the rule of crossing between multilevel cars. It must be noted although prohibited Ms. Cuthbert did request 3-point protection as shown in her statement. That in itself does not make the violation disappear but shows she was attempting to at least protect the situation albeit incorrectly.

Ms. Cuthbert further provided a mitigating circumstance where a close friend of hers passed away suddenly 3-days earlier thus this appears to be part of the reasoning why her head was not in the game, without a doubt she should have sought the proper avenue and not attend work, but that probably would have created an investigation as well and discipline.

The Company has unreasonably, excessively and in violation disciplined/dismissed Ms. Cuthbert.

As per the facts presented throughout, the Union request that Ms. Abby Cuthbert's be reinstated forthwith, she be compensated all loss of 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.

This incident constituted a culminating incident. In addition, the Grievor was also dismissed for failing to communicate intent to detrain resulting in an accumulation of demerits, which is under a separate grievance.

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 improperly crossed over equipment.

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.) 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

Analysis and Decision

Background and Summary

[1] The Grievor was a Conductor. At the time of this Grievance, she had been employed for approximately four years, since 2019.

[2] This Grievance was filed against an assessment of 30 demerits and dismissal for crossing between stationary multi-level cars during her tour of duty on June 23, 2023, when she was working as a Brakeman.

[3] This is the third of three Grievances filed against this Grievor and heard during the June CROA session. In **CROA 5060**, the discipline was set aside as *void ab initio* for the failure of the Company to disclose a video recording to the Union. The incidents of that case took place the same day as the alleged misconduct addressed in this Award.

[4] In this case, the Company disciplined the Grievor for improperly crossing between stationary, multi-level cars after she detrained. For that misconduct, she was assessed 30 demerits and a *second* dismissal, the *first* dismissal having occurred for the misconduct in **CROA 5060.** This Arbitrator questioned during the hearing how the Grievor could have been dismissed *twice.*

[5] Like in **CROA 5060**, the Company Officials who had been E-Testing the Grievor's crew reviewed camera footage prior to discussing the events with the Grievor. That footage revealed the Grievor had in fact detrained, and the side of the train from which the Grievor detrained. As in **CROA 5060**, in this case the Union raised a preliminary issue regarding the fairness of the Investigation due to a lack of disclosure of this video recording prior to the Grievor's Investigation, in breach of Article 39.

[6] While the parties also relied on several other arguments, including whether the video footage was appropriately accessed; whether discipline was warranted as this was an Efficiency Testing situation; and the appropriate measure of discipline if so, the resolution of the issue relating to the fairness of the Investigation process has the potential to render those other issues moot.

[7] For the same reasoning as outlined in **CROA 5061**, the Grievance is upheld. The discipline is *void ab initio* given the fatal flaw in the Investigation process relating to the failure to disclose video evidence to the Union prior to the Investigation.

Relevant Provisions

T&E Safety Rule Book

Rule T-8 Crossing Over or Between Equipment

…

3. The following is prohibited, do not cross:

…

- Over or between cars without end platforms (e.g. multi-level autos).

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…

Facts

[8] The facts relevant to this Award were set out in **CROA 5060**[1] and are repeated here:

> "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.
>
> 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.
>
> 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.
>
> 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

[1] At paras. 10 to 18.

> gotten to the *east* side of the cars, the evidence was that the Conductor “dropped his head and stated she couldn’t”.
>
> 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.
>
> 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.
>
> Neither was the Grievor nor the Union provided any link or information as to how to access that footage.[2] 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”.
>
> While that request is usually seen placed on Investigation transcripts, in this case, the Union *also* noted that it “Objects to this investigation and its entirety, as we believe that not all evidence has been provided to us”. [3] 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 mentioned (in their Memoranda) as being viewed by them.”

[9] At the Investigation in this case, the Grievor’s evidence was that she was riding the west side of the multi-level into Pender. She acknowledged that Rule T-8 was important to follow, for safety reasons. At Q/A 19 she was asked how she ended up on the west side of the cars. Her answer was that she asked for “3 point, once the train was stopped – I crossed over the coupler to the west side”. At Q/A 21 [no question 20], the Grievor confirmed she “crossed over the multi level car, that was stationary”.

[10] At Q/A 22, the Grievor noted that three days prior to this incident, her friend of 20 years had died in a helicopter crash and she was under a lot of stress through that week, as there was no bereavement leave for friends.

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[2] As in **CROA 4622**

[3] At p. 2

<u>Decision</u>

[11] The Analysis relevant to the resolution of this Grievance is outlined in **CROA 5060,** at paragraphs 22 to 29.

[12] That Analysis is to be considered as adopted in this Award.

[13] I am reluctantly drawn to the same conclusion that the same result must occur in this case, as occurred in **CROA 5060.** The Grievor was denied a fundamental, substantive and important right in the Investigation process by not being provided the video evidence upon which the Company relied, prior to her Investigation taking place. This has rendered the discipline *void ab initio.*

[14] I describe this as a reluctant conclusion, as the Grievor *did* engage in very dangerous behaviour in this case by improperly crossing between stationary equipment. She should not take the result in this case as diminishing the valid concerns of the Company for her safety, arising from that conduct.

[15] However, equally important and fundamental to this expedited process is the Grievor's right to view "all" of the evidence against her *<u>before</u>* the Investigation takes place. The parties have enshrined the element of fairness in the Investigation in the Collective Agreement, in Article 39. By not making that video available to her, the Grievor was denied a fundamental and substantive element of fairness to appropriately prepare for her Investigation and to appropriately respond to the Company's evidence in that Investigation.

[16] Whether that would – or would not – have changed the end result is immaterial, as is the question whether the Company would have found out the same facts without the

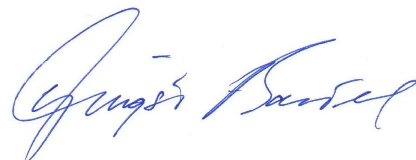
video evidence. The fact remains the Company did review video footage of the Grievor and the Grievor was not given the protection that was bargained in Article 39, which is fundamental to the integrity of the CROA process.

[17] Arbitrators in this industry are united in guarding the integrity of that process, to ensure both compliance with the parties' agreement, and that their broader obligation to conduct a procedurally fair hearing is protected.

[18] The Grievance is upheld.

[19] As the Grievor has already been reinstated by **CROA 5060,** a declaration will issue that the Grievor's discipline is to be vacated. The Company is directed to remove the discipline from the Grievor's disciplinary record.

I retain jurisdiction to resolve any questions relating to the implementation of this Award. I also retain jurisdiction to correct any errors; and address any omissions; to give this Award its intended effect.



August 2, 2024

CHERYL YINGST BARTEL
ARBITRATOR