CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5066

Heard in Montreal, July 16, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20-day suspension of Mr. Mandeep Nijjar.

JOINT STATEMENT OF ISSUE:

Mr. Nijjar was assessed a 20-day suspension as shown in his Form 104 as follows,

"Formal investigation was issued to you in connection with the occurrence outlined below:

Your tour of duty while working TT18-28 on October 29, 2021. More specifically your alleged shoving of track AB06 without verification of the tail end of your movement which resulted in shoving of track AB06 on the west lead and into PPZ."

Formal investigation was conducted on November 4, 2021 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-Section 12 Item 12.3 Shoving Equipment

In consideration of the decision stated above, you are hereby assessed twenty (20) Day Suspension.

Your suspension will commence on Tuesday, November 16, 2021 00:01 until Sunday, December 5, 2021 23:59.

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, the Union contends the assessment of a 20-day suspension in this matter is excessive, does not promote any educational component, and is a punitive assessment of discipline.

As a new employee Mr. Nijjar took responsibility for what happened, provided his commitment moving forward and further as noted this was a new employee and in the early process of continuing to learn and be mentored, punitive discipline is not a mentoring tool.

The Company has unreasonably and excessively disciplined Mr. Nijjar, the facts of the investigation do not warrant, nor justify this quantum which was assessed.

The Union requests that the discipline assessed to Mr. Nijjar be removed and that he be made whole for 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 with the Union's position.

The Company maintains that culpability was established through a fair and impartial investigation. Culpability is not in dispute, only the quantum of discipline. The Company maintains that failure to protect the point while shoving equipment such as this case are serious safety violations.

The Company's position is that the discipline assessed was appropriate, warranted and just in all the circumstances. Discipline was determined following a review of all factors, including those the Union describes. The Company maintains that the discipline was properly assessed under the Company's Hybrid Discipline and Accountability Guideline.

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	Director, Labour Relations

There appeared on behalf of the Company:

E. Carrier	– Manager, Labour Relations, Calgary
A. Cake	– Manager, Labour Relations, Calgary

And on behalf of the Union:

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

AWARD OF THE ARBITRATOR

Context and Issue

1. While working as a Remote Control Locomotive System ("RCLS") brakeman, the grievor shoved additional cars onto a track which was already full, resulting in cars being pushed out onto another track, which was in a Point Protection Zone ("PPZ") without permission.

2. The grievor is a very new employee, with only 7.5 months of service at the time of the incident. He had no discipline on his record.

3. The grievor admits he violated the Rule Book for Shoving Equipment.

4. At issue is whether the 20 day suspension is appropriate in the circumstances.

Position of Parties

5. The Company takes the position that the grievor committed multiple errors:

- Failed to protect the point.
- Failed to observe the track to be clear.
- Shoved out of the track he was required to put cars in.
- Shoved into the RCLS Point Protection Zone without the managers or any crews in the yard knowing.
- Shoved passed multiple switches onto the lead without knowing.
- The Grievor acknowledged the violation and took responsibility for the failure.

6. It takes the position that culpability has been established and that the 20 day suspension is entirely appropriate.

7. The Union does not contest that errors were made, but notes the night time conditions and the inexperience of the grievor.

8. The Union argues that the discipline is too severe and a reprimand would be appropriate.

Analysis and Decision

9. T and E Rule Book Section 12.3 Shoving Equipment reads as follows:

> 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 vehicles and
> (ii) unless the unmanned engine is leading all rules applicable to public crossings for headlights, whistles and bells are compiled 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 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. (Underlining added)

10. Here the grievor did not have a crew member riding point and was mistaken when he thought he had observed the track to be clear:

Q16 Mr. Nijjar where were you located to see that you had the entire AB06 track
A I was in the bend between AB0l & AB06, I can See AB06 from where I was standing and what I presume ·to believe was my tail end car in AB06 is how I confirm I had the entire track

QI 7 Mr. Nijjar just to clarify you didn't fully check the entire track to ensure the west end car was moving is that correct?
A That is correct

Q18 Mr. Nijjar the cars that you see move and stop with your entire movement in AB06 did. you get on the leading point to protect your movement when shoving back?
A: no, I was satisfied that I had room behind me to shove back

Q19 Mr. Nijjar have you read and understood today before today T&E Rule book October 28 2021 or October 25 2015 (Same section in updated Rule book that just came into action) Section 12 Item 12.3 Shoving Equipment?
A: Yes I have

> Q20: Mr. Nijjar can you tell me what the requirement are to enter a PPZ Zone?
> A: Need to have permission from that assigned to enter the zone.
>
> Q21: Mr. Nijjar did you have permission to enter the West PPZ zone and foul the west lease on the day in question?
> A: No, but I didn't believe I was entering the west PPZ Zone.

11. The grievor clearly admits that he did not meet the requirements of section 12.3 as he neither rode point nor placed himself in a position to observe that the track was clear. As such, culpability has been established and discipline is appropriate. The issue is whether the 20 day suspension is appropriate in the circumstances, based on a William Scott analysis.

12. The Company points to multiple cases where the discipline assessed was equal to or greater than that imposed here: **CROA 4351** (30 demerits and dismissal for improper shoving); **CROA 4454** (reinstatement without compensation after a one year dismissal for failure to provide point protection); **CROA 4539** (dismissal upheld for failure to protect point); **CROA 5023** (20 day suspension and dismissal for failure to protect point). It rightly points out the seriousness of the infraction.

13. The Union properly notes that the grievor takes full responsibility for the incident (see Q and A 24), that he is a new employee and has learned from his mistake. It notes that the grievor has a 76/77 success rate on E tests, both before and after the incident, many of which dealt with properly protecting the point (see Tab 2, Union documents).

14. The Union submits that the incident was not the result of any deliberate or pre-meditated wrongdoing and the evidence is that it was an isolated incident.

15. The Union pleads that the jurisprudence shows that discipline for a breach of Rule 115 typically results in a penalty of 15 demerits (see **CROA 4251, CROA 2990, CROA 3237**). Where greater penalties have been imposed, the grievor typically has a much

worse record than that of the grievor (see **CROA 4455, CROA 5026, CROA 5032**), or has not taken full responsibility (see **CROA 4486**).

16. The Union relies in particular upon a recent case, **CROA 5032**, decided by Arbitrator Yingst Bartel. A “green vest” employee, with less than one year of experience, misaligned a switch and caused a collision. The arbitrator upheld a 20 day suspension. It is noteworthy that the grievor had committed a similar infraction 15 days earlier, for which he received only a reprimand. The Union argues that Mr. Nijjar should not receive the same penalty as someone with a previous incident, where he has none, and receive the same penalty as someone who causes a collision, where he caused no damage.

17. The Union also relies on **CROA 4251**, in which a grievor did not protect the point while shoving cars, which were shoved past a fouling point, resulting in a sideswipe collision. Arbitrator Picher reviewed the jurisprudence concerning discipline for Rule 115 infractions and reduced the sanction to 15 demerits;

> The Union submits that the assessment of the thirty day suspension was excessive. In that regard its counsel draws to the Arbitrator’s attention to a substantial number of awards of this Office dealing with similar violations of CROR 115. He submits that a review of those cases confirms that the assessment of demerits, generally in the order of fifteen demerits, is the more appropriate measure of discipline. In that regard reference is made to CROA&DR 2990 and 3237, where fifteen demerits were assessed by the employer for violations of CROR 115 and were sustained by this Office. Additionally, similar infractions were reviewed in CROA&DR 3752, 3773, 3936 in which cases higher awards of demerits were all reduced to fifteen demerits.
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> Having reviewed the cases in question, and the facts of the instant case, the Arbitrator is compelled to agree with counsel for the Union. The assessment of a thirty day suspension for the facts of the instant case is in my view excessive, particularly having regard to the grievor’s length of service and his prior disciplinary record. In twenty-two years of service the grievor has received only minor demerits on two prior occasions, in addition to a single written reprimand. Given the history of dealing with similar infractions by the assessment of demerits, as confirmed above, I can see no compelling basis for the substantial financial penalty which was imposed upon the grievor. I therefore direct that the discipline be reduced to the assessment of fifteen demerits, with the grievor to be

> compensated for any wages and benefits lost, and with the thirty day suspension to be stricken from his record.

18. Both Parties contest the applicability of the other's jurisprudence, pointing out different factual bases for the discipline or different discipline histories. Their comments point out the necessity of assessing proper discipline within the particular facts of each case.

19. When I consider all of the aggravating and mitigating factors raised under a William Scott analysis, I find the discipline to be excessive. The grievor was a short service employee, with a clear record. He was responsible for the movement. I do not believe that a clear shoving violation, with the inherent potential for serious harm to people or equipment, can be adequately addressed with merely a reprimand, as was the case for the initial incident in **CROA 4251**. However, most cases with 20 day suspensions have aggravating circumstances which are not present here. In all the circumstances, I find the review by Arbitrator Picher compelling, where the most common penalty was the imposition of 15 demerits.

20. Accordingly, I allow the grievance and substitute a penalty of 15 demerits in lieu of the 20 day suspension imposed. The grievor should be made whole.

21. I retain jurisdiction for any questions of interpretation or application of this Award.

September 16, 2024

JAMES CAMERON
ARBITRATOR