

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

CASE NO. 5080

Heard in Calgary, September 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Whitty.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Whitty was dismissed as shown in his Form 104 as follows,

"Formal investigation was issued to you in connection with the occurrence outlined below:
"Alleged 439 violation on train 529-738 on the Belleville Subdivision on January 9th, 2024."

Formal investigation was conducted on January 18, 2024, 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 contained substantial evidence that you violated the following:

- Canadian Rail Operating Rules (CROR) - Rule 439

In consideration of the decision stated above, you are hereby dismissed from Company Service, effective immediately.

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 that the discipline assessed, outright dismissal is excessive, in violation of the Collective Agreement and has been done in a discriminatory fashion.

Mr. Whitty was a Locomotive Engineer Trainee and in training as such at the time of this incident. All the facts presented within all statements clearly show that Mr. Whitty was following the instructions of his trainer. That is what a Trainee does, follow the advice, experience etc. of the qualified Locomotive Engineer who is training them.

The direct result of the incident of a Rule 439 violation is directly and without a doubt on the hands of the Trainer. This is clear and can be seen throughout. The facts put forward by Mr. Whitty were never disputed yet he was dismissed from this incident while the Locomotive Engineer, his Trainer providing the instructions to him received a 30-day suspension. There can be no other conclusion than Mr. Whitty has been discriminated against by the Trainer receiving a 30-day suspension, and Mr. Whitty is dismissed.

Mr. Whitty was learning/training to become an Engineer thus he must depend on the coaching, mentoring, instructions of the qualified Engineer on the train. It is of utmost importance that the Trainer at all times is looking to see if the Trainee is doing what they should be and if not, in the same manner as if he (the Trainer) would be running the train apply all aspects of throttle modulation, different braking systems, and as the learned Engineer make decisions in advance of anything happening.

Mr. Whitty qualified as a Conductor at CP in July 2019 (on Western lines) and transferred to Smiths Falls July 2022 and entered into the LET in September of 2023.

As he provided in his statement, he relied on the instruction given to him by his Trainer, based on this he was following instructions which in the end were not good instructions at that time, thus we believe the cause of Rule 439.

Based on the facts provided in the entire investigation the Union does not believe Mr. Whitty carried a far greater responsibility than that of his Engineer/Trainer.

The gross difference in assessment of discipline is no more than discriminatory.

Mr. Whitty should have at most received what his Trainer received for discipline, but we argue should have received less, he was following the advice of his Trainer/Instructor.

As shown in Mr. Whitty's Q&A the following:

28. Referencing Appendix C, the memo from Road Foreman Quackenbush, can you explain why you engaged the emergency brake from the tail end, rather than the head end?

A. I was following the instructions from the engineer, to my knowledge we applied both simultaneously.

31. When we saw the advanced signal I reached to reduce the throttle. At this point the engineer had reiterated the information about longer blocks and with that in mind I chose to delay throttle reductions. The engineer did not specifically tell me not to reduce throttle at that point, however this information was one factor in my decision to delay said reductions.

Simply put we ask the Arbitrator to read Mr. Whitty's statement carefully as there are a lot of mitigating factors.

The Union further notes the following from the Collective Agreement:

25.26 ENGINEER INSTRUCTORS

(3) An Engineer Trainee will assume control of the locomotive under the supervision of an Engineer-Instructor. When an Engineer Trainee assumes control of the locomotive and/or train the Engineer-Instructor will have their responsibilities relaxed to the extent that they will not be held responsible for broken knuckles, damaged drawbars or rough handling; they will, however, continue to be held responsible for the observance of operating rules, special instructions and other regulations.

The Engineer/Trainer is directly accountable to ensure if his Trainee was doing or not doing something in the handling of the train that they must say or do something to ensure rules compliance and safe movement of the train, this did not happen at Bolingbroke.

The Company did not respond to the Union's Step 1 or Step 2 grievances in violation of the Collective Agreement Letter Re: Management of Grievances & The Scheduling of Cases at CROA as well as CROA 4870, the Union does not have a position of the Company.

Further it must be noted by many of the Company's arbitration briefs and statements of issue where they state the following:

"Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure." OR

"In regards to the Union's allegations regarding the grievance correspondence, as per the grievance procedure the remedy for a failure to respond is escalation to the next step. This has occurred and the Company's position has been provided."

In this case there is no position provided at either step within the mandatory timelines of the Collective Agreement. The Company had every opportunity to request an extension if needed, but simply chose to ignore the agreed upon terms of the CBA. There should be no reward for such.

The Union will retain all its' rights (objections) if the Company now puts forward any arguments where none were provided within the mandatory timelines.

The Union requests that Mr. Steve Whitty be reinstated forthwith, he be compensated all loss of wages with interest, no loss of seniority, benefits, and recalculation of AV/EDO's.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Whitty was dismissed on, January 27, 2024, as shown in his Form 104 as follows, "Formal investigation was issued to you in connection with the occurrence outlined below: "Alleged 439 violation on train 529-738 on the Belleville Subdivision on January 9th, 2024."

Formal investigation was conducted on January 18, 2024, 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 contained substantial evidence that you violated the following:

- Canadian Rail Operating Rules (CROR) - Rule 439

In consideration of the decision stated above, you are hereby dismissed from Company Service, effective immediately.

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

Company Position

The Company disagrees and denies the Union's request.

The Company relies upon the positions outlined in its grievance replies.

The Company maintains the Grievors culpability as outlined in the discipline letter was established through a fair and impartial investigation. Discipline was determined following a review of all the pertinent factors, including those described by the Union. Moreover, the discipline was properly assessed in keeping with the Company's Hybrid Discipline and Accountability Guidelines.

The Union suggests the Company has effectively failed to respond to the local grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the local grievance response, consolidated collective agreement article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the submission of the Union's final step grievance, it is also clear the Union acknowledges article 40.04 and has progressed to the next step of the grievance procedure.

As seen on the record a step 2 grievance response was provided to the Union, therefore knowing the Company's position on the matter.

In response to the Union's allegation that the discipline was discriminatory, the Company cannot agree with this allegation. Simply comparing the Grievor's assessment of discipline against that of his crew mate is not sufficient to support the claim of discrimination as it fails to recognize the unique circumstances of both individuals. The Grievor was assessed discipline with the principles of progressive discipline.

The Union's position that the Grievor was dismissed outright is not factual. Prior to being dismissed, the Grievor had active discipline of 30 days suspension related to his positive post-incident A&D test, 40 days suspension for a shoving movement that resulted in a derailment and fouling other tracks and 20 days suspension for leaving equipment foul, and 10 demerits related

to the application of handbrakes. To characterize that the assessed discipline was an outright dismissal is mischaracterization on the union's part.

With respect to clause 25.26, the languages states; the Engineer-instructor will have their responsibilities relaxed to the extent that they will not be held responsible for broken knuckles, damaged drawbars or rough handling; they will, however, continue to be held responsible for the observance of operating rules, special instructions and other regulations. Nowhere does it state the engineer trainee will be relieved of all responsibilities with compliance of the rules and regulations.

The Company's position continues to be that the dismissal was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and respectfully requests the Arbitrator be drawn to the same conclusion.

For the Union:

(SGD.) W. Apsey

General Chairperson

For the Company:

(SGD.) F. Billings

Director, Labour Relations

There appeared on behalf of the Company:

- S. Arriaga – Manager, Labour Relations, Calgary
- A. Harrison – Manager, Labour Relations, Calgary

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- W. Apsey – General Chairperson, CTY-E, Montreal
- S. Whitty – Grievor, Video Conferencing

AWARD OF THE ARBITRATOR

Analysis and Decision

Introduction

[1] This Grievance is one of two Grievances heard during the September 2024 session for CROA, involving this Grievor. The first Grievance was resolved in **CROA 5079**, where a 30 day suspension was upheld for the Grievor's breach of the Company's Alcohol and Drug Policy and Procedures, in consuming cannabis while subject to duty, in breach of Rule G(i).

[2] This Grievance addresses the discipline for the underlying Rule 439 violation which led to that substance test.

[3] On January 9, 2024, the Grievor was working as a Locomotive Engineer Trainee, and was operating Train 529-738, alongside Locomotive Engineer M. Tilford and Conductor Gray. While the Grievor was operating this Train, it proceeded past a stop signal (#293) at MP 29.3 at Bolingbroke, on the Belleville subdivision.

[4] The issue in this case is not whether the violation occurred, but whether the Grievor should have been assessed discipline similar to his training Locomotive Engineer, or a lesser quantum than discharge.

[5] For the reasons which follow, the Grievance is dismissed. The discipline was not excessive or unwarranted, given all of the circumstances, which include not just this serious and significant offence, but the Grievor's short service and significant disciplinary record, which includes a 20 day suspension; a 30 day suspension and a 40 day suspension.

Decision

[6] Certain of the facts have been outlined in **CROA 5079** and that factual recital is adopted here. That Award should be read alongside this Award, in any precedential use.

[7] I am not convinced the discipline to be assessed to the Grievor should be commensurate with that given to his trainer, as argued by the Union. His discipline record and length of service were not the same. There is also the fact it was the Grievor – and not Engineer Tilford – who was ultimately making the decisions as to when to slow this Train, which was noted by the Grievor himself in his Investigation. I do not consider there has been discriminatory discipline in this case.

[8] Rule 439 requires trains to “stop” at a stop signal. That Rule is included in the Canadian Rail Operating Rules “(CROR)”, which are Rules which apply to all railroads.

[9] Arbitrators in this industry view Rule 439 violations to be significant and serious misconduct, although such violations do not result in automatic dismissal: **CROA 2356**; **CROA 4391** (and decisions referred to therein).

[10] Proceeding past a stop light with a Train weighing several tons, on a track which accommodates traffic running in both directions, can obviously have catastrophic consequences. As the “nature of the offence” is one *Wm. Scott* factor to consider when assessing quantum of discipline, this is a significant aggravating factor in this case.

[11] Given that Trains can take multiple miles to bring to a stop, there are two advanced signals which demonstrate to a crew that they must be prepared to slow and ultimately

stop their Train. Prior to encountering the signals at issue, the Grievor was made aware by the RTC that the Train would have a “meet” with Train 132 at Bolingbroke. The crew had job briefed that meet before reaching the first (Advanced Clear to Stop) signal, including the longer blocks and the uphill grade before the signal at Bolingbroke. They had not job briefed “conditioning” the brakes.

[12] The Train download was entered into evidence and helps to establish what was happening at various points along this journey.

[13] In this case, the first signal, the “Advanced Clear to Stop” - was encountered six miles before the stop signal. The information the Grievor had from encountering that signal was that he would need to bring his Train to a stop at the second signal upcoming after that (the 3rd of three signals). He had six miles in which to do so. At that point in time, the Train was proceeding at 39.7 MPH. The train was kept at throttle #8 at this signal.

[14] Six and one half minutes later, the next signal became visible to the crew. That signal was displaying “clear to stop”, which advised the Grievor that the train would be required to stop at the next signal. The Grievor was traveling at 40.6 MPH when he passed that second signal, 2.5 MPH *faster* than at the last signal.

[15] The “stop” signal was observed approximately two minutes later. At the time it was observed, the Train was still traveling at 30 MPH and an automatic brake application was initiated. 15 seconds later, the Train was put into emergency traveling at 26.7 MPH, and passed the stop signal traveling at 23.8 MPH. Both Engineer Tilford and the Grievor were involved in that action.

[16] While the Grievor’s statement indicates that the Train “slid” past the stop light, the Train download demonstrated that the Train operated by the Grievor was traveling at more than 23 miles per hour when passing the stop signal at MP 29.3, and that the Grievor’s Train was went by the signal by *460 feet* (5 car lengths).

[17] That is 160 feet more than the 300 feet of “controlled” space referred to in Rule 439 and is considerably more than a “slide” past.

[18] Fortunately for both crews Train 132 had not yet arrived at the time the Train proceeded past the stop signal.

[19] This is not a situation where the Grievor had appropriately tried to slow his train when he first encountered the signals and his Train was not responding as expected; or where there was a momentary lapse of judgment.

[20] The Road Foreman Report included an assessment of the Train download information. It noted the crew should have “conditioned the automatic brake at an earlier time or approached at a reduced rate of speed”. It also noted the impact of one locomotive unit on the ability of the Train to stop.

[21] While the Grievor stated in his statement that there was a “possibility” he would receive a “stop” signal at Bolingbroke, there was no evidence this was only a “possibility”. In fact, the RTC had noted that there would be a meet with Train 132, so the crew was aware of the upcoming stop.

[22] The Union argued there were several other mitigating factors at play in this case, including the weather (blowing snow) making it difficult to see the signs. While the Grievor was operating in winter weather, in Canada such weather occurs for many months of the year. He was also operating at night, which is also not unusual given that the railway industry operates around the clock.

[23] The Union also focused on the longer blocks on this part of the Subdivision; the Grievor’s limited experience on the Belleville Subdivision since his transfer in the Summer of 2022; the struggle to meet speed initially given conventional power; and the uphill grade, which he anticipated would help him in slowing this Train but did not do so as expected. The Grievor also noted the lack of a Trip Optimizer on this Train (given the Grievor’s experience to that point with Trains that had Trip Optimizers), which required the Grievor to rely on a paper profile; the fact that he was in training and was to be supervised by Engineer Tilford - who the Union argued should have taken a more proactive role - that Engineer Tilford did not advise him he was not slowing down fast enough and that he emphasized the longer blocks to the Grievor, when the Grievor went to reach for the throttle and reduce it (after reaching the Advanced Clear to Stop signal, to see how the train would respond, which had been his standard practice). The Grievor

noted that Engineer Tilford had not told him not to reduce the throttle at the Advanced Clear to Stop, but that he took Engineer Tilford's statement regarding longer blocks into account in making a judgment call not to do so.

[24] There is also no evidence that the Grievor asked any questions of Engineer Tilford to seek direction on how to operate the Train, what he should be doing, when he should be slowing, or how the Train was handling. In fact, Engineer Tilford told the Grievor after the Clear to Stop signal that there could be a stop signal at Bolingbroke and "that we would need to take action".

[25] T&E Rule 411 requires that movements must reduce speed "to a speed not exceeding 30 MPH" before passing a Clear to Stop Signal. That is a clear rule, with no ambiguity. The Grievor's Train was proceeding at 40.6 MPH when it passed that signal; 10.6 MPH more than T&E Rule 411 allowed. While the Grievor stated that "we attempted to reduce our speed prior to passing signal 279" at Q/A 23, the Grievor did not even begin to reduce the speed of this Train until five seconds *after* the light of the Clear to Stop signal was observed, and then only put the throttle to idle one minute *after* passing the signal, when the Train was traveling at 37.3 MPH. He was to be at 30 MPH when he passed that signal.

[26] The Grievor failed to reduce the Train's speed, to ensure it would be traveling at 30 MPH when it passed the signal, in compliance with T&E Rule 411. I am satisfied regardless of the weather or other conditions, the Grievor had access to a speedometer to understand he was going too fast as he approached – and then as he passed – the Clear to Stop signal. As a result, the Train was proceeding at more than 23 MPH when it passed the Stop signal.

[27] When determining quantum, each case is dependent on its own facts, so precedents have limited use. In this case, conducting the required wholistic review, not only did the Grievor violate Rule 439, he also violated T&E Rule 411. He also failed to condition the brakes as required in winter conditions.

[28] While the Union argued that Engineer Tilford should have been more proactive in coaching the Grievor, at this point the Grievor was approximately five months into his training program as a Locomotive Engineer. Further, the Grievor did not seek any

information from Engineer Tilford after the job briefing; he did not ask any questions of when or how he should be slowing the Train or otherwise engage with Engineer Tilford to seek his guidance. Engineer Tilford did instruct the Grievor regarding putting the Train into emergency and he did point out after the Clear to Stop that action was required to be taken.

[29] Further, regardless of the distraction of needing to use a profile map, the Grievor was capable of reading a speedometer and was qualified in how to read and understand signals. He should have taken steps after the Advance Clear to Stop to slow his train down to the required speed so that he would pass the Clear to Stop proceeding at 30 MPH, as required. He did not take that action. Not only that, but the action he *did* take to slow the Train was taken *after* he passed the signal.

[30] While there are factors including the Grievor's lack of experience on this subdivision; the conventional power and the fact he was still training, which are mitigating to a degree, there are also significant aggravating factors in this case.

[31] The Grievor did not follow Rule T&E 411. That Rule was clear and unambiguous. Regardless of the other mitigating factors such as weather and his dependence on a paper profile, I am satisfied he should have been carefully noting his speed, given the signals he was encountering. The Grievor was a short service employee with a significant disciplinary record of 90 days of suspension, assessed between May of 2021 and the time of his dismissal in early 2024. Two of those assessments - the 20 day and 40 day suspensions - were for moving violations (one of which resulted in a derail and one of which left equipment foul of the track), and the third was a 30 day suspension which resulted from a positive drug test and a determination from the Investigation that the Grievor had consumed cannabis while subject to duty (**CROA 5079**).

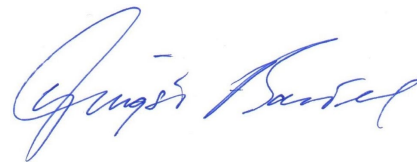
[32] Post-incident, the Grievor has obviously put a lot of thought into how he came to pass the red "stop" signal, traveling at 23 mph. There was a detailed document which he created and which was filed into the Investigation, where he tried to determine how this incident occurred, and how a future incident could be avoided. This was a laudable effort and I am satisfied he has demonstrated remorse and accountability, which are important factors to an Arbitrator.

[33] However, combining the significant aggravating factors with the serious nature of this offence, I am not convinced that the mitigating factors which exist serve to attract an exercise of discretion to reduce this penalty, which I am satisfied was just, warranted and reasonable in all of the circumstances.

[34] The Grievance is dismissed.

I reserve jurisdiction to correct any errors; and address any omissions, to give this Award its intended effect.

December 2, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**