CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5130

Heard in Calgary, January 14, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

UNITED STEELWORKERS LOCAL 1976

DISPUTE:

Appeal of the 40-day suspension assessed to Conductor Logan Kerkhoff of Medicine Hat, AB.

JOINT STATEMENT OF ISSUE:

Following a formal investigation Mr. Kerkhoff was assessed a 40 day suspension on April 4, 2023, for the following:

"In connection with your tour of duty on train 9TEC-20, March 20, 2023, and more specifically the events surrounding the occupancy on the west leg of the north wye in Alyth Terminal after lining the ML Lead switch without permission, while employed as a Conductor in Medicine Hat AB."

UNION POSITION

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union contends the Company's failure to respond to the Step Two appeal in a timely fashion is a violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is void ab initio and ought to be removed in its entirety and Mr. Kerkhoff be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above.

The Union contends the Company has failed to consider mitigating factors contained within the record.

The Union contends the discipline assessed is arbitrary, unwarranted, unjustified, and excessive in all the circumstances. The Union disputes any reference to the Company's discipline policy and the manner in which it has been applied in the instant matter; the discipline is contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Kerkhoff is made whole for all associated loss with interest. 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 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.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those that the Union describe as mitigating.

Regarding the Union's allegation that the discipline was arbitrary, unjustified, unwarranted, and excessive, the Company cannot agree with this allegation. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Company's position continues to be that the discipline assessed was just, appropriate, warranted in all the circumstances.

Based on the foregoing, 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.) D. Fulton	**(SGD.) F. Billings**
General Chairperson, CTY-W	Director, Labour Relations

There appeared on behalf of the Company:

F. Billings	– Director Labour Relations, Calgary
S. Arriaga	– Manager Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY-W, Calgary
B. Wiszniak	– Vice General Chairperson, CTY-W, Regina
L. Smith	– Alt General S/T, CTY-W, Medicine Hat
T. Stehr	– Local Chairperson, CTY, Medicine Hat
V. Linkletter	– Vice General Chairperson, RCTC, Calgary (observer)
L. Kerkhoff	– Grievor, Medicine Hat (via zoom)

AWARD OF THE ARBITRATOR

Background, Issue & Finding

[1] At the time of these events, the Grievor was employed as a Conductor. He had been hired in March 2019, so was a four year employee.

[2] This is the second of three Grievances heard at the January 2025 CROA Session involving this Grievor. In the first Grievance (**CROA 5129**) the Grievor's discipline of 20 days for failing to perform a passing inspection in early March of 2023 was upheld. That discipline was not assessed until the day after this incident occurred.

[3] Prior to the events of March 2023, the Grievor had a clean disciplinary record.

[4] This Grievance involves the assessment of a 40 days' suspension for lining a switch without authority, which occurred two weeks later. This Grievance was filed against that discipline.

[5] The arguments of the parties have been noted in the JSI, above. The Company maintained this was just and reasonable discipline, consistent with its jurisprudence, which recognized the significant nature of the issue of lining a switch without proper authority, in this industry. The Union maintained the Investigation was unfair and not impartially conducted; that the Grievor felt he had permission to line the switch and culpability was not established; and that – even if so – discipline of a 40 day suspension was not just and reasonable.

[6] Other arguments will be addressed in the "Analysis" section, below.

[7] The issues between the parties are:

a. Was the Investigation fair and reasonable?; if so,
b. Was the Grievor's conduct culpable?; if so
c. Was the discipline imposed just and reasonable?; and if not
d. What discipline should be substituted by the exercise of this Arbitrator's discretion?

[8] For the reasons which follow, the Investigation was not unfair and was impartially conducted. The discipline is not *void ab initio.* The Grievor was culpable for lining the

switch without authority to do so. However, a 40-day suspension for the Grievor's actions in this case was not just and reasonable, but was excessive and unwarranted.

[9] The Grievance is therefore upheld, in part and a lesser form of discipline is appropriately substituted by the exercise of this Arbitrator's discretion.

Analysis and Decision

[10] On March 20, 2023, the Grievor and his crewmate were ordered for 0600 on Train 9TEC-20 in straightaway service, from Alyth to Medicine Hat. The Train was located on the "ML Lead", where the Grievor had never worked before. The Grievor's evidence was that the crew had a job briefing and they "discussed where we were going and the ML Lead" (at Q/A 22). The Grievor had informed the Trainmaster neither he nor his LE had ever been to the ML Lead before.

[11] At Q/A 23, in response to a question to this effect from the Union, the Grievor stated: "Yes, we talked to the terminal and I had specifically told him that we had never been out there and we required direction to find where the train was parked". The Grievor also confirmed that a pilot was never requested during his tour of duty on this assignment in Alyth/Calgary (at Q/A 27).

[12] Once the crew arrived at Train 9TEC-20, a job briefing occurred with the Foreman in charge of that train. The Grievor stated at (Q/A 23):

> Yes, we had a job briefing with the TEC train crew discussing speed restrictions and operations when we were on the road. I talked to the engineer about checking the lineup, talking to the terminal and the schematics for the layout of the ML Lead and regarding the derail on the ML Lead [emphasis added)

[13] The Grievor confirmed he was aware that the "method of control for the West Leg of the North Wye Red Deer Subdivision is "CTC", which requires "signal, indication, permission or written authority from the RTC", for a movement to foul or enter "main track": Rule Book for T&E Employees, section 9.3 "Main Track" (at Q/A 30).

[14] No permission was ever sought or granted by the RTC for the Grievor to line this switch.

[15] The crew contacted the Trainmaster for permission off the lead to enter the Red Deer sub. Believing that he had the required permission, the Grievor lined the switch. He subsequently lined it back when it was brought to his attention he did not have permission to line that switch.

[16] The Initial Incident Report - completed by the Grievor on March 20, 2023 – stated:

> Asked for permission out of ML Lead and got permission from terminal out. Lined the switch and was told to line it back. Lined the switch back and waited on train until we were picked up by the yard van and taken to the tower.

[17] Three transcripts of the radio conversations which occurred were entered into evidence. It is unnecessary to outline each transcript. All have been reviewed. I am satisfied from that review that the Grievor did not obtain any permission from the Trainmaster to line the main switch, nor is this a circumstance where the Trainmaster could in fact ***give*** such permission, given that it was ***the RTC*** that had to give that permission. While the Grievor stated he "believed" he had permission from the Calgary Trainmaster (at Q/A 38), the Grievor also acknowledged that it was not the Calgary Trainmaster who gave that authority but the RTC (in Q/A 40).

[18] While the Union argued the Investigation was not conducted fairly or impartially, I have reviewed the entirety of the transcript and do not share that concern. In fact, several questions were improperly objected to by the *Union* representative, when there was no basis for those objections.

[19] I have found no basis for determining the Investigation was unfair or was not impartially conducted, or that there was a basis for the numerous objections made by the Union.

The Wm. Scott Questions

[20] As noted in **CROA 5059**, it is the Company's burden to establish both culpability and reasonableness of its disciplinary choice. The next analysis applies the three "*Re Wm. Scott"* questions to determine if that burden has been met.

[21] The first question is whether culpable misconduct has occurred.

[22] I am satisfied that question is properly answered in the affirmative, in this case. I am satisfied that lining switches is a “core” element of the duties of a Conductor, as recognized in the jurisprudence in this industry. I am further satisfied the Grievor was culpable for failing to obtain the proper authority before lining this switch. Regardless of whether the Grievor “thought” the Trainmaster had given permission, he knew - or should have known – it was not the Trainmaster who could give that permission, for this switch. It was the R.T.C. No authority was gained or sought from that individual. Culpability was established for lining a switch without authority.

[23] The remaining two questions relate to the reasonableness of the discipline assessed, and the substitution by this Arbitrator of just and reasonable discipline, if not.

[24] The second question is whether an assessment of a 40 day suspension was just and reasonable discipline in all of these facts. I am satisfied it was not.

[25] There are a “spectrum” of fact situations involving the lining of switches without authority. I accept that a 40-day suspension is a very serious form of discipline, with significant economic impact. Given that reality, that form of discipline should be reserved for the most serious fact situations involving lining switches without authority.

[26] The Union has persuaded me this is not one of those fact situations.

[27] In this case, I am cognizant of the fact that the Train in this case did not move after the switch was lined incorrectly; no switch was run through and no track was fouled. The mistake was quickly caught and rectified and the switch was lined back.

[28] In addition, I am satisfied that the Company reached its decision to impose a 40-day suspension in this case by “doubling up” the Grievor’s previous assessment of 20 days (upheld in **CROA 5129**), which had been incurred two weeks earlier, so as to act consistent with its discipline policy, rather than through undertaking an assessment of where on the spectrum of switch offences this case properly sat within the jurisprudence. As explained by this Arbitrator in **AH861**, this type of “doubling up” of discipline by application of a policy risks losing the important and key element of *progressiveness* which is required by arbitral jurisprudence. It also risks being found to b punitive rather than disciplinary.

[29] That type of discipline – which I am satisfied has occurred in this case - is not just and reasonable.

[30] The remaining third question is what discipline is just and reasonable and appropriately substituted by the exercise of this arbitrator's discretion?

[31] The parties each offered jurisprudence for what is a reasonable assessment for failing to obtain authority before lining such a switch. Both parties relied on **CROA 5034**, a recent decision of this Arbitrator. In that case, a Conductor with one year's service had been tasked to line two other switches; "heard the work train" coming over the hill; and decided to proactively line a third and different switch for which he was not tasked and for which he did not have authority; without any communication to anybody. He did not communicate with either his crew or the RTC for doing so and was not required to line that switch at that point. Doing so not only showed the block occupied, but it then negatively impacted an approaching work train.

[32] That employee had no discipline on his record, although he had only been employed for one year. A 20 day suspension was upheld by this Arbitrator, in that case. It was found that 20 days was "significant" discipline for that misconduct. That type of conduct – where the switch was not even on that employee's task list; is much more significant and serious than the situation in this case, yet *this* case *also* attracted 40 days, or double the assessment given to that grievor, even though this Grievor in this case had longer service.

[33] The Company relied on **AH772**, which also involved the improper lining of a mainline switch without authority, by a grievor with four years of service, which is factually similar to this case. However, in that case, the Grievor did not have any explanation at all for his conduct; only merely saying "he forgot". In that case, it was found that multiple officials were giving and changing instructions to the train crews and some were confused in that congested yard. A lengthy unpaid suspension was substituted. I am satisfied that case is also factually distinct that the situation in this case.

[34] The Company relied on **CROA 4660**, where an RTC failed in a fundamental duty to voice a proper name and a 20-day suspension was upheld; and **CROA 4448**, also involving an RTC. While failure to pay attention to detail was at issue in both cases, that

is a broad requirement not factually similar to the present case. Further, attention to detail is recognized in the jurisprudence as a particularly important element for an RTC, given their job role in directing train traffic, and the possible catastrophic consequences from even momentary inattention.

[35] Certain authority was only offered by the Union because of its fleeting mention of previous discipline for failing to line a switch, but that offence was not the one in dispute. In **AH871,** for example, there is a reference to the Company having imposed a seven day suspension for throwing a switch, but that was not the discipline under grievance and only reviewed as part of the assessment of the grievor's record. In **CROA 4592**, there is reference to the grievor's record where he was issued a written reprimand in 2013 for lining a switch in violation of the rules.

[36] As the discipline of lining a switch without authority was not actually at issue in either Award, there is no mention of what facts attracted the various measures. Without that context these types of cases are of limited assistance.

[37] I am satisfied that failing to line switches without proper authority is a significant offence in this industry, as was recognized in **AH772** and that it can support discipline up to dismissal, on the appropriate facts, as also recognized in that case.

[38] In this case, the Grievor had one 20-day suspension on his four-year record. While that suspension was for significant misconduct, as described in **CROA 5129**, I accept that a one 20-day suspension in a career of four years is not a particularly aggravating record. The Grievor has not demonstrated by that disciplinary record that he is unable to learn from a progressive disciplinary approach.

[39] The Union has argued the Grievor's intention is relevant as a mitigating factor; as he *thought* he had permission.

[40] The difficulty with this argument is twofold: First, I am not satisfied the Grievor's explanation was compelling given my review of the transcript evidence. What he *thought* he heard was not borne out in the transcript. Second, even if it were, the person the Grievor was relying on <u>for</u> that permission was in fact the wrong person. His explanation therefore demonstrates he failed to understand the requirements of the rule.

[41] The Grievor's confusion in this regard is therefore not a mitigating factor.

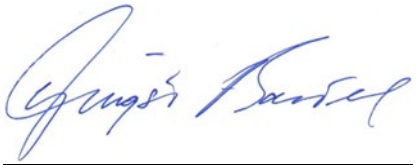
[42] As noted above, both parties relied on this Arbitrator's decision in **CROA 5054**. That is a recent and relevant comparator authority. The Grievor in that case had less service than this Grievor; his actions were more significant and deliberate - given there was no direction to him to address the switch and no job briefing where he was directed to do so - and his actions impacted an incoming train. In that case a 20-day suspension was upheld as just and reasonable.

[43] On a review of all of the facts and circumstances; and considering that this Grievor only had one incidence of discipline on his record for this four-year career at the time of this event; and given the finding in **CROA 5054**, where more significant misconduct for a grievor with less service attracted a 20-day suspension; the 40-day suspension assessed to this Grievor was excessive and unwarranted and therefore was unjust and unreasonable.

[44] A 15 day suspension is appropriately substituted.

[45] The Grievance is therefore upheld, in part. The Grievor's record is to be adjusted and a 15-day suspension imposed for lining a switch without authority. He is to be made whole for the 25-day difference in wages.

I retain jurisdiction for any questions relating to the implementation of this Award; for any issues of remedy or arising from my directions on which the parties are unable to agree; to correct any errors; and to address any omissions, to give this Award its intended effect.



April 1, 2025

CHERYL YINGST BARTEL
ARBITRATOR