CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5154

Heard in Edmonton, March 12, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal on behalf of Locomotive Engineer Dave Ford, regarding being assessed with fifteen demerits.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Ford was assessed with 15 demerits described as:

"In connection with your tour of duty while working train 577-379 as the Locomotive Engineer on June 2, 2022 and being observed failing to point at switch target and switch points before and after lining the F1/D1 switch. A violation of Operating Bulletin SSA-062- 21 Hand Operated Switches – dated November 8, 2021."

UNION'S POSITION:

The Union contends the Company failed to provide a fair and impartial investigation and all the evidence to assess discipline in this situation. When the GYO camera was observed it was noted that there was vehicular traffic between where ATM Ahmed was located, and Engineer Ford. ATM Ahmed states in his memo that when they attempted to download the camera that it stopped recording once the train came to a stop. Within the investigation ATM Ahmed states, he watched Mr. Ford walk up to the switch, which would mean he saw the back of Mr. Ford walking away from him to the switch at a distance of approximately 570-feet. The investigating officer did not allow the Union Representative to ask further questions of ATM Ahmed. Assistant Superintendent Jason Leedhal states in his memo that the camera records for ten minutes and if there is no more movement the camera stops recording. It also contradicts ATM Ahmed's memo that the camera stopped recording once the locomotive stopped.

The Union also notes that the rule does not state that employees must make theatrical gestures of pointing to the points, target in order for management to observe that it was done. If the theatrics were required, then the Union would acknowledge it may have been possible to see the action approximately 570-feet away through vehicular traffic and at the back of Mr. Ford.

Further, the Union contends past jurisprudence explains the proper protocol and handling of efficiency testing, as in CROA 4580 and CROA 4621. Both similar to the situation regarding Mr. Ford, there was no accident or issue causing damage. A more appropriate use of the E-test would have been the education received by Mr. Ford.

The Union submits Mr. Ford was not falsifying the incident; in fact, he asked for the evidence that would prove as such. The Union is perplexed to why the evidence that would exonerate Mr. Ford was missing from the investigation. It was clear in the investigation that Engineer Ford was adamant he made sure to point and check the switch points before handling the switch. The Union finds it extremely concerning that both the Locomotive Camera and the GYO footage could not be relied on. One was allegedly not available and the other had a gap in the timeline that may have exonerated Mr. Ford.

The Union seeks an order that the 15 demerits be expunged from Locomotive Engineer Ford's discipline record and that he be made whole for lost wages, with interest, for the time to attend the investigation. 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 Company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104 and that the discipline was in line with arbitral case law and the Hybrid Discipline and Accountability Guidelines.

The Union takes the position that the Company withheld evidence that would prove the Grievor's innocence. As stated by the Assistant Superintendent it was understood at the time that when a locomotive is stationary it stops recording after 10 minutes. Notwithstanding this, in the Assistant Trainmasters (ATM) memo he states that he observed the Grievor failing to point at switch target and switch points before and after lining the switch.

The Union submits that the Company has engaged in unreasonable application of Proficiency Test policy and procedures. Arbitral jurisprudence has held that the assessment of discipline for a rule violation identified through the efficiency testing procedure does not void the discipline assessed.

The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

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.) G. Lawrenson	**(SGD.) F. Billings**
General Chairperson	Director Labour Relations

There appeared on behalf of the Company:

R. Araya	– Labour Relations Officer, Calgary
F. Billings	– Director Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Calgary
B. Myre	– Vice General Chairperson, LE-W, Red Deer, Alberta
J. Keen	– Local Chairperson, Saskatoon

AWARD OF THE ARBITRATOR

Background & Summary

[1] On June 23, 2022, the Grievor was Investigated for a failure to point at switch targets. He was allegedly observed by Assistant Trainmaster Ahmad failing to point at the Switch Targets for the D1 Switch. The Grievor disputed that he did not point to the Switch targets as required and maintained that he *did* point at the Switch targets.

[2] At the time of observing this alleged infraction, Trainmaster Ahmad was at the "main entrance looking out the window". The evidence was that location would be between 411 and 430 feet from the Grievor. That distance is 100 feet more than a football field, which is 330 feet. The Union understandably sought to ask several questions in the Investigative interview regarding the ATM's vantage point and what he was able to see. Those questions were determined to be irrelevant by the Investigating Office.

[3] As a preliminary issue, the Union alleged the Investigation of this discipline was not fairly or impartially conducted, and as a result, the discipline cannot stand and the discipline was *void ab initio*. It argued that the Investigating Officer improperly failed to allow 12 questions which it argued were relevant relating to the alleged infraction.

[4] The Union's argument was found to be compelling at the hearing and a Bench decision issued, with written reasons to follow. These are those reasons.

[5] This Award addresses what occurs when an Investigating Officer has determined that certain questions are not relevant and does not allow those questions to be asked and answered, but an Arbitrator determines those questions ***are*** relevant questions, which should have been asked and answered. It was determined in this case that the questions

which were not allowed by the Investigating Officer were questions that *should* have been asked and answered and *were* relevant.

[6] Without the answers to those relevant questions, the evidentiary record is incomplete. This has rendered the Investigatory process "*unfair*".

[7] The Grievance is upheld. The discipline of 15 demerits is *void ab initio* and is vacated.

Analysis & Decision

[8] Trainmaster Ahmad and Assistant Superintendent Leedahl filed Memorandums into the Investigation.

[9] It was not alleged that Assistant Superintendent Leedahl observed the alleged infraction and he was only able to provide evidence for what he was told by the ATM.

[10] The Union pointed out that his Memorandum referred to the failure to line a switch that was actually not the switch which was in issue; it was an incorrect reference.

[11] I have reviewed all of the questions at issue. While several of the questions were irrelevant, there are several questions in that group which *were* relevant and material to resolving this dispute, including #5 (whether a vehicle obstructed his view); #6 (regarding how clear the view was from the main entrance to the switch); #10 (when the ATM last had an eye exam) and #12 (vehicles obstructing his view across the parking lot).

[12] I am therefore satisfied that the evidentiary record produced in this Investigation has been rendered as "*incomplete*", as not gathering the appropriate evidence required by an Arbitrator to resolve this dispute. As an Investigation which is "*incomplete"*, it is an

Investigation which was *"unfair*". The discipline which resulted from that Investigation cannot therefore stand.

[13] To understand this result, it is important to understand the importance of the Investigative transcript to an Arbitrator, in this unique and expedited arbitration process.

[14] Both the Investigation and the grievance documentation are key aspects of this expedited process. Another key aspect is the requirement that the parties narrow their issues by agreeing to a Joint Statement of Issue (or receive permission from an Arbitrator to proceed); and the stipulation that if they do not properly raise the issue – an Arbitrator does not have jurisdiction to address that issue.

[15] While the Investigation is conducted by Company officials, who do not have legal training, it is not expected that the Investigation will be conducted as questioning would be in litigation. However, the Investigation is expected to be conducted in a manner which is "fair" and "impartial". Certain elements of how to achieve that type of Investigation are agreed between the parties in the Collective Agreement. Others have been developed by Arbitrators adjudicating in this industry, over the years.

[16] The leading decision on those elements is that of Arbitrator Picher in **CROA 3322.** In that case, a letter had been withheld from the Union. The Arbitrator surveyed the jurisprudence and held that a "*fair and impartial*" Investigation was a "*precondition*" to the assessment of discipline. He found, in part, that the Grievor was entitled to know the evidence against him and "*be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on the employee's responsibility*" (at p.4). He quoted the following from **CROA 1734**:

> *It is well settled that a violation of these provisions amounts to the denial of a substantive right, the consequence of which is to render any discipline void ab initio, regardless of the merits of the case… The reason for that firm rule is to safeguard the integrity of the expedited grievance and arbitration process established within the railway industry and the Canadian Railway Office of Arbitration.*
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> …
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> *This case raises issues fundamental to the integrity of the process of expedited hearings that is vital to the operation the Canadian Railway Office of Arbitration…If the credibility of this Office is to be preserved both the parties and the Arbitrator must be able to rely, without qualification, on a fair adherence to the minimal procedural requirements which the parties have placed into the Collective Agreement to facilitate the grievance and arbitration process in discipline cases* (at p. 4)*.*

[17] As recognized in the jurisprudence, the Investigation is a key part of the evidentiary record available to an Arbitrator tasked with resolving the dispute. The Investigative transcript is in fact the first evidentiary document this Arbitrator reviews when she deliberates.

[18] In regular arbitration, an Arbitrator would create her own record during the hearing, by taking notes of both the direct and cross-examination of the grievor. He or she would also be in a position to provide a ruling on any objections raised as to whether a question is – or is not – relevant.

[19] In the CROA process, the task of producing this evidentiary "*record*" for the Arbitrator is largely borne by the parties.

[20] The comprehensiveness of the Investigative process in this industry is – in large part – what allows multiple grievances to be heard in a short period of time, as oral evidence is rare; short time limits are allowed for conducting hearings and are closely monitored (by direction of the parties, contained in the "CROA Agreement"); and multiple

cases can therefore be heard in each day of the three-day monthly session. While there are significant efficiencies gained by such a process for the parties, there are also trade-offs.

[21] The impact of one of those trade offs has been demonstrated in this case.

[22] As noted in **CROA 3221**:

> For reasons elaborated in prior awards of this Office, the standards which the parties have themselves adopted to define the elements of a fair and impartial hearing are mandatory and substantive, and a failure to respect them must result in the ensuing issuing discipline being declared null and void…it must again be emphasized that the integrity of the investigation process is highly important as it bears directly on the integrity of the expedited form of arbitration utilized in this Office (at p. 2).

[23] A leading decision recognizing the importance of the integrity of the Investigative process is that of the Saskatchewan Court of Appeal, involving the underlying decision in **CROA 4558:** *TCRC v. CN* 2021 SKCA 62. The issue in that case was the failure by CN of disclosing certain "keystone" document.

[24] Relying on previous CROA jurisprudence, the Arbitrator found that disclosure of such documents was a *"basic element of a fair and impartial investigation*" (as quoted by the CA, at para. 22). His decision was quashed by the Court of Queen's Bench but restored by the Court of Appeal.

[25] As noted by that Court, the Arbitrator in **CROA 4558** considered that the "*investigative stage is not only an agreed upon precondition to the imposition of discipline, but….a fundamental aspect of the unique CROA process* (at para. 60). It found that the Arbitrator's decision was focused on the following:

> …the need to protect the integrity of the unique CROA system that the parties agreed to adopt in the MOA to meet the particular needs of employers and employees in this industry.
>
> …
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> In doing so, he was obliged to take account of the MOA and of the potential impact of his decision on the CROA system that embodies that agreement (at para. 56).

[26] That same result was reached in **CROA 3732**, a 2009 decision of Arbitrator Picher, a former Chief Arbitrator of CROA's process. That Arbitrator found that the fact that the Union did not receive notice of the statements given by the yardmaster or the yard foreman was a "*serious procedural issue*", as those individuals would have had evidence which had a "*bearing on his responsibility for the collision which occurred"*. The denial to the grievor of the opportunity to hear what those individuals had to say, or to put questions to those individuals was held to render that discipline *void ab initio*. Likewise, in **CROA 4621**, the Arbitrator set aside certain discipline when it was found that the Investigating Officer failed to allow pertinent questions to be put to the Superintendent.

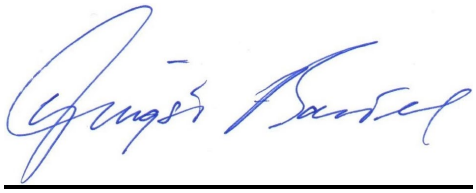
[27] While the Company pointed out that the Investigating Officer is entitled to make determinations of what is relevant or not at the Investigation by the terms of the Collective Agreement, that does not provide protection to the Company if it turns out that individual is *incorrect* in that assessment. If relevant questions are disallowed at the Investigation, the Company bears the risk that the Investigation will be rendered to be "*unfair*" as it will be "*incomplete*". An incomplete Investigation is a concern of a fundamental nature, within this expedited arrangement. That is what I am satisfied has occurred in this case.

[28] I am therefore satisfied this discipline must be set aside, as the Investigation was "*unfair*".

[29] There are two bases on which this result is reached in this case. First, given the lack of relevant evidence and the incomplete record, it cannot be relied upon to determine the Grievor is culpable, so the Company has not established the basis for its discipline. Second, it is also the case that when an Investigation is "*unfair*" as denying the grievor the opportunity to elicit relevant evidence, the discipline cannot stand.

[30] On either basis, the Grievance is upheld and the discipline is vacated.

I retain jurisdiction to address any questions regarding the implementation of this Award. I also retain jurisdiction to correct any errors - and to address any omissions – to give this Award its intended force and effect.



May 5, 2025

CHERYL YINGST BARTEL
ARBITRATOR