CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5155

Heard in Edmonton, March 12, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of 20 demerits to Locomotive Engineer Dave Ford, of Sutherland, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Ford was issued twenty demerits described as:

"In connection with your train handling on November 30, 2022, while working as the Engineer on train 240-08 approaching a switch at mile 19.5 on the Sutherland Sub whereby the throttle was in notch 5 With the automatic brake set for a duration of 31 seconds; resulting in an operational alert for power Braking on CP 8781. A violation of GOI Section 1- Train Handling, Item 42.6 Slowing or Controlling Freight Trains (Stretch Braking) and Item 45.0 – Fuel Conservation, Section D."

UNION'S POSITION:

The Union submits this is not a case appropriate for an assessment of discipline. The education and information provided from the E-test and subsequent investigation meets the Company's need to prevent future similar incidents. Mr. Ford took responsibility for his actions. During the investigation he made it clear that it was not his intention to violate any rule but simply did not realize he was in throttle notch 5 while he was focused on bringing the train to a controlled stop. The assessment of demerits to Mr. Ford for a simple mistake provides no additional prohibitive value. The Union asserts the purpose of efficiency testing must be for education.

The Union asserts the discipline assessed was heavy handed and it would serve better to assess appropriate education for a minor E-test failure.

The Union requests the Arbitrator order that the twenty demerit marks be expunged from Engineer Ford's work record. We further seek a declaration that the Company is responsible for Mr. Ford's lost wages for attendance at 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 Union argues efficiency test failures should not result in discipline or investigations. 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 maintains the employee's alleged violation of the rule was observed, addressed and noted as a failure by the Company Officer. Just because it was noted as a failure does not limit the Company from holding a fair and impartial investigation or assessing discipline.

The Company maintains the burden of proof has been met and that the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union as mitigating.

The Company can see no violation of the Collective Agreement, or any other provisions and maintains that the discipline assessed was appropriate, warranted and just in all the circumstances. The Company maintains that the discipline was progressive and properly assessed under the Company's Hybrid Discipline and Accountability Guidelines.

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:
(SGD.) G. Lawrenson
General Chairperson

For the Company:
(SGD.) F. Billings
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, Issue, Arguments & Summary

[1] The Grievor is a Locomotive Engineer, with 25 years of service with the Company, at the time of this incident, the latter 14 served as a Locomotive Engineer.

[2] On November 30, 2022, the Grievor was working on train 240-08 from Sutherland to Wynyard, Saskatchewan. The train download indicated that at 12:31:34 to 12:31:55 – for a total of 31 seconds - the Grievor had operated with his throttle set in Notch 5, at the same time as applying the train brakes.

[3] This is known in this industry as "power braking". Power braking is a prohibited practice under GOI Section 1, Item 42.6, "Slowing or Controlling Freight Trains", which states: "Stretch Braking" – Throttle 4 or less with automatic brake application".

[4] The Grievor was therefore required to operated in throttle 4 or less, if using the automatic brake.

[5] The Company Investigated the Grievor for his misconduct and assessed him 20 demerits for this offence. This Grievance was filed against that assessment.

[6] The Company took the position that culpability was conceded. It argued this case by applying the *Wm. Scott* criteria – the "second" question of the application of mitigating and aggravating factors. It argued 20 demerits was an appropriate level of discipline. It noted the Grievor had a previous violation for train handling eight months earlier. It also argued that the consequences of "using the brakes and gas at the same time" is that the train could separate, which could cause a derailment, and that the prohibition against "power braking" was therefore a safety issue. It maintained its disciplinary choice was just and reasonable, considering all mitigating and aggravating factors.

[7] While it is not disputed the Grievor had engaged in "power braking", the Union raised issue with ATM Griffith's ability to assess the alleged violation and in also maintained that the Company had not met its burden to establish the criteria were met which would support a disciplinary response under the Efficiency Test framework as established in **AH860** and discussed further in **CROA 4866**. It argued the incident was not "significant". It noted that the prohibition against "power braking" was based on a fuel conservation measure rather than a safety measure, which impacted the issue of "severity" under the E-Test framework. It also relied on the Grievor's long service and disciplinary record as "work history" factors; and argued there was no "frequency" for this issue demonstrated in the E-Test record. It argued that the coaching the Grievor received -was the appropriate and sufficient response for this issue. Even if discipline were appropriate, it argued the Company's disciplinary choice was excessive and that the Company's approach was "heavy-handed".

[8] The GOI, Section 1, Item 45.0 is titled "Fuel Conservation". It states: "*Unless authorized by Time Table or Special Instruction, High Throttle Power Braking (notch 5-8) is prohibited*".

[9] The issues between the parties are:

a. Had the Company established culpability as this was an Efficiency Test fail?

b. If so, was the discipline "just and reasonable"?; if not,

c. What discipline was appropriately substituted?

[10] For the reasons which follow, the Company has not met its burden to establish that just cause existed for discipline, given this was an E-Test failure. The coaching received by the Grievor was a sufficient response on the facts and circumstances of this case.

[11] The Grievance is upheld. The assessment of 20 demerits is vacated.

Analysis & Decision

[12] In this industry, the Company is required to conduct "efficiency tests" or "proficiency tests" on its employees. These E-Tests are planned procedures to assess whether its employees are following the required rules and procedures. The Company is also required to address failures and "retest" when failures occur. A record is kept by the Company of each employee's "efficiency tests", including whether they "passed" or "failed" and the result of the "retest".

[13] It is no longer disputed in this industry that discipline can follow a failed "E-Test". That issue has been resolved. It is also now settled that there is a framework to be applied in determining if there is "*just cause*" for discipline for a failed E-Test – or if coaching, mentoring or education are more appropriately assessed for that failure. That framework was first developed in this Arbitrator's Award in **AH860**, in October of 2023, with a historical analysis provided by this Arbitrator in **CROA 4866**, which was decided a few months later**.** Those Awards determined there are three criteria for assessing whether discipline – or education, coaching and mentoring – are the appropriate responses for an E-Test failure. Those criteria are "frequency"; "severity" and the Grievor's "work history".

[14] While there is some overlap in those factors with those considered for the assessment of mitigating and aggravating factors which occur under the ***second*** question of the *Wm. Scott* analysis, until "*just cause*" for some form of discipline is established, there is no movement to those factors. While the Union sometimes refers to the E-Test criteria as a "threshold" question, it is more accurately considered as one of culpability under the first question to be addressed in the *Wm. Scott* framework, which is whether

there is "*just cause*" for some form of discipline: **CROA 4866,** para. 20. In other words, if the context of the misconduct is that it is part of an E-Test fail, it is not sufficient for the Company to only establish that the incident occurred to support a disciplinary response. It is *also* necessary for the Company to establish the E-Test criteria support a disciplinary response from a culpability perspective, rather than a response which focusses on education, mentoring and coaching. Whether that burden has been met will be a matter of fact in each case.

[15] It is also relevant to consider whether the Company has *treated* the misconduct as an E-Test, even if that situation is not an E-Test as those tests have been described in the jurisprudence. If the Company chooses to *treat* the situation as an E-Test, then it has chosen to subject its decision to that framework.

[16] It is not disputed the Company considered this to be an Efficiency Test failure. It noted that failure on the Grievor's E-Test record and provided coaching to the Grievor. However, the Company chose not to address the Efficiency Test framework in its written submissions, choosing instead to approach this issue under a *Wm. Scott* disciplinary framework as if it were the second question of that analysis that was at issue.

[17] The arguments of the Company therefore assume that since the incident occurred, culpability for some form of discipline was established and that was not in issue. That is not the correct approach when an E-Test failure is at issue. The issue of "culpability" for discipline must first be assessed under the framework criteria.

[18] For the following reasons, I am satisfied after undertaking that assessment that the E-Test criteria have not been met on the facts and circumstances of this case.

[19] As just cause for discipline has not been established for this E-Test failure, a disciplinary response was not appropriate.

[20] Considering first the criteria of "frequency", the Company argued the Grievor had a previous train handling violation eight months previously, to support its discipline. However, since 2013, the Grievor has only failed 5.48% of his 129 Efficiency Tests (to the date of this incident). Included in that record is the "failure" for the incident at issue in this case, and a second failure related to the incident at issue in **CROA 5154**, where discipline

was vacated. While in April of 2022, the Grievor did fail a test for not "*waiting 10 seconds between motoring and dynamic brake on a couple occasion during download review*", that is the only obvious train handling fail of the 129 E-Tests tests conducted on this Grievor in almost a decade.

[21] Considered within the context of an E-Test, I cannot agree that this one previous incident in a 17-year career as an LE supported the imposition of discipline for a second incident which broadly involved train handling. Two incidents of train handling over the course of a 17-year career as an LE is not a record which acts in favour of discipline.

[22] Addressing "severity", I am not satisfied that the level of severity in this case supported a disciplinary response either. The Grievor was "one notch" over what the Company *allowed* with regard to "braking and gas", which was throttle notch 4. I am satisfied that the minimization of fuel consumption – as noted in GOI Section I, item 45.0, "D" was one of the issues for the Company, as that reference is included under the title "Fuel Consumption". While it may not be the only reason Power Braking is limited, I am satisfied it is a significant reason, as argued by the Union.

[23] While the Company provided several authorities to support what could happen with improper train handling, I am satisfied those authorities also serve to demonstrate that the issues in this case were less significant.

[24] For example, **CROA 4832** was a decision of this Arbitrator's involving an LE who was "chasing the signals"; **CROA 3839** involved power braking by keeping the throttle at notch level 8, which is considerably more significant than what occurred in this case; and **CROA 4480-B** involved an employee who had amassed 220 demerits during the course of his career, with discipline occurring every year, which was significantly worse than the record of this Grievor. That was also a case where a train separation and broken knuckles had occurred. Despite the significance in that case, 10 demerits were assessed, which supports the Union's position that the imposition of 20 demerits was excessive, even if discipline were appropriately assessed.

[25] In **CROA 4416**, a train separation also occurred and the Grievor was sitting at 55 demerits at the time of the incident.

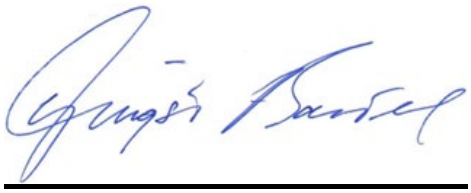
[26] The Grievor explained in the Investigation that the visibility was poor and he was preparing for an open switch. He did not realize he was in throttle 5, and did not notice any “excess pulling” on the train which may have indicated that was the case (Q/A 19). He noted in his answer to Q23 that being in throttle 5 was a “mistake”, as he was watching for this open switch in poor visibility and thought he was in throttle 4.

[27] That explanation is reasonable. I am not convinced that being one throttle notch in excess of the Company’s allowance, in the circumstances of this case, supported a disciplinary response when the factor of “severity” is considered. Neither does the Grievor’s “work history” support a disciplinary response. The Grievor is a long-service employee, of 25 years. I have carefully reviewed his disciplinary record. In the last ***decade*** before this accident, the Grievor had received a Formal Reprimand for his “10 second” issue, noted above, and the 15 demerits which were set aside in **CROA 5154**. That is not the disciplinary record of an employee who requires a disciplinary response for this E-Test failure.

[28] The Company has not met its burden to establish a disciplinary response was appropriate, on the facts and circumstances of this case. As the E-Testing criteria for discipline have not been satisfied, discipline is not a just and reasonable response.

[29] The Grievance is upheld. The 20 demerits are vacated.

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



May 7, 2025

CHERYL YINGST BARTEL
ARBITRATOR