

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

**CASE NO. 5167**

Heard in Calgary, April 10, 2025

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the assessment of dismissal to Locomotive Engineer Dave Ford of Sutherland, SK.

**JOINT STATEMENT OF ISSUE:**

Following an investigation, Engineer Ford was dismissed from Company service described as:

*"Please be advised that you have been Dismissed from Company Service for the following reason(s):*

*A formal investigation was conducted on May 9, 2024 in connection with "your tour of duty on 576-001 while working as the Locomotive Engineer on May 2, 2024, specifically surrounding the details concerning the alleged failure to comply with T&E Rule Book Item 3.8." At the conclusion of the investigation, your culpability was established when you acknowledged failing to see the installed yellow flag at SNS Elstow, failing to contact the RTC or reduce your train speed to 10 MPH, therefore speeding 35MPH over the authority limit.*

*A violation of:*

- *Rule Book for T&E Employees, Section 3.8 Slow Track Protection by GBO*
  - *Rule Book for T &E Employees, Section 6.5 Fixed Signal, Recognition and Compliance*
  - *Rule Book for T &E Employees, Section 4.6 OCS Broadcast Requirements*
- Notwithstanding the aforementioned, this also results in your having accumulated 65 active demerits which also warrants your dismissal."*

**Union's Position:**

The Union asserts that Mr. Ford is being unfairly targeted for his position as a Union Health & Safety representative and Local Union Officer. The Union submits that this E- test came the day after Mr. Ford, as the Legislative Representative of the Union and Co- Chair of the Health & Safety committee had advised Superintendent Alex Lamb that the ongoing issues of Away from Home Terminal resets in conjunction with DRPR and issues in conjunction with the conditions of lead locomotives having inoperable refrigerators would be escalated to Transport Canada. This alleged incident is not the first time that Mr. Ford has been disciplined directly following him attempting to resolve outstanding issues in his role as a Legislative Health and Safety representative.

The Union submits that all these instances of E-test failures and the resulting discipline are directly related to Mr. Ford addressing issues while performing his duties related to his Local Union Officer position and/or his Local Health and Safety representative position.

The Union submits that the Company's objections regarding the alleged consolidation or bundling of multiple disputes into a single grievance, are baseless as no example of the alleged "bundling" has been provided. The Step-2 grievance reply from Trainmaster Jason Leedahl states "The Company's [sic] position is testing by applying a yellow flag on the main track is no different than a police officer on the highway with a radar gun looking for compliance." The Union submits that compliance of this rule requires the individual to first observe the yellow flag and recognize that it is incorrectly placed. This procedure is a last line of defense for an unusual circumstance that may result from other employees not properly following procedures for slow track protection. The Union asserts that not noticing an unusual improperly placed signal while operating a train at 45 mph is not unreasonable and does not demonstrate negligence. The Union submits that this is completely distinguishable from compliance with a speed limit on a roadway. Further, if the Company wishes to continue with this absurd analogy, the Union asserts that the speeder may receive a nominal fine while our grievor received the ultimate penalty of dismissal.

The Union contends the Company has violated Article 39.05 as the investigation was not fair and impartial. The Union has identified numerous issues justifying the assertion.

The Union also submits that due to the lack of evidence, it is impossible to determine if the flag was properly displayed or if there were any sightline restrictions that would determine why the flag was not seen by either crew member. The Union representative at the onset of the investigation asked the investigating officer for full disclosure of all evidence. The Company stated the forward-facing camera footage was unattainable despite regulations stating that the footage is to be retrievable. This footage would have easily established the alleged location and placement of the yellow flag.

Dynamic Testing (E-Testing) is intended to be a learning tool used by management for running trade employees to further their commitment to safety, not to entrap crews or to punish them. This is confirmed by CP's own Efficiency Test Descriptions. The proper protocols and whether discipline should be administered to employees have been adjudicated already as in CROA 4827 and Ad-hoc 860.

The Union asserts that the Company has failed to properly consider the mitigating factors in this instance. The Union asserts that the Company officer placed the flag in a location that contained numerous visual stimuli in the area to procure a, E-test fail on the crew rather than to ensure their compliance of rules. The Union asserts that the Company has failed to provide the burden necessary to warrant outright dismissal and submit that the discipline is unwarranted and excessive for this alleged incident. The Union submits that this is not an accurate representation of what the purpose of Dynamic Testing (E-Testing) is intended for. Mr. Ford demonstrated a thorough understanding of the rules in question during the investigation. He explains that neither he nor his Conductor saw the flag due the location it was placed, what was happening at the time in the cab of the locomotive and weather conditions at the time.

The Union submits the discipline imposed on Mr. Ford is excessive considering the mitigating factors and lack of substantiating evidence. The education received from the alleged failed efficiency test and the investigation have met the need to ensure the correct action is taken by Mr. Ford in the future, as intended by dynamic testing. The assessment of discipline by the Company that amounts to the ultimate penalty of dismissal is unnecessary and provides no additional prohibitive value in this instance on a long- standing employee of over 26-years.

The Union continues to take the position that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. It is because of this lack of consistency that the Union also contends that discipline applied in such an inconsistent manner is in violation of the KVP award.

For the foregoing reasons the Union requests that the Arbitrator reinstate Engineer Ford without loss of seniority and that he be made whole for all lost earnings and benefits 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 and the Union's request.

The Company objects to the Union's attempt to bundle multiple disputes and previous assessments of discipline with this assessment of discipline. The Company cannot agree that the Grievor has been targeted.

The Company maintains that the investigation was fair and impartial and that culpability was established.

The Company maintains that proper steps were taken prior to placing the yellow flag at SNS Elstow. The Grievor admitted that he missed the flag as he passed SNS Elstow. The Grievor was familiar with the territory and ought to have been more diligent in fulfilling his duties and ensuring he was being vigilant and complying with the rules.

The Company cannot agree with the Union's position concerning the efficiency testing. 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 that the dismissal was just, appropriate and warranted in all the circumstances and that discipline was assessed in a progressive fashion. Accordingly, the Company requests that the Arbitrator decline the Union's grievance in its entirety.

**For the Union:**  
**(SGD.) G. Lawrenson**

General Chairperson

**For the Company:**

**(SGD.) F. Billings**

Senior Manager Labour Relations

There appeared on behalf of the Company:

S. Scott	– Manager Labour Relations, Calgary
S. Arriaga	– Manager Labour Relations, Calgary
A. Harrison	– Manager Labour Relations, Calgary
J. Leedahl	– Trainmaster, Saskatoon

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Myre	– Vice General Chairperson, LE-W, Red Deer
J. Keen	– Vice General Chairperson, LE-W, Saskatoon
B. Wiszniak	– Vice General Chairperson, CTY-W, Regina
D. Ford	– Grievor, Saskatoon

## **AWARD OF THE ARBITRATOR**

### **Background, Issue and Summary**

[1] The Grievor was employed as a Locomotive Engineer or “LE”. He has spent the majority of his time with the Company in service as an LE, based in Saskatoon.

[2] The Grievor is a long service employee, having begun his employment with the Company in 1997.

[3] On May 2, 2024, the Grievor was operating Train 576-001 with Conductor Wagner. On that date, he failed an Efficiency Test (or “E-Test”) when he failed to see a yellow flag that had been purposely placed by Superintendent Leedahl, to test the Grievor’s awareness. The yellow flag that day had no other purpose.

[4] As a result of that failed E-Test, the Grievor was dismissed.

[5] This Grievance challenged that discipline. It was the last of four heard by this Office in the March and April CROA Sessions.

[6] The facts of this failed E-Test are not in dispute: On May 2, 2024, a yellow flag was placed at Elstow by Superintendent Leedahl, as part of an Efficiency Test (i.e. there was no reason for the flag to be so placed, except to test to see if the Grievor would see it and react appropriately to it). The crew of Train 576-0001 did not have any slow order in that area.

[7] A photograph of a yellow flag was sought by the Arbitrator and provided, to determine its size and shape in reference to other signs, although it was not represented that what was offered was a picture of the yellow flag that was placed that day.

[8] The “flag” is in fact a large yellow metal “square” situated on the top of a post.

[9] Under the Rule Book for T&E Employees, section 3.8, a signal such as a yellow flag – when seen without an accompanying slow order - required the Grievor to take three specific actions, a) reduce to 10 mph; b) contact the RTC and c) be governed by any instructions received.

[10] Superintendent Leedahl filed a Memorandum into the Investigation. His evidence was that he placed the yellow flag among the signs at Elstow, “just in front of Elstow”. In Conductor Wagner’s Investigation, Superintendent Leedahl was questioned by the union. He stated he did not know what mileage he placed the flag at, but it was “*placed just in front of SNS Elstow*” (Q/A 1 of Leedahl); and that it as “*at the bottom of the road bed so about 4 or 5 feet” from the rail*” (Q/A 2); on the Engineer’s side (Q/A 3); and that it was facing “west” (Q/A 4); west of the High Voltage sign “*so that it could be viewed prior to the high voltage. I placed it so there was clear line of sight on the yellow flag*” (Q/A 6). When asked why he chose that spot “as it was easily accessible for me to put it up. I could safely park my truck and walk up to the location” which also gave him a “safe location to park in the town of Elstow to perform the test. The flag was completely visible. Nothing in the body of the question was obstructing the view of the flag” (second #6 Q/A). The Union had referred in the question to the fact there were “*multiple switches, end of track sign, crossings, yellow overhead power signs, storage track, spur, three piles of ballast and two stacks of rail*” at that location and that it seemed to have been chosen to elicit a “fail” of the test (second #6 Q/A).

[11] A picture of the signs at Elstow was offered in evidence. It shows several signs in that vicinity.

[12] Superintendent Leedahl's Memo stated he then watched the movement proceed by the yellow flag after he placed it, and he did not hear a call to the RTC or see the Train slow down. He drove back to the flag to confirm it was still up, given that it was 'little windy'. He allowed some time for the crew to contact the RTC, then "*called the Director to confirm with the RTC that the crew did not call the RTC per rule*". That was confirmed to him. He then contacted the crew to ask them if they had called the RTC.

[13] Conductor Wagner told him that he did not see the flag and no call was placed. He was told a failed E-Test would be recorded for him and his LE, the Grievor. The Grievor asked where the flag was placed and was told "at SNS Elstow".

[14] Superintendent Leedahl's memo indicates that both the Grievor and the Conductor stated they did not see the flag as they were "*buzzing up different towers to get more track from the foreman*".

[15] Both the Conductor and the Grievor indicated they did not see the flag, and so were going "track speed" or 45 mph. It was also LE's evidence it was raining heavily that day on the Sutherland Subdivision.

[16] Superintendent Leedahl then explained to the crew that they were "*to be on the look out at all times for the flags even when doing other duties*", which was acknowledged by the Grievor.

[17] The Grievor's movement was the only one which was tested with a yellow flag by Superintendent Leedahl, that day. In questioning from this Arbitrator, Superintendent Leedahl was asked by this Arbitrator why no other crews were tested that day. His

evidence was that he had looked at the line-up and had planned to test a second crew, but that crew had left before he had that opportunity.

[18] The Company considered the Grievor's failure to be culpable misconduct warranting his discharge. The Company also relied in the Form 104 on an accumulation of 65 demerits, finding "*this also results in your having accumulated 65 active demerits which also warrants your dismissal*". This was the case, although that activation should have occurred in May of 2023 when the Grievor was assessed with a 45 day suspension, five months after his deferred discipline was assessed: Article 39.13(4).

[19] It was unclear at the hearing why the demerits were only activated with this later event. In any event, the Company assessed discharge for this failed E-Test on a "stand alone" basis, *and* also on the basis of accumulation of 65 demerits.

[20] The assessments of 20 and 15 demerits from 2022 were grieved, along with the 45-day suspension.

[21] All three disputes were heard as part of the March 2025 Session. In **CROA 5154** and **CROA 5155** the 35 demerits were vacated. In **CROA 5156**, the 45-day suspension was reduced to a 10-day suspension.

[22] Before the Grievances were heard, however, the Company discharged the Grievor for his failed E-Test in May of 2024, which resulted in this Grievance, heard in the CROA April session.

[23] Given that the 35 demerits have already been removed from the Grievor's record by **CROA 5154** and **5155**, there is no basis on which the Grievor's dismissal for accumulation can be upheld. The only remaining basis on which dismissal could be

sustained is if the Grievor is found culpable for discipline as a result of this failed Efficiency Test, and if that discipline is found to be just and reasonable.

[24] There is no need to advance to determining whether this discharge is just and reasonable. For the following reasons, culpability for discipline has not been established.

[25] The application of what has become known as the *Efficiency Test Framework*, as noted below, determines if the Grievor's actions were culpable, which determination is required under the first question of the familiar *Re Wm. Scott* analysis. If culpability is found, then the second and third questions of the *Wm. Scott & Co* framework arise, which are: whether discharge for the failure of such a test is found to be just and reasonable discipline; and, if not, what discipline is appropriately substituted.

[26] The Union has challenged the fairness and impartiality of the Investigation. Given the finding in this Award, it is unnecessary to address that issue, as it has been rendered moot.

[27] For the following reasons, the Grievance is upheld. The Company has not met its initial burden of proof to establish culpability for this failed E-Test under the *Efficiency Test Framework*. The discipline must be vacated.

### **Analysis and Decision**

#### **Arguments**

[28] The Company did not argue the elements of the *Efficiency Test Framework* regarding culpability. It assumed culpability from the failure of the E-Test. It moved to an assessment of the second and third questions of the *Wm. Scott* framework and argued that discipline was just and reasonable. It maintained the importance of yellow flags in



this industry is well-understood and that the Grievor was required to maintain situational awareness at all times. It argued this was a significant violation, given that yellow flags are “*often used to indicate that a section of track has been compromised and that the train speed must be reduced to avoid a derailment*” (at para. 22). It denied the Grievor was targeted for his Health & Safety involvement, as maintained by the Union. It also resisted the argument that Investigation was unfair or impartial. It argued the Grievor’s crewmate was also disciplined. It pointed out that Mr. Leedahl performed five e-tests during April and May of 2024, 3 of which passed and complied; and that – across the network – there were 188 yellow flag tests performed. It argued it attempted to access the forward-facing camera evidence but the locomotive had not been converted to Powerview to allow that download. It argued its discipline was consistent with the requirements of the *Wm. Scott* framework. It argued that the Grievor being focused on other duties did not explain why the Grievor missed the yellow flag. It argued the Grievor had an “unenviable” record of “train handling violations, including discipline in April and December of 2022, and that he was aware he was in a “dismissible position” given his deferred demerits in early 2023, and that his employment was in jeopardy. It argued the Grievor was the “author of his own misfortune” (at para. 62).

[29] The Union argued the Grievor was being “unfairly targeted” for his position as the Union Health & Safety representative and Local Union Officer. It argued that the Investigation was not fairly and impartially conducted, as all available evidence was not provided, including the forward-facing camera video. It pointed out it has requested the forward-facing camera footage to confirm the yellow flag could be seen, but has never been provided that evidence. It argued that Superintendent Leedahl’s evidence lacks

specifics that the yellow flag was placed “at Elstow” without any mileage indication. It also pointed out that neither the Grievor nor his Conductor were retested as required for a failed Efficiency test. It noted the Company offered no evidence of the placement of the flag – whether by picture or otherwise to confirm the location and visibility of the flag. It pointed out that over his 27 year career, the Grievor never missed a call for service. It argued the location was not ideal to attempt an E-test, given the confusion resulting from the various signs. It also noted this crew was the only one tested, to support its argument of “targeting”. It also noted that discharge represents the severest penalty for a sole missed Efficiency Test. It pointed out the Grievor had no fails for yellow flag tests in his record. It argued the Grievor answered all questions in an honest and forthright manner at the Investigation. The Union also argued the Company had not met its burden to establish that its discipline was just and reasonable and outright dismissal was “*grossly excessive and unwarranted*” (at para. 75).

### Decision

[30] It must be remembered the Company carries the burden to establish culpability for discipline. The first question that must be answered in an assessment of the reasonableness of discipline - under the familiar *Wm. Scott* approach - is whether culpability has been established for discipline. If not, the analysis stops there and no discipline can stand. The second and third questions from that analysis regarding the reasonableness of discipline only arise if that culpability is first established.

[31] It is now well-established in this industry that discipline *can* follow a failed E-Test; as that failure can be “*culpable misconduct*”. However, it is also now well-established that whether such a failed test is culpable depends on the application of what has become

known as the *Efficiency Testing Framework*. That Framework was developed by this Arbitrator in **AH860** and **CROA 4866**. It is an analysis to determine whether the result of a failed E-Test should attract a) discipline or b) coaching, mentoring and/or education. As noted in **CROA 4866**, the analysis for culpability was developed from the document which sets out the parameters for such testing.

[32] There are three factors to be considered in this Framework: severity, frequency and work history, as described in those two earlier Awards.

[33] The factor of “severity” is self-explanatory. In this highly safety-sensitive industry, many rule violations are “severe”. While there is a spectrum, many such violations have significant and potentially catastrophic consequences.

[34] The factor of “frequency” includes an analysis of the Efficiency Test Record of the particular employee, which is maintained by the Company and the Grievor’s disciplinary record, to assess whether discipline is required. The factor of “work history” would also include the Grievor’s length of service and the comments regarding the Grievor’s work which are often included in the Efficiency Test Record regarding the particular work habits of an employee.

[35] There is no direction on how these factors are to be weighed and measured in coming to the conclusion that culpability is established. Arbitrator’s use their discretion to assess whether the factors support a disciplinary or a coaching response.

[36] Turning to the facts in this case and considering first the factor of “severity”, the importance of a running trade employee maintaining situational awareness at all times is obvious. That includes being alert to signals such as a “yellow flag” when it is not

accompanied by a GBO. While the crew's attention is on various tasks, a yellow flag does not just "appear"; it is large enough to be evident to a crew for some distance, before it is reached.

[37] In this industry, a "flag" is an *additional* form of warning, which "*backs up*" a GBO and therefore may be very meaningful to an approaching crew. Its importance is clearly seen in *CPKC v. TCRC (Lynch Grievance)*. In that case, it was this warning "flag" which in fact offered important track protection when a GBO was cancelled by mistake by a crew repairing the track ahead. When the train crew in the approaching train noticed the flag, and no slow order, they slowed and contacted the RTC, as required, who then contacted the crew, and that was how the error was discovered.

[38] In *Lynch*, it was the approaching train crew's ability to *follow* this rule, which prevented them crossing track that was under repair.

[39] Considering next the factor of frequency, I have carefully examined the Grievor's Efficiency Test record, and his disciplinary record. I cannot agree with the Company's assessment that his disciplinary record demonstrates a concerning pattern of significant and numerous rule violations, supporting a disciplinary response. Close consideration of his discipline record demonstrates he has very few violations, especially given his long service. The Grievor has eight entries on his disciplinary record, three of which indicate reductions in demerits, and one that was informally handled. Two other entries did not result in discipline. This was for a career of 27 years. In 2005 he was assessed 20 demerits, which he had worked off by the next year.

[40] In 2011, he was assessed 30 demerits for failing to comply with "*radio instructions while making a reverse movement, which resulted in a derailment and damage to a track*

*machine, and a failure to properly inspect and report the incident.”* Over the next two years, he worked off those demerits.

[41] In July of 2022, the Grievor was assessed 15 demerits for failing to point at a switch target. He was then assessed 20 demerits in December of 2022, for having the throttle in notch 5 (instead of 4 or less) when using the automatic brake.

[42] This brought his total demerits to 35. The Grievor was then assessed 30 demerits in January of 2023 for failing to restore a derail to normal position. Those demerits were deferred under Article 39. He then received a 45-day suspension in May of that same year, which should have activated these 30 demerits and increased his total to 65 at that time, although he was not then dismissed for accumulation.

[43] As the 35 demerits assessed for the two alleged violations in 2022 have been vacated, that means that between late 2011 and 2022 – *an 11-year period* – the Grievor received a Formal Reprimand.

[44] Turning to his Efficiency Test Record – considered for both frequency and work history factors - I have carefully reviewed this Record, which began in 2013. The Grievor passed 94.52% of his 146 tests conducted in those dozen years, which also includes in that count situations for which he received discipline, so there is some overlap. He has never before had an efficiency test failure related to situational awareness.

[45] The Grievor is a long service employee of more than 25 years. I cannot agree with the Company that this is a Grievor whose disciplinary record or Efficiency Test Record is replete with issues, especially when considering his long career. That length of service

provides a level of depth to both his disciplinary record and his efficiency test documents that has earned considerable loyalty.

[46] It must also be recalled that the issue in this case is one failed Efficiency Test. The Company has a significant burden to support the discharge of a long-service employee on the basis of one failed Efficiency Test, even if it were to succeed in establishing that culpability was established.

[47] While the Company relied on **CROA 4827**, that case is distinguishable. In that case, the Grievor had 5, 7, 40 and 45 day suspensions on his record. The Arbitrator had in fact noted that he had a *pattern* of taking the “easiest” rather than the “safest” course of action.

[48] That is not true of this Grievor and that case is distinguishable.

[49] The same is true of the record in **CROA 1627**, where the Grievor was “*repeatedly assessed demerit marks for a number of serious rules infractions in relation to train movement incidents*”.

[50] That is not similar to this Grievor’s situation.

[51] The two assessments of discipline for the events from 2022, relied upon by the Company to support its choice, were not upheld at arbitration, so cannot be relied upon to support the reasonableness of its discipline. While the Company maintained that dismissal was the next step given that the Grievor had also received a 45-day suspension, that suspension was reduced in **CROA 5156**, to a 10-day suspension. That suspension does not therefore support that a discharge decision was the appropriate next step.

[52] In any event, I am not satisfied the Company has met its burden to establish that culpable misconduct has occurred as a result of this Efficiency Test failure. I am satisfied the factors in the *Efficiency Test Framework* align in the Grievor's favour and that the coaching performed by Superintendent Leedahl satisfied the requirement that the Grievor be coached, mentored and/or educated in the appropriate circumstances.

[53] While severity does align with the Company, as demonstrated in the *Lynch* decision, the Grievor's strong long service - well-demonstrated in his disciplinary and E-Testing Record - is significant and outweighs that factor, supporting a coaching, education and mentoring response as sufficient. That response was already given by Superintendent Leedahl.

### **Conclusion**

[54] The Grievance is upheld. As culpability has not been established, there was no basis to impose discipline on this Grievor.

[55] The Grievor is to be reinstated to active service.

[56] That reinstatement is to be with full compensation for lost wages (after mitigation efforts are deducted); with no loss to the Grievor from the lack of benefits; and with no impact on his seniority.

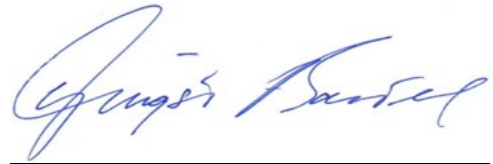
[57] The matter of amount of compensation is remitted to the parties, for their discussion and agreement. I remain seized for any questions relating to remedy, should that be required. In such a case, this Office is instructed to schedule any such dispute on an expedited basis, before a CROA Session over which I preside.

[58] The Grievor is also to undertake any training which the Company may require, to bring his qualifications and experience current, given his time out of their service, over the past year.

[59] If not self-evident, the Grievor's discipline record is also to be amended accordingly.

I remain seized for any questions regarding the implementation of this Award; and for any questions regarding the remedy directions given, as noted. I further remain seized to correct any errors; and address any omissions, to give this Award its intended effect.

**May 30, 2025**



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**CHERYL YINGST BARTEL  
ARBITRATOR**