

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

CASE NO. 5191

Heard in Ottawa, June 12, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The appeal of the assessment of 10 demerits to Locomotive Engineer J. Parent, PIN 149279, of Kamloops, BC. for “circumstances and events surrounding your CROR 44 violation during your tour of duty while working Q10921-11 on April 15, 2023.”

JOINT STATEMENT OF ISSUE:

On April 15, 2023, Mr. Parent was assigned to train Q10921-11 with Conductor Jasdeep Singh Khangura. On the day in question, it was alleged that Mr. Parent and his conductor failed to comply with CROR 44 when they went by a yellow flag placed next to the crossing on the right-hand side of the main at mile 123.4 Clearwater Subdivision without slowing down to ten miles per hour and reporting it to the RTC. Upon arrival at his objective terminal, Mr. Parent was notified of his failure and was served a Notice to Appear for a formal employee investigation. Following the investigation, Mr. Parent was issued 10 demerits, as noted above.

It is the Union's position that efficiency testing should be educational, not punitive. The fact that the manager who performed the test wasn't present to observe it or able to provide a memo afterward is evidence that there was no educational component. Mr. Parent wasn't notified of his failure until the end of his tour of duty. Furthermore, the Company failed to sufficiently meet the burden of proof required to assess any measure of punitive discipline.

The Union would respectfully ask the arbitrator to replace the 10 demerits with a coaching letter or reduce the demerits to a less punitive measure of a written reprimand.

The Company disagrees with the Union's contentions. The Company's position is that compliance with CROR 44(e) is essential to protect with unusual track conditions, and failure to adhere to this rule significantly increases the risk of catastrophic consequences. Given the severity of the infraction, the Company maintains that 10 Demerit Points were justified and respectfully denies the grievance.

For the Union:
(SGD.) K.C. James
General Chairperson

For the Company:
(SGD.) J. Girard
Chief Human Resources Officer

There appeared on behalf of the Company:

R. Singh

– Senior Manager, Labour Relations, Calgary

M. Salemi	– Manager, Labour Relations, Toronto
M. Smadella	– Assistant, Superintendent, Kamloops

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
T. Russett	– Senior Vice General Chairperson, LE-W, Edmonton
KC. James	– General Chairperson, LE-W, Edmonton
D. Davis	– Local Chairperson, Kamloops
J. Parent	– Grievor, Kamloops

AWARD OF THE ARBITRATOR

Context

1. The Grievor is a Locomotive Engineer with some 15 years of seniority.
2. He admits having infringed CROR 44 (e), when he failed to slow and to contact the RTC upon seeing a yellow flag, placed as part of an E-Test.
3. At the time of the incident in April, 2023, he had a good discipline record, with only 10 active Demerits and 30 total Demerits.

Issues

- A. Has the Company established grounds for discipline, given that the violation occurred in the context of an E-Test?
- B. Is the discipline imposed reasonable in the circumstances, and if not, what discipline should be imposed?

- A. Has the Company established grounds for discipline, given that the violation occurred in the context of an E-Test?**

Position of Parties

4. The Company takes the position that there has been an admitted violation of CROR 44 (e). It submits that the jurisprudence indicates that discipline may be imposed for E-Test violations.
5. The Union argues that the Company has not established grounds for the application of discipline, as opposed to education, in the context of E-Testing. It submits that

there were multiple distractions present at the time of the E-Test, and that the Grievor was correct to focus on more pressing safety concerns.

Analysis and Decision

6. CROR 44(e), dealing with unusual track conditions, reads as follows:

CROR 44(e) UNLSUAL TRACK SIGNAL CONDITIONS states:

(e) A movement that encounters a yellow or green signal without a GBO requiring the placement of such signal, must reduce speed to 10 MPH and immediately communicate with the RTC. The movement will be governed by instructions received from the RTC. If the TGB0/DOB system and the engineering supervisor for the territory indicate that Rule 43 is not or will not be imminently in effect within the limits of the signal, the RTC may authorize the movement to resume normal speed. The engineering supervisor will range for removal of the signals that may include having the crew on a movement pick up the signals

7. The Grievor has admitted that he saw the yellow flag, but failed to slow to 10 mph and to contact the RTC:

Q16: [...] Did you comply with this rule by reducing your speed to 10 MPH and contact the RTC when encountering the yellow flag at approximately mile 123.4 Clearwater Sub while working Q10921- 11 on April 15, 2023?

A16: No, I didn't

8. The Company has therefore clearly established a violation of the CROR Rule, albeit in the context of an E-Test.
9. The Company notes the importance of abiding by CROR 44 (e) (see **CROA 1592**) and notes that discipline can flow from an E-Test violation (see **AH 833**). It points to multiple cases where discipline was upheld, following such a violation (see **CROA 4641**, where Arbitrator Sims upheld discipline of 20 Demerits; **CROA 4671**, where Arbitrator Hornung upheld a 3-day suspension; **CROA 4164**, where Arbitrator Picher upheld a 3-month suspension).
10. The Union relies on the comments of Arbitrator Sims in **CROA 4621**, where he cautions against the common use of discipline following an E-Test violation:

“To the extent it might be assumed that this licenses formal discipline any time an efficiency test is failed, any such assumption would be wrong. The exception should not replace the rule, and not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline.”

11. These views were endorsed by Arbitrator Moreau in **AH 695** and Arbitrator Clarke in **AH 811**. Arbitrator Yingst-Bartel in **AH 860** dealt with the issues to be considered when determining whether discipline should flow from a failed E-Test:

[26] *The Canada Efficiency Test Codes and Descriptions for Train & Engine Employees*

- which is reproduced in the Company's document "Proficiency Test Codes and Descriptions for Train & Engine Employees" - states:

An efficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure rule compliance and to isolate areas of non-compliance for immediate corrective action. Efficiency testing is also not intended to be a discipline tool. *While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results.*¹

[27] There has been very little guidance given to the parties in this industry on if – and when – discipline can – or should - result from efficiency tests.

[28] I am prepared to accept that discipline is not foreclosed just because the issue was discovered through an "efficiency test".

[29] The purpose of an efficiency test must be kept in mind – it is to "isolate areas of non- compliance for immediate corrective action".

[30] Education and mentoring are accepted to be appropriate responses, *as well as discipline*, in an appropriate case. The requirement noted above recognizes that discipline may be the "corrective action required".

[31] I am prepared to accept that whether or not a disciplinary response is appropriate for failure of an efficiency test should depend on the "frequency, severity and the employee's work history".

[32] For example, if an individual has been subject to multiple efficiency tests and keeps making the same error, that may suggest that education

and mentoring is not having the desired result and that a disciplinary response is appropriate.

[33] Or, if there are significant safety issues that result from a failed efficiency test, that may make that failure more “severe” and so justify a disciplinary response to bring home the importance of that rule.

12. The same arbitrator again considered a failed E-Test in **CROA 5167**:

[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.

13. In my view, a nuanced view of a failed E-Test is required, based on the Company’s own Policy. As Arbitrator Yingst-Bartel quoted in **AH 860**, the Policy states:

“Efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee’s work history, education and mentoring will often bring about more desirable results.”

14. An analysis is therefore required to determine whether the violation, in all the circumstances, warrants a disciplinary or coaching response. The Company bears the onus to establish that discipline was appropriate in the circumstances.

15. Here, I find that the Company has not established that a disciplinary response was appropriate. With respect to the issue of frequency, the Grievor had no operating rule violations on his record. There is no evidence of any other E-Test failure for failing CROR 44 (e). With respect to severity, there is no doubt that the Rule is important. However, the Grievor was fully aware of the Rule and described prioritizing other safety concerns occurring at the same time. As noted in the investigation:

11.Q. Please describe in your own words, the circumstances leading up to your crew's alleged noncompliance with CROR 44(e) on the Clearwater Sub on April 15, 2023?

A. Approaching the crossing as the detector went off and oncoming train notified us that there was a side by side driving erratically beside the tracks and could be foul of the tracks. Noticed the flag as they were talking with us but was more focused on the side by side. My focus turned to the side by side at that moment in time
[...]

15.Q. Please explain why you did not call the RTC to report the placement of the yellow flag as per CROR 44 (e)?

A. VIA behind me, called the signal at Vinsula, detector went off and communication from the oncoming train about the side by side as well as contacting yardmaster about yarding instructions, as there is a lot of stuff that goes on in this location and whistling the crossing.

16. The Grievor's work history was impressive, with only 10 active Demerits and 30 total Demerits in a 15-year career.

17. Applying the factors of frequency, severity and work history, I find that a disciplinary response was not required, and coaching would have been sufficient. I am also guided in that view by the frank admissions of the Grievor during the investigation.

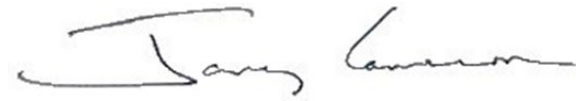
18. There is no need to respond to the second issue of whether the level of discipline was reasonable, as there has been a finding that no discipline was appropriate.

Conclusion

19. The grievance is therefore upheld.

20. I retain jurisdiction with respect to any issues of interpretation or application of this Award.

August 15, 2025

A handwritten signature in dark ink, appearing to read "James Cameron", is positioned above a solid horizontal line.

**JAMES CAMERON
ARBITRATOR**