

IN THE MATTER OF AN AD HOC ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE (TCRC)
(the Union)
And
CANADIAN PACIFIC RAILWAY COMPANY (CP)
(the Company)

AH: 772

DISPUTE:

Appeal of the dismissal of Conductor Aaron Korthuis of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Korthuis was dismissed which was described as “In connection with your tour of duty on September 10, 2019 while working 301-488 on the Swift Current Sub, more specifically surrounding the north track mainline switch being lined without authority. A violation of Rule Book for Train and Engine Employees, Section 4.2 Communication Requirements, Section 17.1 CTC - General and Section 17.4 Entering CTC by Other than Signal Indication.”

UNION POSITION

The Union contends Mr. Korthuis dismissal is unjustified, unwarranted and excessive in all of the circumstances, including mitigating factors evident in this matter.

The Union requests that Mr. Korthuis be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings 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.

Culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor’s past discipline record and length of service. On September 10, 2019, the Grievor was employed as Conductor on 301-488. During his tour of duty, the Grievor was involved in an incident during which the manual crossover switches between the south and north tracks were lined without authority.

The Company maintains the dismissal assessed was appropriate, warranted and just in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION

“D. Fulton”

General Chairman
TCRC CTY West

FOR THE COMPANY

“Lauren McGinley”

Assistant Director Labour Relations
Canadian Pacific

January 6, 2022

Hearing: February 17, 2022

APPEARANCES

FOR THE UNION:

Ken Stuebing – Counsel, Caley Wray
Dave Fulton – GC CTY West
Doug Edward – Sr. VGC CTY West
Ryan Finnsen – VGC CTY West
John Kiengersky – VGC CTY West
Mr. D. Hariniuk – LC Moose Jaw
Aron Korthuis – Grievor

FOR THE COMPANY:

Lauren McGinley, Assistant Director Labour Relations
Ivette Suarez, Labour Relations Officer

AWARD

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] On September 10, 2019, the Grievor was employed as Conductor on 301-488. During his tour of duty, the Grievor was involved in an incident during which the manual crossover switch between the south and north tracks at Moose Jaw Yard was lined without proper authority.

[3] The Grievor had four years of Company service at the time of his dismissal and was working as a qualified Conductor on the day of the incident that led to his dismissal.

[4] On September 11, 2019, the Grievor was provided with a Notice to Appear including all relevant evidence. An investigation statement was held on September 13, 2019. The Company maintained that the investigation determined that the Grievor had operated the manual crossover switch between the south and north tracks without authority. Considering the incident, along with the Grievor's prior discipline and culminating safety record, the Company determined that there was a breach of the bond of trust necessary for continued employment with the Company. The Grievor was dismissed on September 26, 2019.

[5] The Union filed its Step 1 and Step 2 Grievances on October 6, 2019 and January 20, 2020, respectively. The Company declined the Union's request on November 28, 2019, and March 16, 2020.

COMPANY POSITION

[6] The Company's description of the incident giving rise to the discipline is best set out in Superintendent Cole's investigation statement providing:

At approximately 1545 on Sept. 10, 2019, train 301-488 was preparing to depart westward out of Moose Jaw Yard at Mile 2.1 on the Swift Current Subdivision. 301-488 was given their route to depart out of Mile 2.1 crossing over onto the North Mainline out onto the Swift Current Subdivision. The crew failed to obtain authority to occupy the mainline and lined the mainline switch in the reverse position without permission from the RTC, resulting in a Track Occupancy on the North Track at mile 2.1 on the Swift Current Subdivision. The on duty trainmaster noticed the track occupancy and notified the crew to tie down their train prior to the movement making a move out of the yard.

Instructions that were given to 301-488 were to line themselves out 2.1 through the manual crossovers onto the north around 499. I instructed 197 to stay clear of 301 and to restore the mainline crossovers on their departure. I then instructed on the radio that no one was to line a switch until receiving instructions from me. I phoned the RTC to give her the instructions of the movements in my yard and she asked what the occupancy was onto the North main. I asked the crew on 301 if they had opened the mainline switch and they replied yes. I then instructed them to tie down their train and that someone was coming to get them.

[7] The Company maintains the investigation revealed the Grievor lined the mainline crossovers without permission from the RTC. When asked to explain what had occurred, the Grievor simply stated that he forgot. The Company submits the Grievor knew and understood the rules, yet failed to comply with them and provided no valid rationale as to why he chose to act in such an unsafe and irresponsible manner. Accordingly, the Company maintains the Grievor was culpable for the reasons listed in his Form 104. It says the Grievor is in a unique position of trust working unsupervised and being relied upon by the Company and the general public to be vigilant to ensure the safe and efficient movement of railway equipment. Based on all of the foregoing, including the arbitral jurisprudence cited, the Company maintains the dismissal was appropriate, warranted and just in all the circumstances.

[8] The Company maintains that given the Grievor's disciplinary record, his short tenure and the gravity of the rule infraction itself, dismissal was appropriate. The incident marks the third Major-Life Threatening Offense by the Grievor. It says that in accordance with the Company's Hybrid Discipline and Accountability Guidelines, effective November 1, 2018, dismissal is appropriate, warranted and progressive under the circumstances. The Company maintains that the Grievor's employment record reflected a history of carelessness with three documented disciplinary infractions within the previous two years of this incident including 10 demerits, a 30-day (11 deferred) suspension, a 40-day suspension and a 5-day deferred suspension.

[9] The Company acknowledges that there was in fact a change in direction given to the Grievor. It argues that regardless of the change, the crew was responsible for contacting the RTC before handling the crossovers which is what they failed to do. The Union attempts to overshadow what occurred and blame Superintendent Cole's change in direction for what occurred. It says that in that same breath, however, the Union does not dispute the Grievor's culpability in the instant matter. It says that in the Union's brief they acknowledge the Grievor did not contact the RTC for authority which is a rule violation.

[10] The Company further maintains that receiving instructions from a Company officer to carry out a task, ATM or otherwise, does not negate the Grievor's responsibility to do so safely and to abide by the rulebook. Receiving direction does not negate rules compliance. Ultimately, the fact remains that he proceeded on his own accord to handle a mainline switch without authority from the RTC, which is something that he was required to do by rule in CTC territory.

UNION POSITION

[11] The Union submits the crew was initially instructed by Assistant Trainmaster Joseph McNeil to depart from yard to North Main Line. To facilitate this, the Grievor was required to line the switch from F-lead to the South Main as well as the crossovers from the South Main to North Main. The North Main Line is CTC territory at this location. The applicable Timetable requires verbal permission from RTC to enter the South track; written permission is required to enter North track.

[12] The Union argues that Assistant Superintendent Devon Cole later gave different instructions to line the switches after train 851 cleared. Trainmaster Joseph McNeil stated in his subsequent memo:

Initially I broadcasted intentions to have 101 depart, crossing to the north main at Moose Jaw West, after which 498 would travel to the east end of the yard on the south main and back in, after which 301 would depart via the crossovers at 2.1 and depart on the north track. After this 851 would depart on the north track, 499 would depart on the south, and 197 would cross to the south at Moose Jaw west in position to begin working through 2.2. Within perhaps 2 minutes after discussion with Devin Cole we decided there may be time to bring 301 out and 574 in before crossing 197 to the south. **At this time the Conductor (Ray Arney) on 197 began to express some confusion about what was to be done with the manual cross-overs at mile 2.1.**

Emphasis Added

[13] The Union argues that Mr. Cole's abrupt change in plans led to certain confusion in the terminal. Amidst the confusion, the Grievor did not contact RTC for authority. When the Grievor

lined the switches, the RTC was alerted by CTC alarm. The Union's concern and objection to the Company's position was noted during the questioning of the Grievor in his statement at the investigation:

Q27 Was it discussed that you needed to get RTC approval to line the crossover at mile 2.1 from the south track to the north track?

A It was not discussed, as we just received instruction to line the crossovers manually. With all the trains coming and going in Moose Jaw. I forgot to get permission from the RTC.

Q28 To clarify, Do you understand the ATM or TM cannot give you permission to line the crossover at 2.1 to enter the main track?

A Yes

The Union would like to acknowledge that had the ATM not given permission to line the switches, we would not be in this predicament. As per the question they had no right to give instructions to Mr. Korthuis to line the switches prior to receiving authorities from the RTC.

Note: Company Officer: please note that the ATM speaks to the RTC and train crews to direct traffic through Moose Jaw Terminal. This does not supersede the Rules for Canadian Pacific Railway Employees.

[14] The Union submits that, in light of that rehabilitative function, this is indeed a case where it would be appropriate to grant the Grievor an opportunity to prove that he can be a reliable employee who will be vigilant in ensuring the safe operation of his assigned movement while on duty. The Union submits that, based on all the foregoing, the Company has failed to consider all the mitigating circumstances in this assessment of discipline. The Union submits that the discipline assessed to Conductor Korthuis ought to be reduced to a corrective action that more fairly reflects the circumstances.

[15] The Company submits relies on *William Scott & Co. v. C.F.A.W., Local P-162 (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B). Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586 (ON LRB) D. Gee and Railway arbitration CROA 4563, 2356, 3750 and SHP 595.* The Union relies on CROA 2356, 4563, 4419.

ANALYSIS AND DECISION

[16] It is not in dispute that the rule violations, such as in this incident, can lead to catastrophic consequences. Proven violations of such rules can result in termination of an offending employee on the first offence given the facts and circumstances of each case. I agree with Arbitrator Jones in SHP 595 wherein he stated:

As I have noted before, safety is not negotiable and not optional; safety rules must be complied with 100% of the time.

[17] In the Company's response to the grievance at Step II it acknowledged that the terminal was congested. The Grievor overlooked his responsibility to contact the RTC. It says the yard congestion does not mitigate his culpability in this major violation. Nor does his lack of intent.

[18] I find, that multiple officials were giving and changing the instructions to the train crews at the time. Trainmaster Joseph McNeil noted in his memo that some were expressing confusion. In addition Assistant Superintendent Cole stated in his memo:

I then instructed on the radio that no one was to line a switch until receiving instructions from me. I phoned the RTC to give her the instructions of the movements in my yard

[19] It is clear that multiple managers were involved in giving instructions regarding departures and movements to the main line. The Rail Traffic Controller (RTC) was the proper authority for entering the mainline. The available evidence at the Grievor's investigation did not include a memo or statement from the RTC. The memo from Assistant Superintendent Cole indicates that he was giving her instructions rather than advising her of which train crews would be requesting permission to enter the main line and at what switch. There is no indication as to when she was aware that the switch had been lined without her permission or why she did not appear to have taken any action before she was contacted by Assistant Superintendent Cole. There is no indication as to how many times she had received instructions from the various managers or if she was also confused by the changes.

[20] A congested yard with multiple managers giving instructions can be intimidating to an employee without the confidence obtained from long service and who, as in this case, has recently been disciplined. The comments of the type given by Assistant Superintendent Cole above can be confusing as to who gives instruction regarding train movements in Moose Jaw entering the mainline. A review of the evidence does not indicate any instructions to crews that morning containing reference to RTC authority. The words "after obtaining authority from the RTC" with respect to the directions given by managers before the lining of mainline switches are not present in the evidence. While it may not seem necessary to a long service employee, the instructions being given were recognized in the evidence as creating confusion. Equally, yard congestion and the intensity of multiple managers giving instructions may have also contributed to false assumptions regarding proper authority.

[21] That said, a review of the evidence in conjunction with the facts and circumstances established that discipline was warranted. The Grievor did not comply with the applicable rule before lining the switch. However, I find that discipline was excessive.

[22] The Company relied on the Grievor's previous discipline record which has been changed by a recent award of this arbitrator. A previous 40 day suspension was removed.

[23] Mitigating factors in this case were not adequately considered. Notations in his overall record in the section of Company Rides / Evaluations reports by Company officers indicated that he "Worked safe and efficient". The Grievor's Performance Test record generally reflects the same. I am satisfied that given all the evidence and factors that the Grievor can reestablish the level of trust required by the position.

[24] Discipline is recognized as a legitimate deterrence to consider for the Grievor and other employees. Balancing the two factors is necessary. I find that an unpaid suspension in place of dismissal is an appropriate penalty. In this case, reinstatement of the Grievor is not an indication that his continued employment is without the required focus on safety and attendance displayed by discipline free employees at CP Rail. Clear thinking and consideration of applicable rules is

crucial at all times. Yard congestion and changing instructions from senior managers does not justify forgetting a Rule.

[25] In view of all of the foregoing dismissal will be replaced with time served as suspension without pay. The Grievor will be reinstated without compensation for lost time or benefits within 60 days of this award.

[26] I remain seized with respect to any matters regarding the application or interpretation of this award.

Dated this, 9th, day of April, 2022.

A handwritten signature in black ink, appearing to read "Tom Hodges", enclosed in a thin black rectangular border.

Tom Hodges

Arbitrator