

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

**DISPUTE:**

Appeal of the 30 demerits and subsequent dismissal of Conductor Craig Fossum of Calgary, AB.

**JOINT STATEMENT OF ISSUE**

Following an investigation Mr. Fossum was assessed 30 demerits on October 22, 2021 for the following:

In connection with your tour of duty September 29, 2021 on Train 401-29, specifically the failure to call out Signal #1235N as a stop signal, as evidenced by the observations of Trainmaster Mike Rioux at 00:30 September 30, 2021 at Stephen on the Laggan Subdivision; a violation of Rule Book for Train & Engine Employees, Section 4.5(a) CTC Broadcast Requirements.

Please note that pursuant to the Deferred Demerit Agreement dated July 14, 2021 and signed by yourself on July 17, 2021, the discipline that was deferred (30 demerit marks) will now be added to your discipline record.

Mr. Fossum was subsequently dismissed on October 22, 2021 for the following:

Please be advised in light of your October 22, 2021 assessment of 30 (Thirty) Demerits, you are hereby **DISMISSED** from Company Service for an accumulation of 95 Demerits under the Hybrid Discipline and Accountability Guidelines.

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

**UNION POSITION**

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union contends:

- The efficiency testing conducted by the Trainmaster was targeted and discriminatory, as was the ensuing investigation.
- The Trainmaster's attention was focused solely on Mr. Fossum.

- Mr. Fossum was the sole member of the crew formally investigated and disciplined.
- The Rule Book for Train & Engine Employees does not specify which crew member is responsible for making the broadcast.
- Questions 17 and 21 were leading, self-incriminating, and predetermine culpability.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above as follows:

- No evidence is entered to sustain the allegation made by the Trainmaster or contained within the Form 104.

The Union contends the discipline assessed is discriminatory and grossly excessive in all of the circumstances, including significant mitigating factors evident in this matter including:

The crew communicated and acknowledged the stop signal in the cab of the locomotive.

- The crew was engaged in a job briefing regarding mountain grade, and
- Mr. Fossum was preparing to detrain the locomotive to perform a passing train inspection.
- Mr. Fossum provided his commitment to adhere to the rule.
- The train stopped safely at Stephen, and Mr. Fossum completed his tour without incident.

The Union submits the Company has engaged in the unreasonable application of the Efficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union submits that Mr. Fossum was wrongfully held from service in connection with this matter, contrary to Article 39.06 of the Collective Agreement.

With respect to the Company's objections regarding:

- the alleged vagueness of the Union's request that the grievor be made whole,
- the alleged consolidation or bundling of multiple disputes into a single grievance,

The Union's positions remain unchanged. The Union further considers these matters to be res judicata.

The Union requests that Mr. Fossum be reinstated without loss of seniority and benefits, and that he be made whole for all associated loss with interest.

## **COMPANY POSITION**

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation – the Company simply cannot agree with the Union's contentions to the contrary. Discipline was determined following a review of all pertinent factors, including those that the Union describe as mitigating. The Company's position continues to be that the discipline assessed was just, appropriate, warranted and in no way discriminatory in all the circumstances.

In regards to the Union's allegations that the statement was not fair and impartial, the Company cannot agree. The questions raised by the Union, questions 17 and 21, are specific and relevant to the matter at hand. Moreover the Union did not object during the statement to question 17 and

simply objected that question 21 has been asked and answered; to object only during the grievance procedure that these questions were somehow leading, self-incriminating, and predetermine culpability unfairly prejudiced the Company.

The Company maintains that the Grievor was held from service in accordance with the provisions of the Consolidated Collective Agreement Article 39.06.

Regarding the Union's allegation on the proficiency/efficiency test policy, this matter has been adjudicated repeatedly at CROA. The Company maintains that this policy has been properly applied and in no way resulted in discriminatory or excessive discipline nor was the Trainmaster targeting the Grievor.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole".

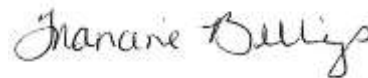
**FOR THE UNION:**



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Dave Fulton  
General Chairperson  
TCRC CTY West

**FOR THE COMPANY:**



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Francine Billings  
Asst. Director, Labour Relations  
Canadian Pacific

April 3, 2023

**Hearing:** April 12, 2023 - By video conference

**APEARING FOR THE UNION:**

Ken Stuebing, Counsel, Caley Wray  
Jason Hnatiuk, VGC CTY West  
Doug Edward, Sr. VGC CTY West  
Craig Fossum, Grievor

**APEARING FOR THE COMPANY:**

Allan Cake, Manager Labour Relations  
Lauren McGinley, Assistant Director Labour Relations

## **AWARD OF THE ARBITRATOR**

### **JURISDICTION**

[1] This is an Ad Hoc Expedited Arbitration pursuant to 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] The Grievor, Craig Fossum, commenced his employment with the Company on December 3, 1994 as an Engine Attendant in the Mechanical Department. Over the course of his career with CP, Mr. Fossum worked in Thunder Bay, Moose Jaw, Smiths Falls and Calgary. At the time of the incident the Grievor was working as a Conductor in Calgary.

[3] The basic facts of the incident giving rise to the discipline are largely not in dispute. On September 29, 2021, the Grievor was working as a Conductor on Train 401-29 on the Laggan Subdivision which spans from Calgary, AB to Field, BC. During his tour of duty the crew was instructed the crew to stop their train at Stephen.

[4] At approximately 0030 on September 30, as the crew's train was approaching Stephen station, Trainmaster Mike Rioux was in his vehicle at Lake O'Hara crossing monitoring the radio. Trainmaster Rioux claimed to have heard the crew call out the Advance Clear to Stop signal to Divide and the Clear to Stop Signal at Divide. However, Mr. Rioux claimed that he did not hear the crew broadcast the Stop signal at Stephen. Notwithstanding what Mr. Rioux claimed he did not hear, the crew claimed to have clearly communicated the signal to each other and complied with the rule. The crew brought the train to a safe stop without incident at Stephen.

[5] At the same time, approximately 00:30, the Grievor and his Locomotive Engineer were conducting a job briefing, acknowledged a stop signal verbally in the locomotive cab amongst themselves and then the Grievor got out of the locomotive to conduct a pull by inspection of passing Train 199-27. While inspecting the passing train, Trainmaster Rioux approached the Grievor to enquire if he had called out the red/stop signal at Stephen on the radio. The Grievor stated that he did not recall broadcasting the signal. Trainmaster Rioux then informed the Grievor that this would be entered as an efficiency test fail.

### **SUBMISSIONS OF THE PARTIES**

[6] The Company reviewed the evidence of the Grievor's discipline file. It emphasised that prior to this issuance of this discipline and dismissal, the Grievor had received formal discipline on 13 separate occasions for a variety of infractions. At the time of the incident and subsequent issuance of discipline, the Grievor had thirty five (35) active demerits and thirty (30) deferred demerits on his record.

[7] The Company maintains that the Grievor received a fair and impartial investigation. It acknowledges the Grievor was the only member of the crew who was investigated for the incident. However, it submits that the Grievor was represented by Local Chairman, Sean Hicks of his Union and no objections were made during the investigation. Further, Article 39.01(3) of the Consolidated Collective Agreement provides that the notification of the investigation shall include advice to the employee of their right to request witnesses on their own behalf. If the Company is agreeable and the witness is a Company employee, the witness will be at the Company's expense. If the Company is agreeable and the witness is not a Company employee, it will be at the Union's expense.

[8] In this case CP argues that no request was received from the Union at the time. Had they thought it pertinent that the Locomotive Engineer provide evidence, they ought to have requested him as a witness or at the very least object or protest in the statement. For the Union to only raise these concerns through the grievance is contrary to the principles of labour relations and arbitral jurisprudence. The Company maintains that this “lying in the bushes” tactic is just a means to enhance their position and prejudice the Company.

[9] In response to the Union’s assertions that the rule does not specify which crew member is required to broadcast the signal, this is nothing more than a deflection of responsibility. The fact remains that the signal was not broadcasted and as a member of the crew, the Grievor was obligated to ensure the rule was complied with and the signal was broadcasted.

[10] During the statement, the Grievor confirmed that he knew and understood the rules he was to be governed by as a Conductor. More specifically, Rule Book for T&E Employees 1.5 (a) CTC Broadcasts, Section 2, Item 2.2 While on Duty and 6.5 Fixed Signal Recognition and Compliance.

[11] The Company maintains that the Union has not established that the discipline was discriminatory. The Company maintains that the Union has not supplied sufficient information in support of this allegation. It is not sufficient for the Union to simply state its position without supplying rationale, details or any support for the allegations. The Grievance handling procedure requires sufficient information to be included in the grievance to be able to properly identify the issue and basis for an allegation. The lack of pertinent information renders the Company unable to properly respond. The Company objects to the Union’s attempt to supply any additional arguments in support of this unsubstantiated allegation.

[12] The Grievor’s record stood at 35 active demerits plus 30 demerits at the time of the incident. The Company submits that in keeping with the principles of progressive discipline as well as the Company’s Hybrid Discipline & Accountability Guidelines, the Grievor was at the final steps for non-major infractions. As such, the Grievor was properly assessed 30 demerits for this infraction and his deferred demerits were activated putting him at 95 active demerits on record. Due to this, the Grievor was dismissed for accumulation of demerits. The Company maintains that this was in keeping with the plethora of case law supporting dismissal for accumulation of demerits and in no way punitive or retributive.

[13] The Company maintains that it was not targeting the Grievor. The Union argued he went from no active discipline on record to dismissal in a period of 14 months. The Company maintains that this is nothing more than a deflection. Had the Grievor complied with the rules in the first place, this would be a moot issue. Moreover, the Grievor was not targeted as he was efficiency tested similar to many other employees at Canadian Pacific. In fact the Grievor was efficiency tested less per year than many employees as reviewed by the Company in its submissions.

[14] The Union submits that the Company officer who performed the efficiency test on September 29, 2021, did not even attempt to adhere to the educative process and purpose of efficiency testing. The single efficiency testing incident was used as a springboard for targeted discipline and dismissal. The Grievor was the exclusive focus of efficiency testing and discipline in spite of his crewmate bearing commensurate responsibility in connection with T&E Rulebook Section 4.5(a) CTC Broadcast Requirements. The Union maintains there can no legitimate justification for the strictly punitive and unjustified application of discipline that the Company undertook in the instant matter.

[15] The Union does not contest that the Grievor may not have ensured the Stop Signal was properly broadcast. During the investigation Mr. Fossum was asked, with reference to his

conversation with Trainmaster Rioux, to please explain why he did not call out signal #1235N as "Stop." He explained:

On Sept 30 approx. 0030, during the approach to Stephen, Tim and I were deeply engaged in a detailed job briefing regarding instructions given to myself from Trainmaster Sadler. As we continued to discuss a new best operating practice from Trainmaster Sadler as to where to stop and to why he wanted us to stop at this particular spot (as the Heavy Grade Sign was moved). As we were coming to a slow stop we both acknowledged and communicated the stop signal in the cab.

As we were rolling to a stop knowing 199-27 was directly behind us, I started getting prepared to go outside for the pull by. Once I was ready and I jumped out of the cab to be in position to conduct the pull by on 199-27.

While 199-27 was going by us, I saw TM Rioux coming up the road. As he approached me I greeted him, he immediately started to question me of not being on the ground while 199-27 was passing, I expressed that I was on the ground performing a pull by inspection, he questioned if I was. I was surprised that he asked the question even though 199-27 was going by us as we were having the conversation on the ground. I pointed out where I just urinated prior to him pulling up. After he inspected the ground where I had just urinated with his lantern, he questioned if I called out the approach to Divide and the signal at Divide, Which I said I did. He then asked me if I called out the red/stop signal at Stephen. At that point I wasn't sure due to the fact that we had discussed the stop signal at Stephen, were talking about the mountain grade sign and I was preparing to get out and perform the pull by.

Once 199-27 was passed us, I climbed on the locomotive where TM Rioux was waiting to speak to us, I explained to him that we were job briefing about the heavy grade and that I was quickly getting ready to be on the ground for the pull by on 199-27. He told me it doesn't matter and it's still a fail on the record.

[16] The Union argues that, the crew was discussing the "new best operating practice" of stopping on a Mountain Grade. This was promulgated by a job aid in the GOI. Shortly prior to this September 2021 tour of duty, the Mountain Grade sign had been moved. Mr. Fossum was actively reviewing such with Locomotive Engineer Stokes.

[17] The Union argues that any degree of fairness and impartiality would require Locomotive Engineer Stokes to be questioned and formally investigated as was the Grievor. This would include having Mr. Stokes confirm, for the record, the in-cab discussions about which Mr. Fossum testified. This absence indicates that the outcome was predetermined, that culpability was assigned to Mr. Fossum, and calls into question the fundamental fairness and impartiality of the investigation.

[18] The Union maintains that the evidence does not reflect any attempts to circumvent or disregard proper safe work procedures on Mr. Fossum part that should attract significant discipline assessed. While Mr. Fossum does not recall if he called the signal on standby, he notes that he was engaged in a job briefing for the mountain grade sign and was getting ready to exit the locomotive to perform a passing train inspection of train 199-27. There is no question that

these circumstances arose from an efficiency test administered by the supervisor. These circumstances presented the ideal opportunity for the Company to properly utilize its efficiency testing practice to identify and educate the employee on this alleged infraction. It was clear in both Mr. Rioux's memorandum as well as record from the investigation, there was some doubt on whether the signal was called out.

[19] The Union maintains that the Grievor was not properly coached on proper compliance by Mr. Rioux, nor was he given the opportunity to be re-tested. Instead, he alone was removed from service and required to attend a formal investigation. The circumstances reflect the most severe disciplinary response to a proficiency testing context. There is no basis for this punitive response in these circumstances. There is no indication that discipline or dismissal was required to serve the legitimate educative role of industrial discipline in the circumstances of this efficiency test. The Union submits that the investigation ought to have sufficed to satisfy the Company's interests in this matter. The discipline and termination can only be seen as punitive and retributive, without any educative purpose. The lack of any progressive discipline deprived the Grievor from taking any action to correct his conduct.

#### ANALYSIS AND DECISION

[20] The incident giving rise to the dismissal flowed from a Supervisory memo filed by Road Trainmaster M. Rioux

October 7th, 2021

Memorandum to File – Craig Fossum #688314

Re: Efficiency Test – Failed Efficiency Test CR578 Radio Broadcast Requirements in CTC.

At approximately 0030 on September 30th, 2021 while I was at Lake O'Hara crossing on the Laggan sub,401-29 was coming up the North track, **Conductor Fossum and Engineer Stokes** on 401-29 were coming up the North track at Divide. As I was listening intently **they** called out the advance clear to stop to Divide, the clear to stop at Divide but **they** did not broadcast Stop signal 1235N at Stephen. As 199-27 went around them at Divide I drove up and I immediately had a conversation with Mr. Fossum as to why he did not broadcast the stop signal. He advised they were discussing the mountain grade sign. I advised Mr. Fossum his train had been parked there for approximately 15 minutes and that he had ample time to call out the most important signal which was STOP. This was escalated to Assistant Superintendent Shawn Wiebe. Mr. Fossum was advised this would be entered as an efficiency test fail and it would be recorded on his record.

Signature

Mike Rioux

Road Trainmaster

**Emphasis Added**

[21] In his memo Trainmaster Rioux refers to listening intently to Conductor Fossum and Engineer Stokes on 401-29 as he was driving. He says they called out the advance clear to stop to Divide, the clear to stop at Divide but they did not broadcast Stop signal 1235N. He concluded that because he did not hear the Stop broadcast, it was not broadcast. He stated that the incident would be recorded as an Efficiency Test failure.

[22] I find that simply saying it was an E-test failure does not necessarily make it so. The purpose of proficiency testing is a planned procedure to evaluate compliance with rules,

instructions, and procedures, with or without the employees knowledge. Testing is not intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) 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.

[23] The Company argues that fact was established that as a member of the crew, the Grievor was obligated to ensure the rule was complied with and the signal was broadcasted. I find that the evidence does not establish that finding.

[24] The Grievor responded to Road Trainmaster Rioux's memo during his investigation stating:

While 199-27 was going by us, I saw TM Rioux coming up the road. As he approached me I greeted him, he immediately started to question me of not being on the ground while 199-27 was passing, I expressed that I was on the ground performing a pull by inspection, he questioned if I was. I was surprised that he asked the question even though 199-27 was going by us as we were having the conversation on the ground. I pointed out where I just urinated prior to him pulling up. After he inspected the ground where I had just urinated with his lantern, he questioned if I called out the approach to Divide and the signal at Divide, Which I said I did. He then asked me if I called out the red/stop signal at Stephen. **At that point I wasn't sure due to the fact that we had discussed the stop signal at Stephen.** were talking about the mountain grade sign and I was preparing to get out and perform the pull by. Once 199-27 was passed us, I climbed on the locomotive where TM Rioux was waiting to speak to us, I explained to him that we were job briefing about the heavy grade and that I was quickly getting ready to be on the ground for the pull by on 199-27. He told me it doesn't matter and it's still a fail on the record.

**EMPHASIS ADDED**

[25] Train 199-27 was passing the Grievor's train at the time and the crew on that train was not asked to confirm if the Stop signal had been broadcast. The Locomotive engineer was not questioned, asked to provide an incident report or appear at an investigation. The Grievor and Union have consistently maintained that he did not recall if the Stop signal was broadcast. The Grievor's acknowledged calling of the previous signals indicates no intent to ignore the rule or reasoning that he would deliberately not call the Stop signal. He has no previous E-test violations for not calling signals. He was not retested pursuant to E-test procedures.

[26] In this case Road Trainmaster Rioux acknowledges he was monitoring the crew's broadcast while driving a vehicle to access the train's location. The train had been stop for 15 minutes. He makes no mention of asking the Locomotive Engineer the same question regarding the Stop signal. The Company has provided no sound reasoning to conclude that the Stop Signal was not broadcast or that if not broadcast, it was solely the Grievor's responsibility.

[27] The facts and circumstances relating to Road Trainmaster Rioux's observations and the investigating officer's conduct raise questions about the degree to which they approached their respective tasks with an open mind.

[28] I agree with the Company that the rule was violated if the signal was not broadcast. However, that fact was not established by the Company.



[29] In reviewing the Company's Proficiency Test policy in AH 695 Arbitrator Moreau concluded;

Proficiency testing of employees (or Efficiency tests) is rooted in Transport Canada's Safety Management System Industry Guideline. It is a tool used to evaluate an employee's compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action. From the Company's perspective, the corrective action can take the form of verbal counselling through to disciplinary action. The Company also notes that these proficiency CROA&DR 4744 tests are often conducted randomly without the employee's knowledge. I note Arbitrator Sims' recent comments on efficiency tests as a basis for discipline set out in CROA 4621:

Third, arguments are repeatedly being advanced about the invocation of disciplinary sanctions as a result of efficiency testing. The Employer cites this arbitrator's ruling in CROA 4580: This policy [cited above], while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage. 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. ...

[30] In view of all of the foregoing I find discipline to be void. The Grievor shall be reinstated and made whole for lost earnings and benefits.

[31] I shall remain seized with respect to the interpretation, application and implementation of this award.

Dated at Niagara-on-the-Lake this 17<sup>th</sup>, day of July 2023

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

Tom Hodges  
Arbitrator