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: 781

DISPUTE

The Union advanced an appeal on behalf of Engineer Wade Delmage of Moose Jaw, SK. regarding him being assessed with a forty-five-day suspension.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Delmage was assessed with a forty-five-day suspension described as:

Please be advised that your discipline record has been assessed with a 45 Day Suspension from Company service without pay (effective 2342 November 9 to 2341 December 24, 2018) which includes the time served when held out of service for the following reason(s):

While working as the Engineer on train 196-08 in the Moose Jaw Yard and your subsequent train handling which resulted in a lost time personal injury to your Conductor and train separation on November 9, 2018. A violation of Rule Book for T&E Employees-2.3 Crew Members; GOI Sec I-Train Handling Items 32. , 32.2 & 32.5 - General Instructions, Item 35 - Use of Throttle, Item 42.3 - Starting Freight Trains, Item 38.3 - Dynamic Brake, Item 33 - Independent Brake, Item 42.4 - Stopping Freight Trains and Item 38.6 - Dynamic Brake Limitations.

Your employment with the Company is in jeopardy if you commit another offense for which discipline is warranted. Please consult the "Hybrid Discipline & Accountability Guidelines" to learn how you can improve your discipline standing.

UNION'S POSITION:

The Union contends that the Company issued the Form 104 stating that Engineer Delmage violated T&E Rule book item 2.3, this rule was never covered within the investigation and cannot apply. Further, the Company issued Form 104 also stating a violation of GOI Sec 1 item 38.6 which the Union objected to in the investigation. Engineer Delmage's Locomotives were on main track during the move

The Union contends this is a case of piling on rules that do not apply and rules that have not been violated.

The Union contends there were twenty-five cars with cushioned drawbars which is a contributing factor to the incident. The Union contends that throughout the investigation Engineer Delmage was asked to admit guilt repeatedly before the facts were established. It maintains that is a violation of Consolidated Collective Agreement Article 39.05, regarding his right to a fair or impartial hearing. The Union further contends that the Company has not provided any evidence that Engineer Delmage was solely culpable of improper Train handling or any intent to cause an injury to his fellow employee.

The Union seeks an order that the forty-five-day suspension be expunged from Engineer Delmage's work record and that he be made whole for lost wages, with interest, as well as any lost benefits in relation to his time withheld from service. n the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION:

The Company disagrees with the Union's contentions and denies the Union's request. The company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104.

The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances and in line with the principles of progressive discipline.

The Union concedes within their grievance submission that it was known that train 196-08 had excessive slack action prior to Locomotive Engineer Delmage taking control of the train. Culpability was established following the fair and impartial investigation conducted as established by article 39, and the 45-day suspension was warranted under all the circumstances when taking his current discipline record into account.

Failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence to the contents thereof. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefit is appropriate in the circumstances.

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:	FOR THE COMPANY
Signed	Signed
Greg Edwards General Chairman LE TCRC CP Rail	Lauren McGinley Assistant Director Labour Relations

January 17, 2022

Hearing: March 31, 2022

APPEARANCES
FOR THE UNION:

Ken Stuebing – Counsel, Caley Wray
Greg Edwards – General Chairman
Harvey Makoski – Sr. Vice General Chairman
Greg Lawrenson – Vice General Chairman
Cameron Murtagh – Local Chairman
Wade Dalmage– Grievor

FOR THE COMPANY:
Lauren McGinley, Assistant Director Labour Relations
Elliot Allen, Labour Relations Officer

AWARD OF THE ARBITRATOR

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] The facts of this matter are that on November 9, 2018, the Grievor, Engineer Wade Delmage was called as Locomotive Engineer to take over train 196-08 with Conductor Brian Wallace. The train would be operating through Moose Jaw after setting off the tail end 22 cars. The train consisted of two locomotives at the head end, 61 loads and 14 empties amounting to 9,216 tons and 7,268 feet.

[3] At the outset of the tour, Locomotive Engineer Delmage performed a briefing with the incoming Locomotive Engineer. The incoming Locomotive Engineer informed the Grievor of a slack action issue with the train. The Grievor and Conductor Wallace then proceeded to set of cars in Moose Jaw Yard.

[4] While in setting off the cars, Conductor Wallace was on the leading piece of equipment, a tank car, on the shove movement. While preparing to stop a slack action, run out occurred resulting in two broken knuckles, a broken air hose and a broken drawbar. Conductor Wallace sustained an injury resulting in 28 days of lost time.

[5] The Grievor was required to attend an investigation on November 14, 2018 in connection with the incident of November 9 while operating Train 196-08. The Company maintains that

following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104 and was assessed with a 45 day suspension.

[6] The Company relied on Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586 (ON LRB) 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.). Railway arbitration decisions SHP 595 CROA 2468 and 2469. The Union relied on Railway arbitration cases CROA 2767, 2838, 3148, 3194, 3201, 3839, 4145, 4480, 4492, 4622 and Ad Hoc 383.

ANALYSIS AND DECISION

[7] In it submissions, the Company provided a detailed review of the rules and General Operating Instructions relating to train Handling. The review included instructions relating to Use of Throttle, Independent Brake and Dynamic Brake.

[8] The Company maintains that culpability was established and there was just cause to assess discipline to the Grievor. The quantum of discipline assessed was appropriate, fair and warranted under the circumstances and in line with the principles of progressive discipline.

[9] The Company maintained that the Union's grievance revealed no dispute with the finding of culpability for a minimum of eight other rules which remain undisputed. On that basis alone, the discipline assessed was appropriate and warranted. It says the Grievor violated critical rules governing the safe and efficient operation. This resulted in an injury to his Conductor. A train separation and damage to equipment also resulted. All for which he was properly assessed as a 45 day suspension.

[10] The Company submits that the investigation clearly established the Grievor violated the General Operating Instructions. It submits that the Grievor's previous poor safety record in combination with this infraction warranted a 45 day suspension up to and including dismissal under the Hybrid Discipline and Accountability Guidelines. Further, it cannot be ignored that immediately following this suspension, the Grievor returned to work and again failed to operate his movement safely resulting in a four car derailment in Moose Jaw Yard.

[11] In handling the train, the Company maintained that the Grievor was fully aware of all applicable conditions that would impact his train handling. It was his obligation to take them into account when handling his train. The Company submits that rather than mitigating this knowledge and failure to take this into account when handling the train, is an aggravating factor. The Company maintains that safety rules are not suggestions or guidelines, and they are certainly not an option for employees to freely choose whether or not to comply. Non-compliance with the rules often results in serious damage to equipment, injuries and in some cases, death. Due diligence and compliance is expected of all safety critical employees. In the present case, it is clear that the Grievor failed to meet this expectation. The Grievor held the safety critical position of Locomotive Engineer at the time of the incident.

[12] Given the paramount importance of safety in the railway industry and the high potential for catastrophic consequences resulting from non-compliance, the Company argued that it has an obligation to ensure it promotes a culture of safety that actively seeks to ensure all employees fully comply with all rules at all times. It relies on the comments of Arbitrator Jones in SHP 595:

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

[13] The Union objected to the use of post incident discipline by the Company in that it is currently before another arbitrator. The Union submitted that the Conductor would likely not have been injured in the incident if he had been properly positioned on the leading car as required by the rules. It also argued that improper marshaling of the train was a significant contributing factor in the incident. With respect to the number of infractions in Rule 104, the Union submits that the Company was "piling on" the Grievor.

[14] CP argues that rail yards are a place where the utmost caution, care and diligence must be practiced by employees who operate equipment. Employees must take due diligence to ensure proper precautions are adhered to, to prevent catastrophe and injury to members of the crew, community and railroad. The Grievor has demonstrated his inability to do so repeatedly. The Company maintains it considered the Grievor's previous poor safety record, in combination with this infraction. It says the 45 day suspension under the Hybrid Discipline and Accountability Guidelines was warranted.

[15] I do not agree with the Union's view in this case that including each of the allegations of rule violations constitute "piling on". The Company has the right, in the Form 104 disciplinary letter, to identify all the actions in the incident which it is seeking to establish as grounds for discipline. Arbitrators assessing whether to substitute a lesser penalty usually consider whether the Company's disciplinary response is too severe, having regard to the all the circumstances surrounding the events. However, a review of the evidence in this case indicates that the Company has not considered all the circumstances and mitigating factors.

[16] The evidence established that upon taking control of Train 196-08, the Grievor was advised by the inbound Locomotive Engineer that it displayed significant slack action. The Company argued that this was an aggravating factor in that he knew what he was getting in terms of train performance. The Union maintains that it is a mitigating factor in that the Grievor was instructed to immediately perform the difficult task of setting off the tail end 22 cars on a difficult grade. He did so while controlling 61 loads, 14 empties, 9,216 tons, 7,268 feet long, 107 tons per operative brake and had 25 cushion drawbars.

[17] The Union argued that marshalling of the cars to be set off was not considered by the Company. It says that the 22 cars to be set off should have been marshalled at the front of the train and would have been more manageable with less risk of serious slack run out. The Company does not challenge that fact. However there are no such marshalling rules and the Grievor acknowledged he could have done better in handling the train.

[18] The Company maintains that the Grievor's previous poor safety record, in combination with this infraction, warranted a 45 day suspension up to and including dismissal under the Hybrid Discipline and Accountability Guidelines. The Guidelines provide:

> Major - Life Threatening & Conduct Unbecoming Offences
> Depending on the offence the issuance of a minimum of a 20-calendar day suspension up to and including a 45-day calendar suspension and/or dismissal. All situations and the disciplinary consequence will be judged based on the circumstances that may be assessed in conjunction with any suspension are:
> - Deferred Suspensions (partial or full)
> - Demotions
> - Requalification
> - Training

- Job Restrictions
- Last Chance Agreement Terms –as an alternative to discharge if conditions warrant

[19] The policy also provides for:

> **1* Leniency consideration – Immediately reported incident and acknowledged responsibility
> **2* Leniency consideration – Immediately reported the incident and took proper protective actions

[20] In this case, the Company claims to have determined that it was a Major Offence. The Union does not dispute that some discipline was warranted. The Company assessed a 45 day suspension but chose to return the Grievor to work after only 28 days without any retraining or restrictions.

[21] The Grievor was forthright and accountable for his handling of the train. He confirmed that he transitioned from Throttle Notch #1 to the Dynamic Braking Zone without waiting a full 10 seconds. He acknowledged not waiting a full 10 seconds before transitioning from power to Dynamic Brake was, "poor judgment on my part". I find the known slack action of the train and the terrain were significant issues. At the start of his assignment, the Grievor was required to perform a difficult set off of cars at the rear of a train that was displaying significant slack issues. The movement was on a significant grade.

[22] Similarly in CROA 4145, Arbitrator M. Picher accepted that the terrain was a mitigating factor in ordering a reduction in the discipline assessed stating:

> At the time of his termination the grievor had accumulated twenty-four years of service. He had only one rules violation on his record as of 1999, although further rules violations appear in 2009, 2010 and 2011. On the whole, however, the grievor's record does not disclose a pattern of serious or cardinal rules infractions causing events such as derailments or collisions. While I do not agree with the Union's submission that this is a case for the application of article 86.9 of the collective agreement, which keeps an employee in active service pending the outcome of arbitration for a discharge prompted by a minor offense, and agree with the Company that the speeding infractions here under examination are serious, I am not persuaded that the termination of the grievor was justified in all of the circumstances. I accept, as a mitigating factor, that the weight of the griever's train and the terrain over which he was travelling did make train handling difficult, a fact that was not assisted by the absence of dynamic brakes. In my view this is a case for an appropriate substitution of penalty.

[23] In this case, there is no dispute that the Grievor acknowledged his responsibility. When considering mitigating factors, arbitrators have consistently recognized the importance of frank and honest admissions of wrongdoing, and of a Grievor being truthful in giving their evidence at investigations.

[24] The Grievor has 30 years of service with no previous record of any rough train handling incidents in the past. The Company's evidence shows that the Grievor had undergone 85 Efficiency Tests with only 2 failures. In the case of the two failures, the Company determined that retesting

was not required. His observations by managers during Train Ride Evaluations are without incident or criticism.

[25] I find the Company chose to assess discipline of a 40 day suspension for this incident as a Major Violation. However, it returned the Grievor to work without restrictions after 28 days. In so doing, I find the Company actually chose to address this matter as less than a Major Violation. After the Grievor had been held out of service for 28 days the decision was made to return him to service without any requirement for training or restrictions. I find that decision is understandable given his previous good record. However, the Company failed to properly consider all the same mitigating factors when assessing the original discipline.

[26] In view of all of the foregoing, I find the disciple assessed was too severe in the circumstances. The discipline will be reduced to 20 demerits and he will be compensated accordingly for lost wages and benefits.

[27] I remain seized with respect to the application and interpretation of this award.

Dated this 9th, day of April 2022.

Tom Hodges

Arbitrator