

IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

DISPUTE

Appeal of the 20 demerits assessed to Conductor Neil Lashley.

JOINT STATEMENT OF ISSUE

Following a fair and impartial investigation Mr. Lashley was disciplined as shown in his CP Form 104 as follows:

Formal investigation was issued to you in connection with the occurrence outlined below:

Your tour of duty, more specifically the failing to performing a Proper Locomotive brake test on October 20th, 2019 while working conductor on T49-20/235-21.

Formal investigation was conducted on October 31st, 2019 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- GOI Section 3 Item 2.3

In consideration of the decision stated above, you are hereby assessed with twenty (20) demerits.

As a matter of record, a copy of this document will be placed in your personnel file.

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

UNION POSITION

The Union's position is that any discipline in this matter is excessive and does not promote education,

In no way does the Union look to lessen the importance of ensuring Mr. Lashley performed a proper brake test, but the Assistant Trainmaster (ATM) who was performing the E-Testing approaches Mr. Lashley well later to advise him of his fail, Instead of immediately stopping the Brake test, and educating Mr. Lashley on proper process, the ATM allegedly performed the other side of the engines.

It is clear from looking at this investigation that not only did Mr. Lashley fail his E-test but so did the LE. Why would the Manager not stop immediately what was going on, talk with Mr. Lashley and ensure compliance to the education provided? There was never a need for a formal statement but deliver the needed education, perform a re-test to ensure the educational aspect worked and move on The LE should have been part of any of the initial discussion/investigation as he also needs to know that the engine brake test was completed properly, he would have clearly seen the Conductor on his side or not on his side while the testing was being performed.

Mr. Lashley provided his commitment now having been educated on the proper process moving forward.

The Union requests that the discipline assessed to Mr. Lashley be removed and that he be made whole for attending an unnecessary statement. 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 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 Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

In the investigation, the Union made no objection that the Locomotive Engineer was to share in the failure, nor with respect to the ATM not immediately stopping the brake test and the Union failed to call on the Locomotive Engineer and ATM as a witness.

The Company maintains its right to utilize efficiency tests, conducted as part of its safety management program, to review actions contrary thereto with the employee when and where appropriate, and assess progressive discipline as required for the rules identified through failed tests. 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.

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:

SIGNED

Wayne Apsey
General Chairperson CTY East
TCRC
March 28, 2023

FOR THE COMPANY:

SIGNED

Lauren McGinley
Assistant Director Labour Relations

Hearing: By video conference. April 12, 2023

APEARING FOR THE UNION:

Ken Stuebing, Counsel, Caley Wray
Wayne Apsey, General Chairperson, CP Rail East
Neil Lashley, Grievor

APEARING FOR THE COMPANY:

Rene Araya, Coordinator Labour Relations
Francine Billings, Assistant Director Labour Relations

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. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] The Grievor, is 50 years of age. He entered Company service on April 6, 2015 and works as a Conductor based out of Smith Falls, ON. At the time of this issuance of discipline, the Grievor had approximately 5 years' service.

[3] The discipline flows from an alleged Efficiency Test failure. In this case, the Grievor was called for duty as Conductor on assignment T49-20 in Spence Yard on October 20, 2019. Also called for duty with the Grievor was Locomotive Engineer Dave Torsky, who had a Locomotive Trainee with him, under his supervision.

[4] In the course of their normal duties, while switching ends on the locomotive, the Grievor was required to perform a locomotive brake test on all 5 of the locomotives in his consist. Regulations require performing a brake test on both sides of the locomotive to make sure that all brakes are properly operating. In this case, Conductor Lashley would have been outside and positioned on the ground, to observe that all brake pistons extend and retract as intended on the locomotives being tested.

ANALYSIS AND DECISION

[5] The Company submits that an E-Test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. An E-Test 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. Regardless of the outcome of an efficiency test, pass or fail, employees are given immediate feedback on their performance.

[6] The Company maintains that efficiency testing itself is not a discipline tool. However, depending on the frequency and severity of particular rules violations and the individual employee's work history, formal investigation and disciplinary action may be taken.

[7] In this case Assistant Trainmaster (ATM) Stockley submitted a memo indicating he witnessed the Grievor failing to inspect the brake pistons on both sides of the locomotives, ensuring their proper operation, a violation of GOI section 3 item 2.3. Seeing the Grievor did not properly complete his work, the ATM ended up inspecting the east side brakes and noted that the Grievor made no attempt to cross over to complete the locomotive brake test. The ATM advised the Grievor of his negligence and the importance of completing a locomotive brake test properly before his departure from Spence Yard.

[8] The Company maintains that a fair and impartial investigation was held as scheduled with the Grievor and his union representative Paul Barker on October 31, 2019. It says that ATM Stockley properly coached the Grievor on his failure to properly perform the locomotive brake test and was made aware of the importance and consequences of neglecting to complete the brake test prior to the completion of his tour of duty. The Company argues that the Grievor has a poor discipline record. His culpability was established and the Company applied progressive discipline.

[9] The Union maintains that the Company officer who performed the efficiency test on October 19, 2019, did not adhere to the educative process and purpose of efficiency testing. Instead, this single efficiency testing incident was used as a springboard for discipline. It says the tunneled focus was on the Grievor, but ignored the train's Locomotive Engineer and Locomotive Engineer Trainee who were also responsible for ensuring that the brake test was performed in accordance with the GOI.

[10] The Union argues that the roles and responsibilities of the other crew members was ignored by the Company officers during the efficiency test, investigation process and discipline process. In the grievance procedure, it submits that the Company provided no answer or explanation for its singular focus on the Grievor. No other crew member was counseled or investigated in connection with this lone efficiency test. Locomotive Engineer Torsky was equally aware of the fact that the units' pistons were not being observed from both sides. The Union emphasised the often cited Company position that all crew members are responsible as CROR Rule 106 states:

106. CREW RESPONSIBILITIES

All crew members are responsible for the safe operation of movements and equipment in their charge and for the observance of the rules. Under conditions not provided for by the rules, they must take every precaution for protection.

[11] The Union submits that Assistant Trainmaster Stockley did not make his presence known to the crew at any point during or immediately after the E-Test. Instead, he permitted the entire crew to complete the brake test and continue preparation to depart. The crew continued with their work of building their train after the completion of the engine break test. Only once the train was ready to depart Spence did the ATM approach Mr. Lashley and advise of an alleged efficiency test fail. The other crew members neglected to ensure the pistons were inspected on the east side. When they were aware that Mr. Lashley was always in their sight on west side of the engines.

[12] The Union argues that there is no evidence reflecting any attempts to circumvent or disregard proper safe work procedures on Mr. Lashley's part that should attract significant

discipline assessed. It is the Union's overall position that a 20 demerit penalty (fully 1/3 of a dismissal under the Brown system) represents a severe penalty for the sole allegation and circumstances. It argues that there is no question that these circumstances arose from an efficiency test administered by Mr. Lashley's supervisor. The record confirms that Mr. Lashley did not have a full and accurate understanding of the rule in question on the day of this test. These circumstances presented the ideal opportunity for the Company to properly utilize its efficiency testing practice to identify and educate this employee. The Company's policy states that when an employee has failed an efficiency test, that employee must be retested. The retest is normally within 7 days. The Union does not deny that the Grievor inspected only one side of the locomotive consist.

[13] The Company submits that Grievor simply did not cross over and did not inspect the brakes on the other side of the locomotives. It submits that the Grievor was required to advise over radio that the brakes were in working order, which is difficult to confirm since he did not observe the east side brakes.

[14] In justifying that failure of the Locomotive Engineer to confirm the brake test procedures, it argues that the GOI Section Item 2.3 sets out a list of 8 items for locomotive brake test procedures, the LE is responsible for 7. In addition to those responsibilities, the LE in this case was also training another employee. The Grievor was responsible to follow only 1 item on the locomotive brake test procedure list. Unfortunately, he did not follow the rule.

[15] I have difficulty with this argument. I find no evidence that the responsibility of the Locomotive Engineer for engine brake functioning is reduced because of other responsibilities. The responsibility for ensuring the proper functioning of the engine brakes by the Locomotive Engineer, including radio communication confirming functioning is clearly stated in CROA 3257 of the Company authorities. Arbitrator Picher stated:

It is clear on the material before the Arbitrator that the failure of the grievor's braking equipment was due to the change of controlling cabs. Mr. Parker did not observe the necessary operating rules which required him to perform a proper inspection and brake test following the change on the controlling cab. Further examination of the facts discloses that other rules violations occurred, including the failure to perform a proper and complete pre-departure locomotive inspection and noncompliance with rules pertaining to radio communication.

[16] The Inequity in the discipline assessed to crew members was addressed by Arbitrator Picher in CROA 3581, where he stated that:

The inherent preferential treatment of Locomotive Engineer Perich and Conductor Mousseau, not sufficiently explained in my view, gives substantial concern as to the equitable nature of the continuing discharge of Mr. Alexander.

[17] In this case, I find the discipline of 20 demerits was significant. It was triggered by an undated, three paragraph memo from Assistant Trainmaster David Stockley. His memo also did not specify a time or date of the incident during which he observed the Grievor without his knowledge. For unstated reasons, the ATM also acknowledged that he did not bring the alleged incident to the Grievor's attention immediately as specified in E-Test procedures, even though he acknowledged being only feet away from him. He waited until later when the Grievor was about to depart before doing so. He also did not bring the issue to the attention of the other crew members at any time or question why they did not ensure the Grievor inspected both sides of the

consist. The Notice of Investigation identified the date as October 20, 2019. However, information at the investigation referred to October 19 and October 21, 2019.

[18] The irregularities of ATM Stockley's actions and documentation do not eliminate the fact that the Grievor did not contest his failure to understand and properly perform the rule. The irregularities do raise concern for the failure to bring a proper brake test failure and radio communication to the attention of the entire crew. The irregularities in documentation also give rise to the acceptance of minimal and questionable evidence by the investigating officer as well as the officer reviewing and assessing discipline.

[19] As the Union submitted, Railway Arbitrators have negated discipline when the Company is found to employ E-testing for the purpose of unfair/inequitable application of discipline. I recognize that legislation requires CP to be vigilant when it comes to safety. CP managers conduct E-Tests to verify employees' attention to safety matters. This verification helps protect not just CP employees, but the Canadian public as trains move across the country. However, I find that in this incident the Company unfairly targeted the Grievor for significant discipline when uniform coaching and a warning to the entire crew was warranted.

[20] In view of all of the foregoing the discipline is allowed in part. The 20 demerits will be reduced to a written warning.

[21] I retain jurisdiction with respect to the implementation of the decision.

Dated at Niagara-on-the-Lake, this 17th, 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