CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4620

Heard in Edmonton, March 14, 2018

Concerning

CANADIAN PACIFIC

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

A: Appeal of 30 day suspension to Locomotive Engineer G. Trollard of Lethbridge, AB, dated May 7, 2015.

B: Appeal of 14 day suspension to Locomotive Engineer G. Trollard of Lethbridge, AB, dated October 6, 2016.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

A. Following an investigation Mr. Trollard was issued a 30 day suspension for; "For failure to be attentive in your duties as an engineer on the 0600 RS on April 27, 2015 resulting in the East track 2 Switch being run through by your movement, a violation of CROR 114, CROR General Notice, CROR General Rules A (i)(iii)(vi)(viii)".

The Union contends that the discipline and subsequent suspension assessed to Locomotive Engineer Trollard as a result of the investigation is arbitrary, unfair and not impartial, as there are no guidelines as to what an alleged offence would or should warrant as far as time held off work is concerned. The Union further contends that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. The excessive level of discipline assessed to Engineer Trollard most certainly can be considered discriminatory when compared to other cases similar in nature. For these reasons, the Union contends that the discipline is null and void and ought to be removed in its entirety.

The Union further maintains that the investigation was neither fair nor impartial and violated Article 23 as pointed out at the time and in the subsequent appeals. The Union further asserts the Company is in violation of the KVP award. For these reasons, the Union contends that the discipline should be expunged and is null and void.

For any and all of the above reasons the Union requests that the discipline of a 30 day suspension be expunged from Mr. Trollard's work record and he be made whole for all wages lost with interest including benefits in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

B. Following an investigation Engineer Trollard was issued a 14 day suspensions described as; "Please be advised that you have been assessed a Fourteen (14) day suspension – 7 Days Deferred, 7 Days served (effective 0001 October 17th, 2016 to 2359 October 23rd, 2016) without pay for the following reasons; *For failing to ensure your crew was riding the footboard of the locomotive while travelling over switches at the Lethbridge yard during your tour of duty on 1500 yard August 31, 2016. A violation of Prairie Alberta Summary bulletin effective 0001 October 1, 2016 Bulletin: ASA-112-15 Trains Working/Travelling in Yards/Industry Tracks page 25"*.

The Union contends that the discipline and subsequent suspension assessed to Locomotive Engineer Trollard as a result of the investigation is arbitrary, unfair and not impartial, as there are no guidelines as to what an alleged offence would or should warrant as far as time held off work is concerned. The Union further contends that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. The excessive level of discipline assessed to Engineer Trollard most certainly can be considered discriminatory when compared to the level of the alleged infraction.

It is the Union's position that the Company failed to provide evidence that would justify imposing the harsh penalty of a 14 day suspension and ignored mitigating factors established in the investigation. The Union also contends that the Company has violated Article 23.09 when deferring discipline as there are no provision for deferring a suspension nor deferring and reactivating a suspension in any instance. For all these reasons, the Union contends that the discipline is null and void and ought to be removed in its entirety.

For any and all of the above reasons the Union requests that the discipline of a 14 day suspension be expunged from Engineer Trollard's work record and he be made whole for all wages lost with interest including benefits in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has not replied to the Union's request.

FOR THE UNION:
(SGD.) G. Edwards
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

W. McMillan	– Labour Relations Officer, Calgary
S. Oliver	– Labour Relations Officer, Calgary
D. Pezzaniti	– Manager, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Calgary
H. Makoski	– Vice General Chairperson, Winnipeg

AWARD OF THE ARBITRATOR

The grievor is 46 years old and has worked for CP at its Lethbridge Terminal since January 2005. The grievor's record shows a number of items of discipline between 2005

and 2012, mostly with demerits absorded later by annual reductions. The record includes no cardinal rule violations. A 2011 incident that attracted 25 demerits was:

> For failing to be attentive in the performance of your duties resulting in your movement passing over and damaging the East Derail located in the backtrack at Seven Persons and further failing to report the incident immediately a violation of CROR 104.5, Alberta Service Area Summary Bulletin Effective 0001 November 1, 2010 until January 31, 2011 Reporting of all Injuries/Operating Officers GOI Initial Reporting Requirements Section 2, Item 1.1, 1.4 CROR 106, General Notice, General Rules (iii)(iv)(vi) January 19, 2011, Train 518-19, Lethbridge Alberta.

In 2014, he received a suspension:

> Please be advised that you have been assessed a five (5) day suspension, with 3 days only to be served with an Admission of Responsibility for the following reason(s): 5 day suspension from June 9 to June 13, 2014, with the first 3 days only to be served W AOR from 2201 Sunday, June 8, 2014 to 2201 Wednesday, June 11, 2014 for your failure to be attentive in the performance of the duties as Locomotive Engineer on May 4, 2014 resulting in skidded wheels 1, 2 and 6, on CP 6030, a violation of GOI Section 1, 32.3, 32.5 and 33.0(c) and CROR 2 General Rules A(i), A(ii).

The 30 Day Suspension

It is not disputed that on April 27, 2015 Mr. Trollard, as Locomotive Engineer on a 3 person crew, committed a run through violation described in his disciplinary letter as follows:

> 30 day suspension – (April 28 @ 22:00 to May 28 @ 22:00) for failure to be attentive in your duties as an engineer on the 0600 RS on April 27, 2015 resulting in the East track 2 Switch being run through by your movement, a violation of CROR 114, CROR General Notice, CROR General Rules A(i) (iii)(vi)(viii)

The facts are not really in dispute. The crew's operation occurred around the time when a grain train was leaving the Lethbridge yard. Crew members Lee and Homan were towards the rear of the train and had no clear view of the switch. Neither received any discipline for the incident. Mr. Trollard was in the locomotive and did have a clear view of the switch. His description of the event was:

> A16. Mr. Homan made the joint in track 2, Mr. Lee then informed me that the A45 was going to yard in track 9 from the east, he lined the track 2 switch normal and made a broadcast and I acknowledged that the track 2 switch was normal. Mr. Lee also lined the East A track switch to reverse and made a broadcast and I acknowledged. I advised conductor Lee that I would be off the engine to do a pull by on A45 on south side. After which I got back on the engine went to road channel to broadcast the results of the pull by and came back to the yard channel. I informed my crew I was back on channel and ready to make a move. Mr. Homan asked for a release test on the cars we were leaving behind, he then told me to pull ahead as far as I could to which I pulled ahead and then I noticed a train in track 1 before fouling track 1 went to road channel to see what he was doing. Found out the engine was the tail end remote and train was departing west ward so I went back to my yard channel and stopped my movement clear of A track. At which point conductor lee asked if I had lined the track 2 switch which I replied no and later was informed track 2 had been ran through.

The Union objects that a 30 day suspension is unreasonable, excessive and an uneven and discriminatory application of discipline. Behind this objection is the uncertainty created by the Employer's decision to abandon the Brown point system of discipline and, implicitly, the body of precedent that has built up on how penalties match an alleged breach and the grievor's past record. The Union claims that this imposition of discipline, without clear and published guidelines, violates the *KVP* principle and is unenforceable for that reason alone. I do not need to resolve that issue for this case.

While the transition from a point system to a progressive discipline system raises issues, and makes past discipline harder to compare to current assessments, this is not impossible. Particularly, CROA awards involve much arbitral review against the *Canada Labour Code* remedial jurisdiction standard:

> 60(2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

It is still possible to assess any particular penalty alleged to be arbitrary or disciplinary against similar cases, although with perhaps a little more emphasis on the grievor's prior record than may have been the case in the past. I agree with the employer to the extent that discipline is not siloed so each employee is considered clear if they have never been disciplined before for the particular offence. However, I caution that the nature of the grievor's prior record is still a relevant consideration.

A thirty day suspension is very serious discipline. The Union argues it is out of proportion to past discipline for Rule 104/Rule 114 run through switch violations. It cites examples of such conduct attracting 15-20 demerit points under the Brown system and 3-5 days suspensions under the newer system. It cites **CROA 905** and **3581** for the uneven and disciplinary discipline principles. It relies on **CROA 2775** and **4411**, and **4423** (a second incident case) for setting the range of suitable penalties.

The Employer relies upon **CROA 3939** which involved running through a mainline switch which attracted 25 demerits resulting in termination. The arbitrator found fit to replace the points based termination with a time served suspension. It also relies on the arbitration decision in **CROA 4583** where a termination was replaced with a time served suspension without compensation. I do not find **CROA 4583** analogous. That case involved proceeding into a protected track where a track crew was working, in what I find to be significantly more serious circumstances, with the potential for catastrophic harm.

Having considered all these cases and the grievor's prior record, I find that a 30 day suspension is disproportionately harsh. It is set aside and replaced with a 15 day suspension, which is progressive discipline given the grievor's prior record. The grievor will be made whole for the difference.

The Fourteen Day – Seven Day Suspension

The Union's first point is that this hybrid form of suspension and "suspended suspension" is contrary to Article 23.09 of the collective agreement. The penalty assessed amounts to a form of deferred discipline. Generally, the choice of disciplinary penalty falls to management. However, the parties have chosen to define, by agreement, just when and how deferred discipline may be used. This use does not fall within that defined purpose, nor does it adopt the agreed upon procedure. There is nothing in the agreement to authorize a penalty to stand, but only be served in the event of future default. For these reasons alone the penalty must be altered.

The Union also objects that this discipline arises from a failed efficiency test conducted by Trainmaster Frank Tzing on August 31, 2016. That alone does not preclude discipline arising from the same incident: See **CROA 4580**. However, the Union argues that the Employer must still meet the procedural requirements as well as its onus of proof, for any violation alleged. It asserts the Notice to Appear for investigation is unusually deficient in that it provides no particulars and no accompanying evidence.

Article 23 provides:

> 23.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.
>
> (1) The notification shall be provided not less than two days prior to the scheduled time for the investigation unless arrangements for a shorter notification time have been made between the Company Officer and the employee being investigated or the accredited representative of the Union.
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> (2) The notification shall include advice to the employee of their right to have an accredited representative of the Union attend the investigation.
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> (3) The notification 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.
>
> (4) <u>The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation</u>, whose evidence may have a bearing on the employee's responsibility.
>
> (5) The Company shall include with notice to the employee a copy of information provided by the Union outlining name(s), addresses and telephone numbers of the Local Chairmen.

> (6) The employee will sign their statement and be given a copy of it. (*emphasis added*)

Article 23.01(4) is mandatory. Perhaps it might be waived, but here it was not. The Notice reads:

> As per Article 23.01 Item 4, included with this notification is the following available evidence:

This (apparently from a template) is just followed by a blank space. That space is followed by a reservation of the right to introduce further evidence "should evidence come to the attention of the Company subsequent to the notification process above". The only other thing the letter adds is that the investigation is in connection with:

> Your tour of duty on 1500 Yard August 31, 2016 in particular you failed efficiency test conducted by Trainmaster Tzing.

The Notice of Investigation did not include any memorandum of what it was Mr. Tzing was said to be alleging. It did not enclose a copy or make any reference to Operating Bulletin ASA-112-15 "Trains Working/Travelling in Yards/Industry Tracks". It said the Company did not intend to call any witnesses. Just prior to Question 10 of the investigation the grievor's union representative made the following points:

> Vice Local Chairman Jay Matheson would like to add the following; The union requests full disclosure of all evidence, photographs, voice recordings, audio/video records, including any documentation whether paper or electronic, that has been utilized by, or is on the possession of the company, and which may have a bearing on determining responsibility.
>
> Q10. Do you have any evidence, photographs, voice recordings, audio/video records, including any documentation whether paper or electronic which you want to enter into this investigation and which may have a bearing on determining responsibility.

A10. No.

Vice Local Chairman would like to object to the fact that the Foreman and helper on the assignment Mr. Trollard was working on are not in attendance in this investigation.

Q11. Do you understand the employees referred to in Mr. Matheson's objection are not in attendance as they could not secure Union representation for this date and a further supplementary investigation will be held if required once there investigations are completed.

A11. Yes.

Nothing emanating from Mr. Tzing was entered into the investigatory record. It is clear from the questioning and the reference at Question 20, that the Investigating Officer was acting on some prior knowledge of the alleged events that could not have been gleemed from the notice or the documentary record (of which there was none). This, despite the Union's request and its subsequent denial.

The Union objects that, in these circumstances, the investigation was flawed for failure to comply with Article 23.01 and as a result was not fair and impartial within Article 23.04.

The Employer's view is that none of the above matters since, in the course of the investigation, questions were asked and answered that show that the grievor moved his unit forward through a switch (without incident) while he knew, must have known or failed to ensure his two conductors were positioned outside the cab, as required in Bulletin ASA-112-15.

The Employer refers to **CROA 2911** which, it asserts finds a similar procedural breach, but then finds it was waived by the Union proceeding with the investigation and not objecting then or at any time until the arbitration hearing, months after the imposition of the discipline. The award reads in part:

> In the Arbitrator's view, the circumstances disclose a course of Company action which goes beyond the minimal requirement for notice provided in article 6.2 of the collective agreement. It is clear that the process contemplated under that article is something less that the more elaborate protections of a fair and impartial investigation found typically within collective agreements in the railway industry. However, the Arbitrator cannot conclude that the requirement that an employee be given written notice of the reason for an interview is as empty of content or meaning as the Company's position would suggest. If the concept of a written notice is to have any value, as I believe the parties intended, it must be construed, at a minimum, to give the employee some advance indication of the incident or conduct being investigated. Needless to say, a phrase as cryptic as "employer concern" could be advanced as a "reason" for any investigative interview. It would, however, scarcely give an employee any indication of what was to be dealt with. Similarly, in the case at hand, the failure to communicate to the grievor that the reason for the investigation was his actions on two specific dates, some thirteen days prior to the investigation, is, in the Arbitrator's view, a departure from the minimal protection of the requirement to give him meaningful notice of the reason for the interview.

As to the waiver it reads:

> There is, however, a factor which would lead to a contrary result. It is not disputed that in the case at hand neither the grievor nor his union representative made any clear and formal objection to the lack of meaningful notice at the time of the disciplinary interview. In the circumstances, I am compelled to conclude that by failing to put the Company on notice of its intention to challenge the validity of the proceedings, the Union must now be taken to have waived its right to do so. There is obvious prejudice to the employer if a procedural objection of this kind is first raised at the arbitration stage, months after the assessment of discipline. On that basis the Union's objection cannot succeed.

In this case I am not prepared to find the grievor waived the right to object. The Union's representative, while not objecting to the adequacy of the initial notice, asked at Question 9 for an assurance that all the evidence being acted upon had been disclosed. It is obvious that, despite nothing being produced from Mr. Tzing, the investigating officer was in possession of details of the allegations yet he disclosed nothing. An informed waiver requires full knowledge. The absence of disclosure when asked adds to rather than waives the seriousness of the initial absence of a compliant notice of hearing.

I find a failure to comply with Article 23.01(4). I therefore allow the grievance and set aside the discipline, directing that the grievor be made whole. I reserve jurisdiction to make any further remedial order necessary, should the parties be unable to agree.

March 29, 2018

ANDREW C.L. SIMS, Q.C.
ARBITRATOR