CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4577

Heard in Edmonton, September 13, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor K. Lyle of Moose Jaw, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Lyle was dismissed from Company service, which was described as "For your involvement in the run through switch at Kalium on January 20, 2016 while working the K39 Assignment. A violation of Rule Book for Train & Engine Employees Item 2.2 (a) (c) (v) (vi) (x) (xii), Item 2.3 (b), Item 4.2 (f) and (g), Item 11.9, GOI Section 4 General Information I Definitions, Train & Engine Safety Rule Book T-0 Job Briefing, Train & Engine Safety Rule Book CORE Safety Rules, CP's Corporate Safety Policy, Train & Engine Safety Rule Book T-11 and GOI Section 4 Item 7.1."

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and ought to be removed in its entirety and Mr. Lyle be made whole.

The Union further contends that the Company has not met the burden of proof necessary to justify formal discipline in the circumstances. In the alternative, it is the Union's position that the termination is excessive, unjustified and unwarranted in all the circumstances, including significant mitigating factors evident in this matter. Additionally, the Union contends the discipline assessed to be contrary to the arbitral principles of progressive discipline.

The Union contends that Mr. Lyle was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement. The Union requests that Mr. Lyle be reinstated without loss of seniority and benefits, and that he be made whole for all associated loss including interest. 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.

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Edward	– Senior Vice General Chairman, Calgary
B. Pitts	– Vice General Chairman, Moose Jaw
K. Lyle	– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

Mr. Lyle was a trainee conductor with just over 18 months of service when he was terminated. The Union raised five points in favour of setting aside Mr. Lyle's termination.

Point one is that he has been "overcharged". The list of infractions said to have arisen from the Kalium incident is long, which leads the Union to characterize them in the same way the allegations in **CROA 4492** were viewed:

> The Union urges that, in respect to both the sleeping allegations and the speeding allegations, the Company has "thrown the book" at the grievor using every possible rule violation that might be claimed over the alleged conduct. I accept the proposition that an arbitrator should look at the individual allegations as a whole and not treat each possible rule violation as a separate failure.

An incident may be the result of several separate breaches, compounding to cause an event. It is quite legitimate to treat breaches that are severable and identifiable more seriously, where they are significant in themselves and not simply separate ways of describing the same breach. Managers should be cautious, however, in charging rule breaches that are not contributing factors. In such circumstances, reviewing

arbitrators may question whether such a wide ranging set of charges, some remaining unproven or insignificant, call into question the soundness of their initial judgment.

Point two challenges the fairness and impartiality of the investigation process. The Union's brief identified little specific in the record of the investigation to justify this complaint. The Employer relies on **CROA 2073** which sets out the approach to be followed in assessing such allegations:

> … disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline.

After examining the entire process, including interview questions 52-60, about which the Union complained in the early stages of the grievance, I find this standard was met.

Point three asserts that the Employer has failed to meet the burden of proof they carry to establish just cause. Mr. Lyle was part of a three person crew. Their task involved switching phosphate cars at the Kalium potash mine and then going over to nearby Belle Plaine to switch more cars. One loaded car was deliberately left on track 11 at Kalium. When they returned from Belle Plaine a few hours later, they found that

the one car had moved, running through the east end switch in the process, although without derailing. The Employer's position is that the grievor missed a step while tying down the car and while testing the hand brake for effectiveness.

When leaving a car like this, the hand brake must itself be capable of holding the car in place. Before applying the hand brake, the air brakes need to be released. Only that way can the Conductor be assured through testing that it is the hand brake alone that is holding the car in place. If the air brake remains applied during testing, the air pressure may subsequently bleed off, leaving the car without effective brakes.

The Union says firstly that the Employer uses a principle that the entire crew is responsible to ensure rule compliance. In this case, the two other crew members were only held out of service for two weeks and each received 30 day suspensions.

The Employer's reply to this point is that (a) the grievor had the shorter service and poorer record (see below) and (b) that the grievor's role in the braking and testing was the more direct cause of the movement. It was Mr. Lyle who was most directly responsible for tying down the loaded car on the track.

The Employer argues that, if the proper steps are used, a rail car should not move. It did, and from this, and the failure of Mr. Lyle to offer any explanation, it infers negligence on his part. It bolsters this inference by reference to the Q-tron download from one of the two locomotives.

The prescribed process for hand brake application is:

- Apply a hand brake with air brake released or brake cylinder bled off. Do not attempt to bleed a car off with SERVICE brake applications in effect as this can trigger an undesired release of all other cars.

- It is not always practicable to apply hand brakes with the air brakes released (e.g. heavy grades with heavy cars or when providing 3 point protection). When an air brake application is required, it must be as light an application as possible to prevent movement while hand brakes are being applied.

- When applying a hand brake, it must be applied fully.

- Hand brakes must not be applied while equipment is being pulled or shoved.

The testing process directions are as follows:

> To ensure a sufficient number of hand brakes are applied, release all air brakes and allow or cause the slack to adjust or apply sufficient tractive effort to provide force on the equipment. It must be apparent when the slack runs in or out, or when force is applied, that the hand brakes are sufficient to prevent that equipment from moving. This must be done before uncoupling or before leaving equipment unattended.
>
> IMPORTANT: When air brakes are released to test effectiveness, allow sufficient time for the brakes to release.

The Union says that, at about 01:00 hours, Mr. Lyle took control of the movement and told the locomotive engineer to bring the equipment to a stop. As it did so, Mr. Lyle climbed up on the hand brake end of the car. Once it stopped, he applied the hand brake and asked for “a release and pin test”. That involves releasing the air brakes and shoving the equipment sufficiently to compress the slack so as to test the hand brake’s

effectiveness. Mr. Lyle says he saw the slack adjust, then the car move and stop, indicating to him that the hand brake was holding. After he verified that the hand brake was applied to the car, he closed the angle cock and left the car in place.

Three hours later, when they returned to find the car had moved, Mr. Lyle says the hand brake chain remained tight, and the brake shoes were tight to the car, confirming to him that he had indeed applied it properly.

Once the event was reported, Trainmaster Justin Drover interviewed the crew, performed a re-enactment, and downloaded the one Q-tron. The Union questions the authenticity of the re-enactment and the probative value of the Q-tron.

Validating the Q-tron, in the Union's submission, requires two things. Firstly, the Company did not measure the wheel by which the Q-tron is calibrated. Secondly, the Company should have, but did not, download the second engine's Q-tron and compare the two so as to ensure that the one was not wildly off, due to wrong software versions or other problems.

The Company provided little answer, either at the time or later, to the complaints about the re-enactment, that it failed to reflect either the action or timing involved in the original event. I gave the results of the re-enactment little weight. The complaints about calibrating the Q-tron or comparing the Q-tron results have some merit. However, in my view, the Q-tron download is not as a result irrelevant. What it does record is the

sequence of events; even if the specific times are off, it still establishes the order in what those events took place and gives some indication of the time lapse (at least relative) between those events.

Clearly the onus of proof is on the Employer and mere suspicion of wrongdoing is insufficient. See **CROA 2939** where Arbitrator Picher said at para. 53:

> "… an arbitrator cannot convert suspicion into legal conclusions which involve grave consequences for an individuals employment."

What the Q-tron download shows (subject to the caution noted above due to lack of calibration and comparison) is described in the grievor's investigation:

> Q39 To simplify the events the locomotive download indicates is that the movement shoves into track 11 and a full train brake and engine brake were applied. Three seconds prior to the movement coming to a stop the train brake was released. Thirteen second after the movement comes to a stop the locomotive is reversed and the movement pulls out of the track. Do you understand this?
>
> A Yes I do according to appendix B now
>
> …
>
> Q45 Do you understand with the information you provided and the events captured on the download indicate that at the time you tied on the hand brake the air brakes were applied on the car?
>
> A According to Appendix B I would

Earlier the grievor had described the events (at Q17), saying in part:

> With one car left I entrained the west end of the movement and then told him to stop. <u>As the movement was coming to a stop I applied the hand brake</u> and after doing so I detrained and proceeded to the cut (*emphasis added*)

He confirmed the same thing at Q31. At Q47 Mr. Lyle explained how at the time he thought the air brakes were released. He answered:

> As I was walking up I could hear the air brakes releasing.

He maintained that, although the Q-tron did not show the slack being allowed to adjust, but they in fact did so. His description of the slack adjustment was however, rather vague. Weighing the evidence from the investigation, I am satisfied that the Company's summary at para. 46 of its brief has been established; that is:

> … the investigation revealed: the Grievor was the only member in position to secure the loaded phosphate car; the hand brake was secured while the air brake was still applied; and the download does not indicate that the slack adjusted.

On this basis, I am satisfied the Company has established, on the balance of probabilities, cause for discipline.

Point 4 argues that termination is excessive. This requires consideration of the grievor's record, any mitigating circumstances, and the principles of progressive discipline. The grievor was hired on August 4, 2014 and worked exclusively out of Moose Jaw during his eighteen months with the Company. He had two prior incidents recorded on his record, each based on admissions of responsibility on his part.

4/1/2015	RESOLVE: Reduce to 10 Demerits with AOR vs 30 Day Susp (15 to Serve and 15 Days Deferred)	For failure to ensure the switch was properly lined for your movement resulting in the XS06 switch being run through while working as the Conductor on train 205-

		01 on April 1, 2015. A violation of CROR General Notice, CROR 106 and CROR 114.B.
9/3/2015	RESOLVE R70-510.9749: Reduce to 10 Demerits with AOR vs 30 Day Susp (Sept 3 to Oct 2, 2015 incl)	For failing to ensure that the east F2 switch in Moose Jaw yard that was lined and locked in the reverse position for the intended route at mile 1.0 Swift Current Subdivision, while working as a Conductor on train 2K31-02 on September 2, 2015. A violation of CROR 114(a), (b) & (c). 30 day suspension (AOR), which includes time served, from 1904 September 3, 2015 to 1903 October 2, 2015 inclusive.

On the question of penalty the Union refers to **CROA 4411-B** which upheld an assessment of 15 demerit points for a train's run through of a switch. The case involves no discussion of any record, but it does rely on **CROA 2775** for guidance. That case involved an employee with a serious record and 55 current demerits. The grievor was an 18 month employee. The arbitrator upheld the assessment of 20 demerits for a run through of a switch. However, more significantly, the arbitrator saw no reason to alter the consequential termination. **CROA 4423** imposed 10 demerits for a run through of a switch, but for a 20 year employee.

The Employer's submission on penalty focussed on four of the factors listed in the seminal cases of:

> *William Scott and Co. v. C.F.A.W. Local P-162* [1977] 1 CLRBR 1 (Weiler), and
>
> *Steel Equipment Co. Ltd.* (1964) 14 L.A.C. 356
>
> 1. The previous good record of the grievor;
>
> 2. The long service of the grievor;
>
> 3. Whether or not the offence was an isolated incident in the employment history of the grievor;
>
> 4. The seriousness of the offence in terms of company policy and company obligations.

The grievor's record shows two prior run through switch violations. The grievor's length of employment was only 18 months (I recognize that 45 days of that was for rescinded discipline). The two prior related offences show, in the Company's submission, that further progressive discipline is unlikely to change the grievor's behaviour. It refers to Brown and Beatty, *Canadian Labour Arbitration* at 7:4422 where the authors say:

> … discharge is normally reserved for those cases in which the seriousness of the employee's offence in and itself justifies termination, or where the employee's disciplinary record shows that he or she is unlikely to change his or her behavior and become a satisfactory employee.

The Company cites **CROA 3655** where Arbitrator Moreau commented that careless and recklessness in the application of safety rules can have no place in a workplace where teamwork and safety concerns remain paramount. It also cites **CROA 2659** where a switch was lined to a main track, resulting in a main line train running

through and damaging the switch. Arbitrator Picher in that case reduced the penalty of termination (a result of prior demerits plus a further 30 for the infractions in question). He said:

> Although the grievor is not a long service employee, the benefit of the doubt would suggest that in the circumstances a substantial suspension, in lieu of discharge, should bring home to him the gravity of his conduct in violation of an important operating rule. He must, of course, appreciate that any similar infractions in future will attract the most serious of consequences.

The Company argues that having already served substantial suspensions, without apparent curative effect, the grievor's conduct cannot now be expected to change. I agree with the Union's point that the grievor's prior record is to be assessed based on the record as adjusted after the results of grievances are incorporated into the record, and not as they were originally imposed. However, the point is still well taken that the grievor has twice had discipline for related offences within a short period of employment.

In addressing the seriousness of the infractions, the Company emphasizes the potential for very significant harm to persons and property if equipment is improperly secured. The Company is not required to wait for that potential to be realized before imposing corrective discipline or, in suitable cases termination. I have considered **CROA 4171, 4481** and **4564**, but the individual's length of service in the two of the cases, and prior record in the other render them distinguishable from the situation at hand.

When the grievor was terminated, his record, on its face but subject to grievances involved two thirty day suspensions (one 15 days served and 15 days deferred). However, his prior record, as the matter stands now, involves only 20 demerits; 10 for each prior offence. Considering that fact (as management was initially unable to do) and the 30 day suspensions imposed on the other two crew members, I find it is appropriate to set aside the penalty of termination and replace it with a 60 day suspension. The grievor must recognize that is a very substantial penalty and one unlikely to help his prospects for continuing employment should further lapses of this nature occur. Except for the 60 days suspension, the grievor is to be made whole, subject to mitigation. I retain jurisdiction to finalize the quantum and other remedial points if the parties are unable to agree.

Point five contends that the grievor was wrongfully held from service, contrary to Article 70.05, which reads:

> 70.05 An employee is not to be held off unnecessarily in connection with an investigation unless the nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual or to expedite the investigation, where this is necessary to ensure the availability of all relevant witnesses to an incident to participate in all the statements during an investigation which could have a bearing on their responsibility. Layover time will be used as far as practicable. An employee who is found blameless will be reimbursed for time lost in accordance with Clause 30.01(1), (2), (4) or Clause 49.01(1), (2), (4).

The Union submits this was a minor offence and the other two crew members were only held out of service for two weeks. The question is whether the nature of the alleged offence, of itself, placed doubt on the continued employment of the individual.

The Union says no. However, the grievor was a short term employee with a significant and related record. I do not find a violation of Article 70.05 in these circumstances, albeit that I have seen fit to mitigate the penalty.

For these reasons, I find that the Company has established just cause for discipline, but that the penalty of termination, should be reduced to a 60 day suspension.

November 15, 2017

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