CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4579

Heard in Edmonton, September 14, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer K. Hansen of Revelstoke, B.C. dated October 18, 2016.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Engineer Hansen was issued dismissed from Company Service with the following explanation; *"Please be advised that you have been dismissed from Company service for the following reason(s): Failing to control your movement, train 875-034, 8944 west, at Squilax East resulting in signal 867, Squilax East displaying stop, being passed without authority, Sept 28, 20 I 6. A violation of Rule Book for Train & Engine Employees Rules: Section 2 - General, Item 2.2(a), 2.2 (c)(xii), & 2.3(b), Section 19 - Block & Interlocking Signals, Item 19.3, Rules 411 & 439."*

Based on the facts of the case, as well as the reasons outlined within grievance appeals, it is the Union's position the dismissal of Engineer Hansen is unjustified, unwarranted and excessive in all the circumstances. It is further our position this wrongful dismissal constitutes a violation of the Collective Agreement Article 23 and Section 230 of the *Canada Labour Code*.

The Union requests that Engineer Hansen's dismissal be removed from his record and that she be reinstated to his former position without loss of seniority or benefits, and made whole for all wages lost, with interest, in relation to the time withheld from Company service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

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

There appeared on behalf of the Company:

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

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairperson, Calgary

H. Makoski – Vice General Chairperson, Winnipeg
L. Daley – Vice General Chairperson, Revelstoke
K. Hansen – Grievor, Revelstoke

AWARD OF THE ARBITRATOR

On September 28, 2016 the grievor, a Locomotive Engineer, along with Conductor Kyle Richardson were in charge of a loaded coal train travelling east in the Shuswap Region of B.C. Another train was known to be heading westbound. The grievor's train passed a signal reading "Clear to Stop" meaning she should be prepared to stop, if necessary, at the next signal. The train went through that next signal which was red. In her investigation the grievor essentially agreed with Assistant Superintendent Ken Haddad's description of the event, which was based on what she told him at the time. It reads in part:

> I interviewed the crew. Locomotive Engineer Karen Hansen stated to me this was her fault. They were both aware they working on a Clear to Stop signal to Squilax East. They had spoken and reminded each other of the Clear to Stop. Train 875-034 was meeting train 198-27 at Squilax and Engineer Hansen was pacing her movement to make a rolling meet due to a crossing in the area. Engineer Hansen said she could not pin point the exact location she forgot about the Clear to Stop signal and started thinking about making the meet at Squilax. Just prior to the signal at Squilax East coming into view Engineer Hansen said she had released the brake as she felt the brake was too effective. Even when the stop signal came into her view, she said, she thought the signal had dropped at Squilax East and so she started a service brake application to bring the train to a controlled stop. Engineer Hansen said the Conductor put the train into emergency with his brake valve but they were unable to stop prior to passing the signal.
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> Conductor Richardson stated he was aware they were working on a Clear to Stop signal as well. He said they had reminded each other and he felt the train was under control as they were below 15 mph prior to seeing the signal. He was unaware the Engineer had released the brake and when the stop signal came into view he recognized the sound of the brake being set. Conductor Richardson said he did make

> the emergency brake application with his brake valve but it was too late, the train stopped within the controlled location.

The Employer argues that going through a stop signal as a very serious offence, involving a high potential for property damage and high personal risk. The seriousness of the incident itself plus the grievor's record led it to conclude that termination was the appropriate and only response. While the grievor had one other minor discipline, most significant is that the grievor had recently been dismissed for a very similar infraction that resulted in a major derailment and personal injury to the Conductor. That event occurred on September 6, 2015, just over one year earlier. Following a grievance, that termination was set aside and the grievor returned to service with what then became a 151 day suspension. The record of discipline for that incident reads:

> As per Grievance Resolve dated January 11, 2016 disciplinary record will be administratively adjusted to reflect a suspension from the date held out of service in lieu of the dismissal – a period of 151 days. Dismissed for failing to control your movement … resulting in speed in excess of General Bulletin Order and failing to control and stop your movement Signal 610, Beavermouth East, Mountain Subdivision, resulting in stop signal passed without authority and side collision with train 113-01 September 6, 2015. [a series of Rule violations are then cited including CROR 439]

This resolve came with a signed "last chance" agreement (signed by the Union and the grievor) dated January 11, 2016. While referred to by the Employer as a "last chance agreement" it actually consists of a statement followed by 9 conditions, the significant of which include:

> Notwithstanding that the discipline assessed was appropriate and warranted under the circumstances, the Company is willing, on a compassionate basis, to reinstate Ms. Hansen's employment subject to the following terms and conditions:

> 1) Before her reinstatement takes effect, Ms. Hansen must first submit to a safety critical medical examination, and any other medical assessment deemed necessary under the terms and conditions directed by the Occupational Health Services Department (OHS). …
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> 2) Before commencing work or training, Ms. Hansen's return to service is conditional upon her successfully completing a screening interview with her local manager concerning her return to the workplace. The purpose of this interview will be to review any changes which may have occurred since her discharge, discuss his/her ongoing expectations and to provide Ms. Hansen with a full understanding and clarity regarding the application of this agreement. …
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> 4) Before recommencing active duty, re-qualification under the CROR and RQ and remedial training will be required. …
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> 6) Ms. Hansen shall strictly comply with all of CP's safety policies, procedures and work practices.
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> 8) Any violation of or failure to comply with any of the terms of this Agreement will result in removal from service and an investigation. If such violation or failure to is established, it may be considered just cause for discipline, up to and possibly including termination of his employment with CP.
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> This Agreement shall have a term of 2 years from the date Ms. Hansen is returned to service and will remain on Ms. Hansen's employment record and may be utilized in the event that she appears before an arbitrator regarding this proceeding or any other future proceeding.

The Employer argues that arbitrators have treated Rule 439 violations as very serious (see **CROA 4391**) and have repeatedly upheld termination for second violations. It refers to **CROA 681** where Arbitrator Weatherill said:

> The grievor had no excuse to offer for this failure which can only be attributed to inadvertence. It may be that the grievor's mind was on certain family problems which he is said to have had at the time. Understandable as those may be, they cannot be allowed to relieve someone in the position of engineman from the requirement of strict compliance with the Uniform Code of Operating Rules, and especially with the rules in question here.
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> …

> This grievance … does not involve a claim for payment for time lost. The possibility of reinstatement of the grievor – perhaps even with a restriction to Yard Service – would, in the normal case, be given serious consideration. In the instant case, however, the grievor was dismissed on July 28, 1974, for an earlier violation of Rule 292 which occurred on July 3 of that year. He was reinstated to engine service on December 1, 1975. The matter of the severity of the penalty imposed on that earlier occasion is not now before me. What is significant is that within eight months of his reinstatement, the grievor committed the same offence, leading to the present case.
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> In these circumstances it cannot be said that discharge is not justified. The Company had indicated its willingness to hire the grievor in another bargaining unit. That is not a matter over which I have jurisdiction. As to the grievor's reinstatement in engine service, whether restricted to yard work or not, it is my conclusion, for the reasons above set out, that such an award should not be made. The offence involved is obviously a very grave one, and when it is repeated after a relatively short interval of working time, there must be said to be just cause for discharge. Accordingly, the grievance is dismissed.

The Union argues that this new Rule 439 violation is minor in that the train only passed the stop signal by 348 feet, no damage or injury occurred, and there was no danger of a collision. The grievor, it says and I agree, has been open and candid about the incident. Further, there is no allegation or evidence of dishonesty, deceit, misrepresentation, fraud or willful derogative for safety critical duties.

The Union urges that the grievor's discipline be characterized as discriminatory because Conductor Richardson received no discipline, contrary to the principle of shared responsibility. The Union refers to **CROA 2556** and **2267** as cases where the arbitrator declined to reduce the penalties of co-workers who were present within the locomotive but not in control. It also referred to Brown and Beatty's discussion of discriminatory discipline at 7:4414 and quoted in Ad Hoc 305.

Two considerations lead me not to mitigate the penalty on the basis of disparity. The first is the grievor's prior incident, which is both proximate and similar. The second is that both the grievor's description of the event, as well as Mr. Richardson's, suggest Mr. Richardson's actions were reasonable and his perception that the grievor was already slowing to stop based on his reasonable observation and on her failure to tell him she had released the brake. Mr. Richardson was obviously paying attention to his job as it was he who applied the Emergency Brake while the grievor says she was "momentarily confused."

The Union argues that each Rule 439 violation must be determined on its own merits, and it cited several past awards where, even for a second offence, termination was held to be excessive. It refers to **CROA 3238, CROA 3865** and **CROA 3972** all concerning the penalty for Rule 439 violations. **CROA 3238** involved a first offence on an unusual train for which the grievor had not been trained. The train was going one mile per hour and actually stopped two feet from the signal. Arbitrator Picher upheld a penalty of 20 demerits, saying:

> It is common ground that a violation of rule 439 constitutes a cardinal rules infraction normally deserving of a high degree of discipline. In such cases discipline in the range of thirty to forty demerits, sometimes coupled with a suspension is not uncommon (CROA 1479, 2230, 2556 and 2859).

He felt, by assessing 20 not 40 demerits, the Employer had already allowed for the mitigating circumstances. In **CROA 3865,** Arbitrator Picher upheld a 30 demerit penalty

(not 20 as argued by the Union) for a first rule infraction by a discipline free employee with twenty-five years service. In doing so he said:

> …it is well established in the jurisprudence of this Office that cardinal rules infractions must be viewed seriously, no matter what the circumstances. There is arguably no more critical cardinal rule than CROR 439, the requirement to stop a train, the violation of which is obviously fraught with the most dangerous of possible consequences. While no damage to equipment or injuries was encountered in the incident here under examination, the error committed by Locomotive Engineer Fox was most serious, arguably a textbook example of the danger of a train crew making assumptions about signals which lie ahead of them.

CROA 3972 involved a second Rule 439 violation, the first of which had earned the grievor 30 demerits. However, that was seventeen years earlier and the grievor was a thirty-five year employee. The termination was set aside and the grievor reinstated but without compensation.

The Union cites two more recent cases: **CROA 4182** and **CROA 4247** where employees were given 90 day suspensions. In **4182** this was reduced to 30 days based on an exemplary record and thirty-three years of service. **CROA 4247** declined to interfere with a 90 day suspension for a first time Rule 439 violation, but the case involved a variety of other circumstances making it less than helpful here.

The Union refers to two other recent cases where terminations were set aside in favour of reinstatement despite a second Rule 439 violation. In **CROA 3866** the second violation occurred three years after the first. The grievor had a twenty-nine year career with only one prior Rule violation. The circumstances of the incident also suggested mitigation. Even then the remedy was only reinstatement without compensation. In

CROA 4278 Arbitrator Schmidt upheld a termination for a second Rule 439 violation. That also occurred in **CROA 4391**. While it is true there, the grievor had multiple prior rule violations and had far longer service.

The grievor here has ten years of service including, and as the Union emphasizes, a period of five early years without discipline.

The Union refers to two extracts from Brown and Beatty, *Canadian Labour Arbitration*, in support of the view that there is rehabilitation potential in this case. The authors say, at para. 7:4422:

> In assessing whether a viable employment relationship can be re-established, arbitrators put great weight on whether the employee has tendered a sincere apology and/or expressed real remorse. The assumption is that employees who do so recognize the impropriety of their behaviour and are likely to be able to meet the employer's legitimate expectations.

And at 7:4424:

> A mitigating factor closely related to the potential of an employee to reform his or her behaviour is the employee's intention and state of mind at the time of the alleged offence. Premeditated and/or persistent wrongdoing is always regarded as more culpable than momentary lapses and those that lack a malicious intent.

The Union urges that there is an available option here short of termination which is to reinstate the grievor, but only to the job she performed for five years as a Conductor, working in the yard (see **CROA 1896** and **CROA 2487**). This would, it argues, allow her to salvage her employment relationship. She is forty-six years of age and lives in Revelstoke where she has family and community ties.

Having considered these arguments, I find I must dismiss the grievance. Most of the cases cited in support of intervention involve first offences or longer service employees. None of them involve both a very recent prior infraction or a reinstatement on strict conditions as is the case here. Like Arbitrator Weatherill in **CROA 681** I find that the Employer had just cause for dismissal and no intervention is warranted.

November 21, 2017

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