CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4806 & 4807

Heard via Video Conference and in Ottawa, Ontario, January 13, 2022

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

4806 Appeal of the 15-demerits, 20-demerits, and 30-day suspension of Conductor Lesley Hanna.

4807 Appeal of the 30-demerits/dismissal of Conductor Lesley Hanna.

JOINT STATEMENT OF ISSUE:

4806: 15-Demerits Entraining

Following an Investigation, on July 2, 2020 Conductor Hanna was assessed 15-demerits as shown in her Employee Notification Letter as follows;

"Please be advised that you have been assessed with fifteen (15) demerits for entraining onto equipment without communicating with the Engineer that you were on the equipment and riding, while working as Conductor on Train 235-04 on June 4, 2020.

Violation of T&E Safety Rule Book Section T-11 Entraining and Detraining Equipment".

Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position of an assessment of 15-demerits is unnecessary and the continuation to discipline before or even when education of the employee takes place. As noted within our grievance the equipment was stationary and therefore Rule T-11 is not violated as the rule is about when the equipment to entrain/detrain is moving.

Therefore, Ms. Hanna was not in violation of said rule as noted. As provided the CP trainer was requested for his advice and also commented that the rule referred to moving, not stationary equipment. Yet the investigation officer refused to acknowledge this advice and marked it down as hearsay. This in itself proves the biased, unfair, and prejudicial investigation that Ms. Hanna

was succumbed to and was destined to suffer discipline regardless of her story or the Union's evidence.

The Union believes Ms. Hanna was targeted by the Company wherein they simply did what is commonly being seen, build a file on the employee and then dismiss in order that they can state to an Arbitrator, we followed the progressive discipline approach no matter if the employee was in violation or not, the following two cases will further strengthen this argument.

The Company did not respond to the Union's Step 2 grievance; therefore, the Union is not in possession of any further position of the Company on the matter and this leaves the Union at a disadvantage. In the Union's view this a violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA.

The Union requests that the 15-demerits be removed. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position:

The Company disagrees and denies the Union's request.

20-Demerits Lining Switches:

Following an investigations, on July 2, 2020 Conductor Hanna was assessed 20-demerits as shown in her Employee Notification Letter as follows;

"Please be advised that you have been assessed twenty (20) demerits for incorrectly lining three switches in London Yard, while working as Conductor on Train 141-13 on June 14, 2020.

Violation of T&E Safety Rule Book Section T-26 Switches, Item 1, keep your body, hands, and feet clear of all moving parts and out of the path of the switch handle."

Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position of an assessment of 20-demerits is unnecessary and the continuation to discipline before or even when education of the employee takes place. As provided in our grievance the Company did not prove without a doubt that Ms. Hanna was in violation as noted. Ms. Hanna provided that she not only check but handled the switches as per the rule. For a Manager to single out three times that Ms. Hanna allegedly did not for her shift is very questionable as well as the fact of the Managers vantage point.

The Company ignores their own E-Testing Policy wherein the Manager after the alleged first violation should have intervened and educated, for some reason he was not required to provide his reasons in the investigation, a fair process did not happen. The building of discipline file continues.

The Company did not respond to the Union's Step 2 grievance, therefore, the Union is not in possession of any further position of the Company on the matter and this leaves the Union at a disadvantage. In the Union's view this is a violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA.

The Union requests that the 20-demerits be removed. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

The Company disagrees and denies the Union's request.

30-Day Suspension Detraining with No 3-Point Contact

Following an investigation, on July 2, 2020 Conductor Hanna was assessed a 30-day suspension as shown in her Employee Notification Letter as follows;

"Please be advised that you have been assessed with a thirty (30) day suspension for detraining a stationary loaded bulkhead flat and failed to maintain 3 points of contact, while working as Conductor on Train 140-16.

Violation of T&E Safety Rule Book Section T-11 Entraining and Detraining Equipment.

Your suspension date will start on July 4, 2020 and end on August 2, 2020 inclusive.

Please be advised that your employment is in jeopardy. Any further infraction for which you may be found culpable may result in the dismissal of your employment."

Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position of an assessment of a 30-day suspension is unnecessary and abusive.

As shown in the Union's grievances Ms. Hanna is disciplined for allegedly detraining stationary equipment without 3-point contact is not proven without a doubt. At best the Company is reaching here as the fluidity and movement of a person detraining is just that, fluid and not robotic.

To state that she violated a rule when her foot was an inch off the ground and 1 hand let go of the ladder in one continuous motion is erroneous and clearly the targeting of Ms. Hanna.

There is no doubt to the Union as noted that the Company was building a discipline file on Ms. Hanna as they continued to target her. This is the third discipline event she receives on July 2nd and as noted at the end of this events discipline letter, she is warned that a next occurrence will lead to dismissal. Ms. Hanna has since been dismissed.

There was never any reason to suspend Ms. Hanna 30-days for this alleged violation, if the Manager was correct in their assumption, simple education with a retest would have been the route to use, instead heavy-handed discipline was the road taken. Again, the Company's own E-Testing Policy was ignored.

There is no doubt that the 3 discipline events were simply to build a file, aggressively discipline when no discipline was warranted. The Company achieved their intended course over a 13-day period wherein the above 3 cases took place, and then finally dismissed Ms. Hanna.

There never should have been discipline in any of the above cases and if there was substantiated proof by the Company, the quantum assessed was not inline with the alleged violations.

The Company did not respond to the Union's Step 2 grievance; therefore, the Union is not in possession of any further position of the Company on the matter and this leaves the Union at a disadvantage. In the Union's view this is a violation of the CBA Article 40, the Letter Re: Management of Grievances and the Scheduling of Cases at CROA.

The Union requests that the 30-day suspension be removed and Ms. Hanna compensated all loss of wages, benefits with interest, no loss of seniority. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) C. Clark**
General Chairperson	Manager, Labour Relations

There appeared on behalf of the Company:

C. Clark – Manager, Labour Relations, Calgary
L. McGinley – Assistant Director, Labour Relations, Calgary

And on behalf of the Union:
D. Ellickson – Counsel, Caley Wray, Toronto
W. Apsey – General Chairperson, Smiths Falls

AWARD OF THE ARBITRATOR

1. This award concerns the discipline and ultimate discharge of Conductor Lesley Hanna in relation to four separate incidents, which occurred between June 4 and August 3, 2020.

2. The Parties provided two separate Joint Statements of Issue regarding the discipline and the discharge, respectively. With the Parties' consent, all the grievances were heard together on January 13, 2022.

Overview

3. The Grievor is fifty-eight years old. She is a Conductor with twenty-three years of service.

4. As of June 4, 2020, the Grievor had 20 active demerit points. Her active discipline record also included a 5-day suspension for a missed work assignment; a 5-day suspension for a work rule violation; and a 19-day suspension for a work rule violation.

5. Summarized briefly, the four incidents addressed in this award are as follows:

- On June 4, 2020, the Grievor entrained stationary equipment without advising the locomotive engineer that she had done so. The Employer submits that this was in violation of *Safety Rule Book Section T-11 Entraining and*

Detraining Equipment ("T11") and it imposed 15 demerit points. The Union submits that T-11 applies to moving equipment only and there is no requirement to communicate with the locomotive engineer after entraining stationary equipment. The Union states that there is no reasonable basis for discipline in the circumstances and, in any event, the discipline imposed was excessive.

- On June 14, 2020, when she was lining three switches, the Grievor allegedly failed to keep herself clear of all moving parts. The Employer states that this was in violation of *T&E Safety Rule Book Section T-26* and it imposed 20 demerit points. The Union notes that there were no injuries or damages and that, to the extent there was any violation, it was minor. The Union states that the discipline imposed was unwarranted, unreasonable, and excessive.

- On June 17, 2020, the Grievor allegedly failed to maintain three points of contact when detraining a stationary bulkhead. The Employer imposed a 30-day suspension. The Union submits that discipline was unwarranted, unreasonable, and excessive.

- On August 3, 2020, the Grievor missed a call on the date immediately following the 30-day suspension, mentioned above. The Employer imposed 30 demerit points, which brought her active disciplinary record above 60 points. The Employer discharged the Grievor on this basis. The Union acknowledges that the Grievor did not take steps to determine when she was expected to return to work. However, it submits that the Employer provided no information about the process for her to book back on following the suspension. The Union states that discharge is unwarranted, unreasonable, and excessive in these circumstances.

6. The Union contends that the Employer singled out the Grievor for harsh and excessive discipline. According to the Union, each of the four incidents in question is minor and should have resulted in no more than a discussion or, at most, a caution.

7. The Employer disputes that the incidents were minor; it states that they could have had significant consequences. The Employer denies targeting the Grievor. It states that she attracted its attention because of her disciplinary record and unsafe work habits, which she failed to correct despite progressive discipline.

First Incident: Entraining Stationary Equipment

8. There is no dispute that a conductor is required to advise the locomotive engineer after she entrains moving equipment. The issue between the Parties is whether T-11 also required the Grievor to communicate with the locomotive engineer after she entrained stationary equipment.

9. In this case, the most relevant provisions of T-11 are paragraphs 2 and 3. However, it is important to consider the rule in context and as a whole.

> Entraining and Detraining Equipment
>
> 1. When conditions are determined to be safe, employees are permitted to entrain or detrain moving equipment at a walking pace not exceeding 4 mph.
>
> 2. **Always communicate the intent to the locomotive engineer (includes RCLS operator) prior to entraining or detraining moving equipment. The locomotive engineer must acknowledge only the intention of entraining or detraining the movement and then ensure speed is 4 mph (or less if requested) at the entraining or detraining location.**

3. **Always communicate to the locomotive engineer once you are safely entrained or detrained.** [Emphasis added.]

4. Never entrain or detrain moving equipment while in possession of a grip/bag or any item that would prevent the full use of both hands (Eg. SBU's, tools, water, switch broom).

5. Entrain and detrain clear of switch stands, bridge approaches, retaining walls, restricted/ close clearances, debris and other fixed objects.

6. Face the locomotive when entraining or detraining a locomotive stairwell.

7. Do not jump from any piece of equipment or structure to ground level or onto another adjacent equipment or structure except in an Emergency situation.

8. Use 3 points of contact on steps, ladders, railings, or handrails when entraining or detraining any piece of equipment or structure, maintaining a firm grip.

9. Entrain or Detrain moving equipment on the leading end of equipment.

10. The Union submits that T-11 does not require an employee to communicate with the locomotive engineer after entraining stationary equipment. In support of its position, the Union notes that paragraphs 1, 2, 4, and 9 of T-11 refer specifically to moving trains. According to the Union, these references suggest that the rule, as a whole, applies only to moving equipment.

11. In addition, the Union submits that paragraphs 2 and 3 must be interpreted contextually. Paragraph 2 refers to communications with the locomotive engineer when an employee intends to entrain or detrain "moving equipment." According to the Union, it follows that the obligation at paragraph 3 (to communicate with the locomotive engineer after safely entraining) is also limited to circumstances when the train is moving.

12. In my view, the interpretation proposed by the Union is not supported by the language of T-11. The heading of T-11 refers to detraining and entraining, generally. It does not suggest that the requirements are limited to situations where the equipment is moving. Importantly, the language of paragraph 3 requires employees to "always communicate" with the locomotive engineer once they are safely entrained. Given its use of the word "always," I cannot conclude that the application of paragraph 3 is limited to moving trains. In any event, only four out of nine of the paragraphs in T-11 use the word "moving." It does not necessarily follow from this, nor would it be appropriate to read into T-11, that the remaining 5 paragraphs also apply only to moving trains.

13. Accordingly, the Grievor's failure to communicate with the locomotive engineer after she had entrained is a violation of T-11. There is no basis to conclude that 15 demerit points is unreasonable or excessive discipline in the circumstances.

Second Incident: Switches

14. On a balance of probabilities, I accept the trainmaster's observation that the Grievor was inappropriately positioned when she lined a series of three switches.

15. It is significant that the trainmaster was nearby and watched the Grievor throw three switches before he intervened. Had the trainmaster perceived a real or serious risk or rule violation, I would have expected him to intervene sooner.

16. Based on the evidence provided, I find that although the Grievor was not appropriately positioned, she did not throw the switches in a manner that created a significant danger or a likely risk of injury. In these circumstances, the Employer's imposition of 20 demerits was excessive. Instead, it is appropriate to impose 10 demerit points.

Third Incident: Three Points of Contact

17. A superintendent observed the Grievor descend a stationary train, without maintaining the required three points of contact. The Grievor's evidence was that her foot was approximately one inch off the ground when she released the ladder with her hands. She described her foot landing on the ground as "practically simultaneously" with letting go of the ladder.

18. On a balance of probabilities, I accept that the Grievor let go of the handles briefly before her foot touched the ground. I note that the train was stationary and that no injuries were sustained.

19. The Employer's imposition of a 30-day suspension is disproportionate to the conduct in question. In reaching this conclusion, I have given consideration to the nature of the misconduct, the principles of progressive discipline, and the Grievor's significant disciplinary history.

20. Safety rules exist for a reason and employees are certainly required to comply with them. That said, a brief failure to maintain three points of contact when descending a stationary train is not a serious violation, nor is it deserving of a 30-day suspension. It would have been appropriate and sufficient to caution the Grievor in these circumstances.

Fourth Incident: Missed Call

21. The Employer provided the Grievor with a letter specifying that the 30-day suspension for the third incident (described above) ended on August 2, 2020. The Employer's letter did not provide any details about what time it expected the Grievor to be available or how it expected her to book back on. The Grievor did not contact the Employer to request clarification about her return to work.

22. The Grievor missed a call on August 3, 2020 at 0540. She described the situation as a "misunderstanding."

23. I accept that a missed call will generally attract discipline, particularly in circumstances such as the Grievor's, where her disciplinary record shows a history of missed calls.

24. In this case, the Grievor ought to have contacted the Employer to confirm or request additional information about her return to work. Importantly, however, the missed call on August 3rd was in direct relation to the 30-day suspension, which I found to be unwarranted and excessive. In my view, it would be unfair to discipline or further penalize

the Grievor for a missed call that arose in relation to a suspension that was unwarranted in the first place.

25. Accordingly, the Grievor should not have been disciplined for the missed call on August 3, 2020.

Other Issues

26. I find that the discipline imposed by the Employer was generally excessive. However, there is insufficient evidence to substantiate the Union's allegations that the Grievor was unfairly targeted by the Employer. The fact that the Employer identified a number of rule violations in short succession suggests that her work was being scrutinized. That said, she had a significant disciplinary record at the time and the violations identified by the Employer were legitimate, although the discipline was generally excessive.

27. Finally, the Employer argued that the discipline imposed on the Grievor was reasonable and in keeping with its Hybrid Discipline and Accountability Guidelines. The Union objected to the Guidelines because they were introduced unilaterally by the Employer and are the subject of outstanding Union grievances.

28. These issues are beyond the scope of my jurisdiction. Having assessed the discipline based on existing CROA jurisprudence and principles, I am satisfied that the

discipline imposed was excessive and must either be rescinded or reduced, as described above.

Conclusion

29. The grievances are allowed, in part.

30. The Grievor's disciplinary record should reflect a total of 25 demerits points for the incidents reviewed in this award. This would have brought her active discipline record to 45 demerit points at the time of her termination, which is below the threshold for termination under the Brown system. Therefore, the termination is set aside and the Grievor is to be reinstated and made whole in all respects.

31. I shall remain seized with respect to the interpretation and implementation of this award.

January 24, 2022

MICHELLE FLAHERTY

ARBITRATOR