CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4581

Heard in Edmonton, September 14, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor S. Taylor.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on October 3, 2016 Conductor Taylor was dismissed from Company service as shown on his Form 104 as follows; *"Reference the formal investigation held commencing on September 16, 2016 in connection with your tour of duty on August 21, 2016 while working as Conductor on train 235-21, specifically the incident at Howland. Please be advised that you have been dismissed from company service for failing to ensure the safe operation of train 235-21 on the North Toronto Subdivision as evidenced by your train operating beyond a signal displaying stop indication resulting in the collision between your train 118-18 at signal 33-2 North Toronto Subdivision on August 21, 2016 at 0515, a violation of the following rules from the company rules: Rule Book for Train and Engine Employees: Section 19,19.3 rule 411. Section 19, 19.3 rule 439. Section 17, 17.7. Section 6, 6.5. Section 2, 2.3 a,b,c,d. Section2, 2.2 a. Section 2, 2.2 c,v,vi,vii,viii,x,xi,xii. Job Briefings."*

The Union's position is that the dismissal is unjust, unreasonable and excessive.

Mr. Taylor did not dispute that a collision had occurred between train, 235-21 and train 118-18 at the crossovers at Howland on the North Toronto Sub. However, the Union contends that many mitigating factors may have contributed to this event.

Including, but not limited to, - The appearance of a predetermined assessment of facts from the Company regarding Mr. Taylor's responsibility in this incident. - Through the Company's investigation, as well as a previous investigation, and supporting documentation the discovery of deficiencies in Mr. Taylor's training while working as an RTE in Toronto.

During Mr. Taylor's investigation, the Union entered the following objection, "The Union objects to the pre-determined nature of this investigation. On August 21, 2016; CP Rail spokesman Martin Cej gave a quote to Canadian media outlets including City News. City News, in an article posted at 0746 on August 21, 2016 titled: "Train Derailment near Dupont Street blamed on Human Error"; In the article, Mr. Cej is quoted: "CP spokesman Martin Cej says there was a small diesel leak after the collision but it was quickly contained and there is no environmental risk from the incident. Cej says the collision was the result of human error."

The company issued this statement prior to Mr. Taylor being investigated by the company. This is a violation of CTY East collective agreement article 70.04: *"70.04 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced. No employee will be required to assume this responsibility in their statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e. the date the last statement in connection with the investigation is taken except as otherwise mutually agreed. Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed."*

Further: Mr. Taylor was required to fill out an Initial Incident Report after suffering a concussion during the collision of 235-21 and 118-18. The company has already conducted certain aspects of this investigation by way of having Mr. Taylor provide a written detailed explanation without Union representation being afforded. The company, without Union involvement has changed the provisions of CTY East Collective Agreement Article 70. This investigation cannot then be considered fair, or impartial.

The company has not complied with CTY East Collective Agreement Article 70. By requesting a formal written statement from Mr. Taylor, instead of what preliminary set of facts were needed to secure, and to be sure the situation was safe. This is a violation of CTY East Collective Agreement Article 70. "

The Union contends that the initial response of the Company was to assess blame to Mr. Taylor and crew before any formal investigation was conducted.

The Company asked Mr. Taylor during the investigation, "Q116 Do you understand that the incident at Howland on the morning of August 21, 2016 effected the reputation of CP in a negative way, especially with the general public living in the area of the accident scene? A116. I understand how any accident can impact the image of CP rail. We did not intend for this to occur, it was an accident."

The Union objected to the question as it was a self-incriminating question. The purpose of the investigation was to ascertain the facts. Mr. Taylor was clearly not intending to damage the reputation of CP.

In fact, Mr. Taylor was a very dedicated and loyal employee of the Company, "Q3 Please state your service record with CP Rail? A3. I hired on June 4, 2012 in Smiths Falls, I was laid off for extended period once qualified. I came to Toronto on a 91 day relocation in October 2014 and worked until March 2015. I returned to active service in March of 2016 in Toronto and worked for three months then laid off. I returned to active service on August 21, 2016. Train 235-21 was my first trip back following lay off."

In the four years that Mr. Taylor was an employee of the Company he only worked for 7 months. Mr. Taylor's commitment to the Company carried him through many extensive layoffs. Despite this he continued to be a dedicated employee of the Company.

In Appendix L (Item 12) Mr. Taylor's Employee Profile; his discipline record is clear. Mr. Taylor added to the investigation: "Q160 Do you have anything you wish to add to this statement? A160. Yes in addition to my answer in question 123, I would like to add that I am very sorry about the way things turned out. I am a proud CP rail employee and I hold my head high knowing that I am employed by CP Rail."

What Mr. Taylor possessed in pride of working for the Company, he lacked in experience of working for the Company. After completing his initial Conductor training program in Smiths Falls, Mr. Taylor was qualified during the only ride along with a Company officer he ever received in his entire career.

During Mr. Taylor's initial 91-day relocation to Toronto in October of 2014, the scheduling and handling of his familiarization program was so disorganized that it ended with one of Mr. Taylor's transferring co-workers, Mr. Craig Cleroux dismissed from the Company. Mr. Cleroux was returned to Company service through the Arbitrator's ruling in CROA 4421, which read in

part, "*The record reveals that Burnett provided the grievor (and his colleagues) familiarization schedules on November 18 and November 30, 2014. Throughout the familiarization period there were logistical problems experienced by the grievor, Ford and Taylor. They shared some of their concerns and frustrations with each other. Their respective difficulties were also shared with the Company when all three provided statements during the grievor's investigation."* Arbitrator Christine Schmidt, CROA 4421.

On January 21, 2015 Mr. Taylor provided a statement to the Company in connection with his familiarization and training. During the statement, Mr. Taylor was asked, "Q24 Mr. Taylor, do you have anything else that you would like to add at this time. A24 (partial) I am not blaming anybody whether it be Lore Burnett or any manager of some sort. I believe the system itself is flawed. In aspects of we came here, speaking for myself, I have no clue where anything is in Toronto or the GTA are as far as CP Rail is concerned. I will not give you a problem without a solution. On our first day of RQ we should have received a package with three names on it. Lore Burnett with a phone number, Paul Proudlock with a phone number and title and Doug Elen with a title and phone number as well. People say Doug is in charge of the yard, I have never met him or seen his face. On that first day we should have been provided a spreadsheet timetable graph with our entire familiarization schedules with days to work on it. … I was scared and confused showing up and having all this show up with scheduling and communication. I love this job and all I want to do is be a good CP Rail employee…"

Even after this statement, and after being laid off again for another year, Mr. Taylor was contacted by the Company asking if he would return to work earlier than the allowed time after recall from layoff. Mr. Taylor outlined this exchange when asked about returning to active service on August 20, 2016; during the investigation, "Q124 Prior to returning to active service on August 20, 2016 did you contact a company officer and request familiarization? A124. I did not contact a company officer, I asked the gentleman from CMC after my three week layoff if I could get familiarization (FM), he indicated that after three weeks you generally do not get it. I remember after my year layoff after only working for three months Mr. Terry Lee called to ask if I would book on early from lay off. I explained to him that I had been off for a year and he advised me from where he stands no to FM but Dan Molher makes the final call. I contacted my Union rep and got 1 week in the yard and I believe one trip north and one trip east. At no time during my time in Toronto have I ever ridden with a company officer when returning from layoff."

During the investigation, the Union entered an email from the Union Representative to Mr. Jan Polley and Mr. Dan Mohler dated March 21, 2016, "*Jan and Dan, I am writing to follow up on earlier conversations regarding re-familiarization with employee's recently recalled in Toronto. We are now getting into employees that have not worked in Toronto in quite a while. All listed were laid off before October 14, 2015, when all of our working documents and forms changed.*

These employees should be receiving an RQ refresher to familiarize them with all new documents, forms, and rules. As well they are going to need re-familiarization in the field. The amount of re-familiarization required may vary from employee to employee, based in part on temporary relocations and transfers.

Lore Burnett and John Boyd handled the training and re-familiarization of employees previously, and would probably have an understanding of what they require.

I have received many calls from the last group recalled in Toronto regarding this. including an employee who was told by a Trainmaster that he would not be entitled to re-familiarization. As you can imagine this has caused them some concern amongst these guys. I'm hoping we can alleviate this and start getting these employees back to work. Recently recalled, with varying need of RQ and re-familiarization: T.B, Shayne Taylor, J. B., K.M., J.B.. Thanks for your help in this matter, Brent Baxter, Local Chairman (CTY Yard) | TCRC Division 295 Toronto.

During the later stages of the investigation the Company provided Mr. Taylor with his entire work history from his time in Toronto listed as Item (or Appendix) 17, *Q135 Referencing appendix 17 records indicate that you have made 17 main line tours of duty over this territory since Dec*

2014, is this correct? A135. No. Q136. A joint review of the data was complete, both the union and the Company agree there was 11 single tours over the time period in question for the north pool, do you agree? A136. Yes I agree. Q137 Where there any other tours in yard or road service that you required you to go over the north Toronto sub during this time frame? A137. I am not sure that is why I previously answered approximately 20 trips. Q138 Do you understand that it is your responsibility to ensure you are familiarized with the territory that you work on? A138. I tried to follow that rule but upon review of my history in Toronto I have asked three times for familiarization and each time there have been mitigating factors.

The first time I came to Toronto I came after a two year layoff. I had not worked a single paid trip, familiarization became such and issue that it became the subject of an investigation and a CROA case #4421 After my year layoff and only working approximately three to four months in the Toronto terminal and never had a ride along with a company official to see if I am qualified, Terry Lee called me to ask me to book on early, I explained to him that I just suffered a one year layoff and I needed familiarization. He advised me from where he stands no to familiarization but Dan Mohler makes the final call. I also underwent RCLS training from April 19 to May 16, 2016 during this time frame I was pulled from RCLS training to work regular duties as a conductor on two separate occasions April 20 and May 1 thus suffering a broken period of training.

After working three months in Toronto yard I was laid off for one month layoff, CMC called me to come back to work, I asked them if I could have familiarization, the gentleman on the phone said you do not typically get that following a one month layoff. I remember from the CROA #4421 and my conversation with Terry Lee I did not want to be a targeted employee. I feel I made repeated attempts to become familiar, each time these attempts were met with resistance. I was made to feel that I was not allowed more familiarization even though I might require it."

Mr. Taylor requested re familiarization from CMC after they recalled him to work. He was told by CMC that he was not entitled to this re familiarization. During the investigation, the Company tried to insulate itself by stating that Mr. Taylor should have contacted the Assistant Superintendent in Toronto to request re familiarization. Based on Mr. Taylor's previous experiences he took the word of the CMC employee. He did not feel he was entitled to the re familiarization: "*Q144. If you understood the Assist Supt had the final say on familiarization, why did you take the CMC employees word that you could not have familiarization if you believed you required it upon your return to active service on August 20, 2016? A144. At that time CMC explained because it was only a month layoff I generally would not get that and with my previous experience with CROA 4421 and resistance I have met in the past I did not ask for familiarization for fear I would be targeted."*

Mr. Taylor's first attempt at training in Toronto; he was involved with a formal investigation. Mr. Taylor's second attempt at training in Toronto he was initially told "no", and then given a sub-par training schedule. The third-time Mr. Taylor requested training in Toronto he was denied by CMC. The management in Toronto had provided Mr. Taylor with and insufficient amount of training to work in a terminal as large as Toronto.

The Union contends that Mr. Taylor's training in Toronto was insufficient. The Union further contends that the handling or rather the mishandling of Mr. Taylor after the incident was beyond anything conceivable. The Company Officers were aware this employee was just in a serious incident, had smashed his ahead against a window and provided no medical assistance. Asking an employee who was most likely in shock if your good to go and ignore the obvious is no more than an abuse of rights and Mr. Taylor should be compensated for this injustice in of itself.

The Union requests that Conductor Taylor be reinstated with all discipline removed from this event, payment with interest for all loss of wages, without loss of benefits/pension or seniority. In the alternative, the Union requests that the penalty be mitigates as the Arbitrator sees fit.

The Company disagrees and denies the Union's requests.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) W. Apsey **(SGD.)**
General Chairman

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
W. Apsey	– General Chairman, Smiths Falls
J. Campbell	– General Chairman, Peterborough
S. Taylor	– Grievor, Smiths Falls

AWARD OF THE ARBITRATOR

Train 235-21 operated by Locomotive Engineer Paul Jarvis and Conductor Shayne Taylor missed a slow to stop signal and then were unable to stop at the next red signal causing a major collision, summarized in the Transport Safety Board report as follows:

> On 21 August 2016, at approximately 0517 Eastern Daylight Time, Canadian Pacific Railway freight train 118-18 was crossing from the north to the south track at approximately Mile 3.3 on the North Toronto Subdivision in Toronto, Ontario. Freight train 235-21, proceeding westward with 2 locomotives only, collided with the tail end of train 118-18. Four of train 118-18's intermodal cars (10 platforms) were struck and damaged. Four of the platforms derailed upright. The 2 locomotives of train 235-21 derailed upright. The fuel tank on train 235-21's lead locomotive was punctured, resulting in the release of about 2500 litres of diesel fuel. A number of small fires were extinguished. The conductor of train 235-21 sustained injuries.

The cost of the damage was $675,000. Mr. Taylor suffered a concussion.

Mr. Taylor grieves his termination questioning the impartiality of the investigation, alleging that termination was too onerous in the circumstances, and that there were mitigating circumstances due to deficiencies in his training for the job he was assigned to at the time.

Fair Investigation

The Union maintains that the result of the investigation was "pre-determined from the outset". It bases this firstly on a media statement by CP Rail spokespersons Martin Cej. The Company says he was quoted as saying:

> "Preliminary indications are that the incident was as a result of human error" Martin Cej said "there were no track, mechanical or signalling issues."

The Union says he was quoted as saying:

> "The collision was as a result of human error."

I do not infer any pre-judgement from this. The liberties the press take in compiling headlines often result in exaggerated statements. It is unrealistic to think that the Company would not need to respond to press inquiries after such a serious collision in a populated area. What is attributed to Mr. Cej was not directed at any particular person and was accurate to the extent it ruled out mechanical or equipment failure.

The Union objected and still objects to question 116, which it also suggests shows pre-judgement.

> Q116 Do you understand that the incident at Howland on the morning of August 21, 2016 effected the reputation of CP in a negative way, especially with the general public living in the area of the accident scene?
>
> A I understand how any accident can impact the image of CP rail. We did not intend for this to occur, it was an accident.

While the question perhaps calls for a self-evident and largely irrelevant answer, the grievor's answer was appropriately responsive. Having considered the entirety of the investigation I do not find it indicative or pre-judgement or in violation of the tests set down in **CROA 1561** and **CROA 2934**.

Justification for Termination

The Union argues that termination was excessive and unwarranted. It urges and I accept that the grievor is remorseful. It argues that the evidence shows no wilful misconduct or wilful derogation from the Operating Rules. It advances certain compelling factors, beyond the control of the grievor, which it says were insufficiently weighed by the Company.

- There were distractions at the time caused by the warning of a possible trespasser. I accept that to be so.
- Thick smoke from 118-18 blocked the view of the signal. That may be so, but the locomotive camera still showed signal visability and the smoke itself called for some cautionary movement given the route, the passing train, the clear to stop signal and the movement's speed.
- Alterations to practices and policies have since been made. Had such changes been instituted earlier, the incident might not have occurred. However, saying that does not diminish the incident.

The evidence discloses both Rule 411 and Rule 439 violations. It shows that the Engineer failed to reduce speed in response to the situational issues that arose; the smoke obscuring where a signal would have been known to exist and any feeling of distraction or overload due to the pedestrian warning. The very proximity of train 118-18, close to a crossover point, should also have induced caution. While the locomotive

engineer had direct control of the speed, the notion of shared crew responsibility means that Mr. Taylor as conductor still carried responsibilities, particularly for signal monitoring during the movement.

The grievor, in his investigation says he observed the Clear to Stop indicator at signal 15-2 and communicated that to the locomotive engineer. He did not, however, reiterate this after they had passed signal 15-2 because he was quite confident in the engineer's ability, and was not concerned about how the movement was being handled and did not think there was a problem. He conceded then that he should have been concern. Inexperience may be a mitigating factor (discussed below) but this indicates the grievor's own conduct was clearly a contributing factor to the Rule violations.

A Rule 439 offence is a cardinal rule violation and has been treated very seriously in prior CROA decisions as cited by the Employer, for example **CROA 4391** and **4112**.

Mitigation of penalty due to lack of familiarity

The cardinal rule violations here were very serious. The damage, potential for greater harm had the collision occurred slightly earlier, and the physical injury (concussion) to Mr. Taylor are aggravating factors. The Union urges however that there are countervailing mitigating factors in Mr. Taylor's case. The record shows that when called in to work in Toronto, Mr. Taylor actively sought greater familiarization to the area than was made available to him. During this trip, Mr. Taylor's sixth time on this track, he still found himself consulting documentation to confirm the train's location. Mr. Taylor is

one of the individuals mentioned in **CROA 4421** which too concerned familiarization shortfalls. More significantly, the problem of familiarization was identified in the Transportation Safety Board report as significant. It noted, at page 7, that Mr. Taylor still wore a green vest to indicate his lack of experience. The report notes at page 9:

> Over the course of employment at CP, the occurrence conductor had requested additional familiarization trips on 2 occasions. After encountering resistance to these requests, the conductor escalated the requests through the union and was then provided with the additional familiarization trips.
>
> On 06 August 2016, after being called back from lay-off status, the conductor enquired with the crew office (not a company officer) about obtaining additional familiarization trips. It was indicated that, after a 5-week lay-off, these would not likely be provided. The conductor did not escalate this request to the union or a company officer.

and at page 10:

> Familiarity with a territory improves crew members' knowledge of signal locations and enables them to take forward-planning (proactive) measures to detect and see signals. The knowledge of signal locations in a specific territory increases with the frequency of trips. When less familiar with a territory, crew members can refer to the track schematics, in a timetable, which identify the location of each signal. However, frequent reference to track schematics would reduce the amount of time spent observing outside and forward during the operation of the train. Alternatively, signals can be detected without prior knowledge of their locations; this is considered reactive, as opposed to proactive, detection.

At page 27 the report focused on the lack of familiarization as a factor that had increased the risk for this incident.

> Despite having worked at Canadian Pacific Railway (CP) for 4 years, the conductor had only accumulated 15 months of operational experience. For 5 of those 15 months, the conductor was working in Smiths Falls, and was stationed in Toronto Yard for the remaining 10 months. While stationed in Toronto Yard, the conductor had been working intermittently over a 21-month period, due to a number of lay-

> offs. As a qualified conductor, the conductor spent approximately one third of the time in road service. The other two thirds were spent in yard service. Due to this discontinuous work history focused primarily on yard service, the conductor did not believe that he had mastered all the skills required for the position. Consequently, he continued to wear a green vest when on duty to inform other operating crew members of his level of experience.
>
> After returning from a 9-month lay-off in March 2016, the conductor requested and received a number of familiarization trips. Although these trips were granted, all took place in yards. The conductor had not operated on the North Toronto Subdivision for more than 9 months, and the familiarization trips given did not aid in improving his familiarization.
>
> As well, after returning from a lay-off on 20 August 2016, the conductor was advised by a crew dispatcher that it was unlikely the company would grant additional familiarization trips after a lay-off of only 5 weeks. Because of the difficulty he had experienced obtaining familiarization trips in the past, the conductor did not request further trips from his manager immediately upon his return, despite not being fully comfortable operating on the North Toronto Subdivision.
>
> Following extended workplace absences, if additional familiarization trips are not made available to operating employees to ensure that they are fully comfortable with their designated territory, crew members may not be sufficiently prepared, increasing the risk of train accidents.

The lack of familiarization Mr. Taylor had actively sought is a significant mitigating factor in this case. It also had a direct impact on these events. Mr. Taylor was far less familiar with the terrain and the signals than the locomotive engineer. As a result, in addition to the other distractions, he was having to consult his documentation. Also, his inexperience and anxiety over that fact goes some way to explaining his over reliance on and over confidence in the locomotive engineer's actions.

I find this factor is sufficient to consider whether Mr. Taylor is worthy of a second chance to pursue his career with CP. In favour of this is his discipline free record, and his willingness, even eagerness, to stick with the job despite a rather patchy record of available employment since he started, as he described at question 3 of his investigation:

> A: I hired on June 4, 2012 in Smiths Falls, I was laid off for extended period once qualified. I came to Toronto on a 91 day relocation in October 2014 and worked until March 2015. I returned to active service in March of 2016 in Toronto and worked for three months then laid off. I returned to active service on August 21, 2016. Train 235-21 was my first trip back following lay off.

My conclusion is that, despite the seriousness of these Rule violations, aggravated by the damage caused, Mr. Taylor's employment relationship is capable of restoration. I find it just and equitable in the circumstances that his termination be set aside and he be restored to employment, but without compensation, the intervening period being recorded as a suspension. I remain seized to finalize this remedial award, if necessary.

November 29, 2017

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