

IN THE MATTER OF AN AD HOC ARBITRATION
BETWEEN
TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

And
CANADIAN PACIFIC RAILWAY COMPANY (CP)

DISPUTE:

Appeal of the 30 demerits and subsequent dismissal of Conductor Matthew Emery of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Emery was assessed 30 demerits for the following:

"In connection with being called as the Conductor for Moose Jaw Yard 41026 and your wearing of improper safety footwear resulting in a three (3) hour delay on January 26, 2021. A violation of T&E Safety Rule Book T-21 Personal Protective Equipment."

Mr. Emery was subsequently dismissed for the following:

"Please be advised that you have been DISMISSED from Company Service for an accumulation of 65 demerits under the Hybrid & Accountability Guidelines."

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION POSITION

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union asserts:

- Question 39 was self-incriminating and asks Mr. Emery to admit to violating rules he had not violated, and had not admitted to violating.
- Questions 41, 42, 46, 47, and 48 were outside the scope of the investigation.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above as follows:

- The Company failed to enter evidence establishing the state of Mr. Emery's boots prior to reporting for duty.
- The Company failed to enter evidence supporting the allegation of a three hour delay to his train.

The Union contends the discipline assessed is discriminatory, unjustified, unwarranted, arbitrary, and excessive in all the circumstances. Alternatively, the Company has failed to consider the significant mitigating factors in the determination of discipline assessed to Mr. Emery.

- Mr. Emery was truthful throughout the entire procedure and answered all questions posed of him.
- Company submitted memorandum supports that Mr. Emery's boots ripped during his shift.
- Mr. Emery was proactive in ordering new boots; however, they were on backorder.
- Mr. Emery realized the safety concern of working with torn boots and reported the problem immediately to his supervisor.
- Mr. Emery did not attempt to hide or conceal that fact that his boot failed during his shift.

The Union requests that the discipline be removed in its entirety, and that Mr. Emery be reinstated without loss of seniority and benefits and be made whole for all associated loss with interest

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

With respect to the fairness and impartiality of the investigation, the Company cannot agree with the Union's allegations. Specifically Q41 and 42 pertained to the Company officer's memo submitted into the investigation; Q46-48 were directly relating to the subject matter of the investigation as they relate to the nature of the Grievor's employment, safety and risk of unsafe actions.

Regarding burden of proof, Rule T-21 is clear that the sole of the boot must be puncture resistant and be maintained free of tears and have a functioning tread. As established in the investigation, this rule was not adhered with.

Accordingly, the Company cannot see a reason to disturb the discipline assessed.

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:



Dave Fulton
General Chairman
TCRC CTY West
April 3, 2023

FOR THE COMPANY:



Chris Clark
Manager Labour Relations
Canadian Pacific Railway

Hearing: April 13, 2023 - By video conference

APPEARING FOR THE UNION:

Erin Carr, Counsel, Caley Wray
Ken Stuebing, Counsel, Caley Wray
Doug Edward, Sr. VGC CTY West
Jason Hnatiuk, VGC CTY West
Les Inverarity, LC Conductors, Moose Jaw
Mathew Emery, Grievor

APPEARING FOR THE COMPANY:

Chris Clarke, Manager Labour Relations
Sharney Oliver, Manager Labour Relations
Simone Scott, Manager Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018, and Letter of Agreement dated September 7, 2021, between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. Awards, with brief written reasons, are to be issued within thirty days of the hearing. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the Canada Labour Code.

BACKGROUND

[2] The Grievor, Matthew Emery, was hired by the Company in Moose Jaw, Saskatchewan, in May of 2014. He has worked out of the Moose Jaw Terminal for his entire career with the Company.

[3] On January 26, 2021, the Grievor was called for duty on Moose Jaw Yard at 05:10. Approximately one hour after starting his shift, Mr. Emery was being transported by Company vehicle from the yard to the station. While in the Company vehicle, Mr. Emery noticed the sole of his boot gave out.

[4] The Grievor contacted Austin Hientz, the Assistant Train Master (“ATM”), and advised him of the damaged boot. Mr. Hientz made the decision to send Mr. Emery home and call a replacement crew. After relieving Mr. Emery of duty, Mr. Heintz prepared a memorandum stating that Mr. Emery’s boots ripped during his shift. On February 1, 2021, Mr. Emery received a Notice of Investigation in connection with “Your tour of duty on Moose Jaw Yard 410-26, on January 26th, 2021, more specifically the alleged rules violation.” On February 3, 2021, Mr. Emery appeared at a Company investigation to provide a formal employee statement.

SUBMISSIONS OF THE PARTIES

[5] The Company submits that the Grievor approached the on-duty Trainmaster to report that he could no longer work the train he was called for as his boots were torn and in an unwearable state. It emphasised that when advising the Company Officer of his broken-down boots, he also reported that he had been wearing anti-slip cleats over the soles of his footwear as required in winter conditions and further illustrating how deteriorated his boots actually were.

[6] CP maintains that the investigation also confirmed the following with respect to his footwear:

- The side of the sole blown out;
- The sole being ripped;
- The sole coming detached from the boots;
- The tread of the sole was worn down; and
- The ball of the sole is worn down to the point that there is no longer any tread

[7] The Company maintains the Grievor’s footwear were long overdue due for replacement and that replacement boots had been ordered by him. CP says the Grievor knew and understood all applicable rules, policies and programs available to him to ensure he had the proper footwear (PPE) to fulfill a tour of duty. He was also aware of the Company’s Enhanced Safety Footwear Subsidy program.

[8] The Company maintains the Grievor's footwear were long overdue for replacement and that replacement boots had been ordered by him. CP says the Grievor knew and understood all applicable rules, policies and programs available to the Grievor to ensure he had the proper footwear (PPE) to fulfill a tour of duty. He was also aware of the Company's Enhanced Safety Footwear Subsidy program.

[9] There is no doubt culpability was established. CP argues that the Grievor did not place any importance on the conditions of his boots or the potential for injury. For reasons only the Grievor is aware, be it procrastination or hesitation or maybe he simply didn't care, he was the author of his own misfortune. Following the fair and impartial investigation, and after a determination of all pertinent factors and in accordance with the Hybrid Discipline and Accountability Guidelines, the Grievor was assessed 30 demerits for wearing improper footwear and for causing a delay to his assignment.

[10] The Company submitted that the Grievor needed to be relieved after only 4 hours and 45 minutes of being on duty. To be clear, not only was the Grievor required to fulfill at a minimum a 10 hour tour of duty, he would also have had to wear the same boots on his return trip from the away from home terminal. Canadian Pacific has a responsibility to maintain a safe workplace under Part II of the Canada Labour Code, specifically, Part II Section 125 (1) (y). Limiting the ability of the Company to deliver appropriate disciplinary consequences to employees who undermine that safety, restricts the Company's ability to meet its statutory obligations within the Canada Labour Code and leaves the safety of our employees and the public in potential peril.

[11] In reply to the Union position that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement, The TCRC representative objected to the line of questions of the investigating officer. Counsel claimed it required the Grievor to admit guilt, which CP says is simply untrue. Asking the Grievor the aforementioned question is not only beneficial from an educational perspective, but also allows the Investigating Officer to understand his frame of mind.

[12] CP argues that the Grievor took a very contradictory position when reviewing the pictures of his safety boots. While confirming obvious tears to his deteriorated footwear, he still maintained his boots were in a safe condition. The Investigating Officer is required to ask these types of questions in order to understand how the Grievor will work going forward. It needs to know if the Grievor put himself in this situation again.

[13] The Union submits that on February 3, 2021, when the Grievor appeared to provide a formal employee statement, he was forthcoming and answered all questions put to him in an honest and straightforward manner. Throughout his statement, Mr. Emery confirmed his boots had normal wear at the start of his shift, but were in safe condition. He repeatedly confirmed that he reported the damage as soon as he noticed it.

[14] The Union maintains that the Company failed to establish any grounds for discipline whatsoever, let alone for 30 demerits. Even if there were grounds for discipline, which is denied, the Company's legitimate interests would have been served by providing coaching to the Grievor.

[15] The instant matter is not a case of culpable actions by the employee deserving of discipline resulting in dismissal. The onus of establishing that the Grievor's conduct was culpable lies with the Company and must be established on the basis of clear and convincing evidence. The Union submits that there is no precedent to sustain 30 demerits for an employee immediately reporting a broken boot. From any comparator group against which the Arbitrator contrasts the instant discipline, it is grossly excessive. The record before the Arbitrator does not reflect willful ignorance of safety rules by Mr. Emery. There is nothing aggravating about these circumstances that

elevates this matter to anything beyond a coaching opportunity, if that. There was no injury, accident, or incident.

[16] The Union submits that, should the Arbitrator find some cause for discipline, the alleged conduct in question is the first such offence of its nature in Mr. Emery's career, and warranted at most a verbal or written warning. Mr. Emery has never had a previous infraction regarding the use of personal protective equipment. The Union submits that the Arbitrator ought to consider other mitigating circumstances in the case, namely that the incident at issue did not result in any accident, injury, or damage to company property. By all accounts, the incident was a mistake. Meanwhile in the present case, Mr. Emery's boot failure was not preventable.

[17] Mr. Emery started his shift with all of his PPE in safe condition. Mr. Emery was wearing all of the required equipment, but for reasons beyond his control, his boot ripped during his shift. He immediately reported the failure. There was no injury or accident. Again, no rule violation is established in Mr. Emery's case. Railway arbitrators are reluctant to uphold dismissals for accumulation of demerits in cases where the individual infractions, though perhaps culpable to some degree, were not so serious as to justify discharge.

[18] The Union submitted that Mr. Emery was discharged for accumulation of demerits, but the "culminating incident" itself was clearly not of a character and nature that justifies discharge. The Grievor was wearing all of the required equipment, but for reasons beyond his control, his boot ripped during his shift. He immediately reported the failure. There was no injury or accident. No rule violation is established in Mr. Emery's case.

ANALYSIS AND DECISION

[19] It is not in dispute that the Grievor works in a Safety Sensitive position within a Safety Critical workplace as a Conductor. Trains can be over a mile long and Conductors may be required to walk their trains for various reasons in all conditions. Safety boots are required Personal Protective Equipment (PPE). PPE, is recognized as equipment worn to minimize exposure to hazards that cause serious workplace injuries and illnesses. If you work on a railway, you need to have a work boot with specific safety features. The great variety of hazards in the railroad industry require all round protection. You'll be facing work in all types of weather, uneven terrain, long hours on your feet and falling heavy falling objects to mention a few.

[20] Some PPE is a one size fits all equipment supplied by employers. Other PPE is bought by the employee because of size, fit, comfort or other personal preferences. I find that work boots for Conductors is akin to a welding mask for welders, radio headsets for pilots or masks for nurses in ensuring personal safety and the safety of co-workers. They are not one size fits all. They are critical to the safety of the owner, co-worker and in some cases the public. Checking their reliability and general fitness is not an inspection to undertake after work has commenced.

[21] I find that in a safety critical workplace, if you put yourself or others at risk by misuse or not using PPE, you can expect to be held accountable. The accountability level will depend on the outcome of the investigation and the level of risk you put yourself or others at. There are many other factors such as training, awareness of risk, or intention that would be considered. As the Union submits the goal is generally corrective, not punitive. Like many workplaces, CP has a safety footwear program which subsidizes employees for up to \$150.00 annually for new safety footwear.

[22] The Union argues that at the start of his shift, Mr. Emery's boots were in good working condition. The soles of his boots were intact. Aside from normal wear and tear, his boots were not damaged. Approximately one hour after starting his shift, Mr. Emery was being transported by Company vehicle from the yard to the station to complete his paperwork. While in the Company

vehicle, Mr. Emery noticed the sole of his boot gave out. He removed the safety cleats he was wearing to inspect the damaged boot further.

[23] I have reviewed the pictures of the Grievor's boots. I find the Grievor's explanation challenging, as did the investigating officer. I find the boots were severely worn and falling apart. The Grievor says he determined they were not safe after starting work that day rather than before working. To say they were intact aside for normal wear and tear is inconsistent with the deterioration in the pictures. The wear and tear in the pictures is consistent with the Grievor having ordered a new pair of boots.

[24] The Union relies on Ad-Hoc 595, in which an employee was assessed 15 demerits for failing to have his boots laced all the way to the top, when walking from a taxi to the booking-in room. The Arbitrator found the discipline "grossly excessive," and ordered it expunged. The employee was reinstated with full compensation. In AH 595 the Grievor was a long service employee who was getting out of a taxi at the completion of his assignment, not at the beginning of his assignment. This is not a case where the oversight could be rectified by tying up the boot laces.

[25] This case is about the extensive delay caused by the Grievor's failure to have proper personal equipment. It is also about the Grievor's failure to take responsibility for his actions and concern that he did not commit to focusing on detail in the future to avoid a repeat of the situation.

[26] I find the assessment of thirty demerits was not unreasonable in the circumstances. The Grievance is denied.

Dated at Niagara-on-the-Lake this 17th, day of July 2023.

A handwritten signature in black ink, appearing to read "Tom Hodges", is centered within a light gray rectangular box.

Tom Hodges
Arbitrator