

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

**And
CANADIAN PACIFIC RAILWAY COMPANY (CP)**

DISPUTE:

Appeal of the dismissal of Conductor Matthew Emery of Moose Jaw, SK.

JOINT STATEMENT OF ISSUE

Following an investigation Mr. Emery was dismissed for the following:

“Your tour of duty on January 31, 2021 when called for train 410-31 and more specifically your unbecoming conduct as the Conductor resulting in train 410-31 being delayed and the subsequent recrew. A violation of HR 1300 Harassment and Discrimination Policy, CROR General Rules A (viii) and (ix) and Rule Book for Train & Engine Employees, Section 2.2 While on Duty – Item (ix).”

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 contends:

- In Questions 33 and 37, the investigating officer refers to Company
- Records that were not provided to the investigation despite the
- Union’s request for full disclosure at the outset.
- Evidence Appendix B is biased and speculative.
- Question 31 is biased and self-incriminating.
- Questions 32, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, and
- 50 were outside the scope of the investigation.
- The Company attempted to exaggerate Mr. Emery’s role in the incident preferring to not question any of Mr. McBride’s decisions. The Company pose 52 questions to Mr. Emery but only 18 to Mr. McBride.
- The Company accepted Mr. McBride’s version of events despite several glaring deficiencies.

The Union contends the Company failed to meet the burden of proof for the alleged rule violations as contained with Mr. Emery’s Form 104. The Union contends:

- Engineer McBride confirmed that it was he who decided to abandon the tour and go home that day, causing a delay to the train.
- No evidence was produced that Mr. Emery had any intent to delay the train.
- Mr. Emery was ready to continue working and had the locomotive engineer not decided to go home that day there would have been no delay (other than operational delays) to the train.

The Union contends the discipline assessed is discriminatory, arbitrary, unjustified, unwarranted, 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.

- The RTC contacted Mr. Emery to ask how long it would take before his train was ready to depart. Mr. Emery took this opportunity to serve notice, it was in no way a retaliatory reaction to his power not being ready on time for the train depart as scheduled. (Q. 19)
- The Assistant Trainmaster was confrontational with Mr. Emery.
- Mr. Emery had no intention of delaying the train.
- Engineer McBride operated the movement to the east end of the shop tracks without any instruction from Mr. Emery.
- Engineer McBride changed radio channels without informing Mr. Emery.
- Engineer McBride made threatening and antagonizing comments, yet he was not removed from service nor subject to discipline.
- The crew's locomotives were not ready to depart the shops until 0600, 2 hours and 25 minutes into their tour, as estimated by Mr. Emery.

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

With respect to the fairness and impartiality of the investigation, the Company cannot agree with the Union's allegations. The Notice of Investigation was in connection with the Grievor's tour of duty and the alleged delay to train 410. Q37 pertained to the reworking of this train, while the majority of the other questions raised by the Union dealt with the Harassment and Discrimination Policy further to the comments of the Grievor's Assistant Trainmaster and Engineer.

Regarding the Union's allegation that the discipline was discriminatory and arbitrary, the Company cannot agree with this allegation. Moreover, the Union supplied insufficient information in support of this allegation. It is not sufficient for the Union to simply state its position without supplying rationale, details or frankly any support for the allegations. The Grievance handling procedure

requires sufficient information to be included in the grievance to be able to properly identify the issue and basis for an allegation. The lack of pertinent information renders the Company unable to properly respond. The Company reserves the right to object should the Union attempt to supply any additional arguments in support of this unsubstantiated allegation.

Regarding burden of proof, the Union has focus on the delay to train; however it was determined that the Grievor's actions resulted in the delay both directly and indirectly. 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

FOR THE COMPANY:



Chris Clark
Manager Labour Relations
Canadian Pacific Railway

April 3, 2023

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 31, 2021, Mr. Emery was called for duty for train 410-31 with Locomotive Engineer Wade McBride at 03:35. The assignment involved Train 410-31 travelling from Moose Jaw, Saskatchewan, to Broadview, Saskatchewan, in straight-away unassigned service.

[4] Mr. Emery and Mr. McBride had to go the shops to get their power and assemble the train. In the course of the work, they engaged in an argument. The argument concluded with Mr. McBride contacting Trainmaster Desrosiers on the radio, and advised that he could not continue with the tour of duty.

[5] Mr. Desrosiers created a memorandum to file about the incident.

[6] On January 31, 2021, Mr. Emery received a Notice of Investigation in connection with:

Your tour of duty on Moose Jaw Yard 410-31, on January 31st, 2021, more specifically the alleged delay to train 410.

[7] The Grievor was dismissed on February 19, 2021.

SUBMISSIONS OF THE PARTIES

[8] The Company submits that the Grievor's is familiar with its rules, regulations, and policies. He has completed the Conductor training program not once but twice. Working as a Conductor, CP says his role was to oversee the safe operation of trains and help ensure their assignments, complete their work and reach their destinations in a timely and efficient manner. It is the Conductor's responsibility to ensure that all operating rules and procedures are followed and that customer service standards are met.

[9] The Grievor's job was to perform the job safely, effectively and efficiently. It is incumbent on the Conductor to know and understand the rules and regulations that govern safe railway operations. The Company maintains that the Grievor's record demonstrates he failed at several aspects of his job, which lead to the safety infractions and resulting discipline. After having his employment terminated only eight months after hiring on, he was unfazed by the possibility of subsequent discipline. In addition, less than five days prior to this incident the Grievor had been involved in another incident which also caused a delay to his train when he reported to work with safety footwear that was in such decay, he could not complete his tour of duty. Not including the assessment of 30 demerits for the January 26, 2021, incident with improper safety footwear, the Grievor had four active assessments of discipline on file.

[10] The Company submitted that in February 2016, just eight months after joining the Company, the Grievor was dismissed for the following reasons:

For your conduct unbecoming with Canadian Pacific Railway regarding your unwillingness to follow the conditions of your employment. Your negative attitude when working with fellow employees and Company officers. For working in an unsafe manner that places you and your fellow workers and the public at risk. A violation of CP's Corporate Safety Policy and the Train and Engine Safety Rule Book.

[11] Notwithstanding the Company's decision to terminate the Grievor after just completing the probationary period for a new hire Conductor, as a matter of managerial leniency, CP says he was offered the opportunity to rehire as a Conductor. It submits that it is important to note that the reinstatement, endorsed by the Grievor and his Union, contained several conditions, one of which was to go through the entire Conductor training program for a second time and the reinstatement was to remain on the Grievor's employment record providing:

This Agreement will remain on the employment record of Mr. Emery and may be utilized in the event that he appears before an arbitrator regarding this proceeding or any other future proceeding.

[12] The Company maintains that if anything, the Grievor ought to have known that his conduct and approach to the rules, regulations and policies governing safe train operations were expected to be nothing less than impeccable.

[13] The Company maintains that the Grievor is a very short service employee who has already been dismissed once before. He either is unwilling to change his unsatisfactory working habits or, in the alternative, lacks the necessary skills to change them. The Grievor's conduct was not indicative of an employee ready to fulfill his obligations as a Conductor at Canadian Pacific Railway. For reasons only the Grievor can explain, he began his tour of duty in an argumentative and negative state. The day of the incident, his personal frustrations ultimately led to the creation of a noxious environment for his Locomotive Engineer who could not continue working with the Grievor. The Grievor's lack of patience, combative attitude and failure to work in an efficient manner resulted in his removal from service and delay to his train. His actions were contrary to the work ethic required at Canadian Pacific.

[14] The Company maintains the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union.

[15] The Union maintains that the Grievor was in fact trying to address a number of errors and misinformation which contributed to the delay and his frustration. Mr. Emery and Locomotive Engineer McBride had to go the shops to get their power and assemble the train. When they arrived at the shop track, they could not locate the locomotive consist. Mr. Emery immediately contacted the Assistant Trainmaster, Matthew Desrosiers via radio.

[16] Mr. Desrosiers informed the crew he made a mistake, and their power was at the west end of the yard, rather than the east end. He advised Mr. Emery and Mr. McBride that he would send a ride from the mobile truck driver. Mr. Emery and Mr. McBride waited 30 minutes at the shop track to get a ride. Once the crew arrived at their locomotive consist, they called Mr. Desrosiers and informed him that the unit that was listed as the lead locomotive was in fact facing the wrong direction. Mr. Desrosiers instructed the crew to take the power to the shops for servicing, but to use the second unit as the leader, as it was facing east.

[17] While travelling from the west end of the Moose Jaw Yard to the shop track, Mr. Desrosiers contacted Mr. Emery and the crew on the radio. The crew again informed Mr. Desrosiers that the eastward facing unit could not be used as a lead locomotive. The crew would now have to take power to the shops and get the west facing unit turned on the turntable. After their power was properly serviced, Mr. Emery wanted to depart off the west end of the shops, as he could see they would be blocked off the east end. However, Mr. McBride decided to move the locomotive consist forward, to the east end of the shop track. Mr. McBride switched radio channels to the yard channel to see if the train could clear in order for the crew to depart the shop track with their locomotive consist, and begin their switching duties. As the Grievor had predicted, the yard crew

confirmed that their movement was blocked, and they would have to wait for further instructions to depart the shop track.

[18] The Union submits that when the yard crew confirmed their movement was blocked off the east end, Mr. McBride said to Mr. Emery in a warning tone: “don’t go there” (or along those lines). Mr. Emery replied that the Conductor should decide how the movements are performed, not the Engineer. Mr. McBride escalated the conversation by stating “maybe you should do some conductor work.” The Union submits that at that point, the conversation escalated into an argument. Both men stood up from their chairs and began yelling about what had just taken place. After several moments of yelling, Mr. McBride announced: “I think we are done for the day.” Mr. McBride then reversed the locomotive consist back onto the Moose Jaw shop track, contacted Mr. Desrosiers on the radio, and advised that he could not continue with the tour of duty.

[19] The Union submits that Mr. Emery was not subject to a fair and impartial investigation, as the Company pre-determined Mr. Emery’s guilt, and posed numerous irrelevant, confusing, and unfair questions about matters that fell well beyond the scope of the investigation. The Union submits that the Company pre-determined Mr. Emery’s guilt before issuing a Notice of Investigation. During the investigation, the Company expressed significant impartiality in the questions it posed to Mr. Emery.

[20] The investigating officer relied on a memorandum completed by Mr. Desrosiers, who clearly held a biased view regarding what took place. The Union maintains that the initial delay that day was caused entirely by Mr. Desrosiers lack of knowledge as to the location of the locomotives, and the situation with the locomotive consist assigned to train 410-31. The Company relies on Mr. Desrosiers’ biased statement that Mr. Emery was bickering and argumentative towards him. Rather than providing Mr. Emery a fair opportunity to explain what took place, the Company asks Mr. Emery to confirm Mr. Desrosiers’ statement as true. Further, the Company made the inflammatory and unsupported assertion during the investigation that other engineers “don’t want to work with” Mr. Emery, and asks Mr. Emery to explain why. The Company never produced any records to support this assertion.

[21] The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union further contends the discipline assessed is discriminatory, arbitrary, unjustified, unwarranted, 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.

[22] The Union maintains that at the outset of his assignment, the Grievor was contacted by the Rail Traffic Controller to ask how long it would take before his train would be ready to depart. Mr. Emery took this opportunity to serve notice of rest. The Union submits that it was in no way a retaliatory reaction to his power not being ready on time for the train to depart as scheduled. Assistant Trainmaster Desrosiers was then confrontational with Mr. Emery when he had no intention of delaying the train.

[23] Following the incident, Assistant Trainmaster Desrosiers provided the following memo stating:

MEMORANDUM TO FILE

TO: INVESTIGATING OFFICER

FROM: MATTHEW DESROSIERS

SUBJECT: 410-01 (Matthew Emery) Jan 31, 2021

DATE: JAN. 2021

On Sunday January 31; 2021 Mathew Emery was on train 410-01. Employee entered on time with all paper work and instructions ready on desk. Upon entering Emery was given instructions for his train. It was a basic lift where the employee had to flip the 3rd from head end cart to the #1 position. Upon Matts departure to shops to lift power crew was advised to lift power from the west end on f4. When Matt was given these instructions, immediately he stated the work would take over 2+ hours. I met him on his working channel then we spoke about why the work would take that long and I mentioned that if he believes the work will take this long I would call someone to assist him as he knew very well that the work would not take this long. He continued to argue and bicker with me for over 5 minutes and within 1 hour of his shift he went on road channel 4 and gave notice immediately. Around 5:30 am I received a call from engineer saying that Matt was not giving effort and not working in an efficient manner and he refused to work with Matt Emery as the train build was very simple and the engineer was obviously trying to make it across town.

Matthew R. Desrosiers
ASST Trainmaster — Moose Jaw

[24] The Union maintains that the Grievor did not receive a fair and impartial investigation. It relies on CROA Case 3952 in which Arbitrator Picher concluded that the discipline imposed by the company was void ab initio in part because the investigating officer's questions did not reflect general impartiality stating:

However, in the Arbitrator's view, the Union is correct in its submission that the discipline assessed against the grievor cannot stand by reason of the Corporation's failure to conduct a fair and impartial investigation as contemplated under the collective agreement. It is clear from the record reviewed above that the investigating officer clearly did not, to use the words of CROA 2934, pose questions which were "... conducted in such a manner as to reflect general impartiality and a withholding of judgement." Far from maintaining that standard, the investigating officer formulated questions which simply asserted that he had drawn negative conclusions with respect to the grievor's conduct. His questions in fact were accusations and conclusions followed by the question "Is that correct?". That is clearly not within the standard of a fair and impartial investigation as contemplated under the collective agreement.

[25] In this case the Grievor was given the opportunity to rebut the evidence put before him and his Union representative. He chose not to do that and acknowledged bickering with the ATM. The Grievor acknowledged confronting Engineer McBride, shaking his headset, being extremely frustrated and being told by the Engineer to calm down. The Locomotive Engineer said he warned him not to try and create conflict as this had happened before. He acknowledged being offered help by ATM Desrosiers and responding: "If I need help I will ask for it".

[26] After reviewing the investigation statements and submissions of the parties carefully, I find no evidence that the Grievor was making reasonable attempts to expedite the departure of the train. I find that discipline was warranted.

[27] In *William Scott & Co. v. C.F.A.W., Local P-162* (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B), Chair Paul Weiler specified the five most important factors in determining the appropriateness of penalty as follows: seriousness of the offence; premeditated/repetitive or momentary aberration; length of service; earlier attempts at corrective discipline; and, is the penalty consistent or does it single out the Griever for arbitrary or harsh treatment.

[28] It is recognized that angrily confronting others in their workplace, raising one's voice to them, and doing things to make others feel uncomfortable in their workplace constitutes workplace harassment. It is not a minor matter as it upsets people, makes them uncomfortable, and may make them feel unsafe. It has potential to make people stay away from work. In this case Locomotive Engineer McBride said he had enough and was going home. He also noted that this had happened before with the Griever.

[29] At the time of this incident the Griever had less than 7 years of service. Eight months after hiring on in 2014, the Griever was dismissed. Notwithstanding the Company's decision to terminate the Griever he was offered the opportunity to rehire as a Conductor. The Reinstatement Agreement contained a provision that it would remain on his employment record and could be utilized in the event that he appears before an arbitrator in any other future proceeding.

[30] Most recently prior to this incident Mr. Emery was assessed 30 demerits, for the following:

In connection with being called as the Conductor for Moose Jaw Yard 410-26 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.

[31] Given the delay of January 26, I find that a reasonable person would find his actions in this incident a disregard for the provisions of his previous reinstatement. He knew or ought to have known his conduct was inappropriate. In his statement Locomotive Engineer McBride said the Griever was agitated by his effort to expedite the movement of the engines off the shop track. He said the Griever slammed his lantern on the desk and shook his headset violently and he felt the Griever was deliberately trying to delay the train.

[32] When faced with these kinds of facts, an arbitrator must consider very carefully whether reinstatement is appropriate or could lead to the return of a person unwilling to take direction into a safety critical workplace. The discretion to reinstate should not be exercised without some basis for believing that the employment relationship can be effectively and safely re-established. In the case at hand, the Griever has not expressed remorse. He did not apologize for his actions.

[33] The Griever's evidence demonstrated that he does not feel badly about what happened. I find that his record shows he does not take his responsibilities seriously. All this leads to the conclusion that he is not capable of returning to the workplace and resuming the employment relationship. The Griever has a significant and blameworthy record of employment committing infractions of different policies and rules.

[34] At the time of this incident, the Company is without a reason to believe that progressive, corrective discipline was having an impact on his attitude, choices and behaviour. Whether it was his approach or personal characteristic, the Griever has not met performance expectations when dealing with instructions and working with others. He has not demonstrated a commitment to his employment in a safety critical workplace. It bears noting that this is a safety critical workplace where there is often no ability to provide oversight or direct supervision to the Griever in his position as a Conductor.

[35] The Company relied heavily on the prior discipline and dismissal when deciding to dismiss him in this case. It started with the presumption that dismissal would be the appropriate discipline for a second similar offence. The aggravating factors in this case are the Grievor's short seniority and his failure to admit wrongdoing when first confronted regarding his actions.

[36] In view of all of the foregoing 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 enclosed in a thin black rectangular border.

Tom Hodges

Arbitrator