CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4564

Heard in Edmonton, June 15, 2017

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the dismissal of Locomotive Engineer Christopher Payne of Edmonton, Alberta.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Payne was issued a letter from the Company on July 29, 2016 informing him that he was dismissed from Company service described as:

> *"For leaving unsecured equipment in track DELK at Elk Island, resulting in an unintended movement of equipment and collision resulting in derailment during your tour of duty on July 14th 2016; a violation of GOI section 4 General Information/Definitions, GOI Section 4 item 1.1, GOI Section 4 item 4.0, Train and Engine safety rule book Job briefing and safe work procedures, Train and Engine Rule Book Section 2, 2.1A(ii), Train and Engine Rule Book section 2, 2.2A (v)(vi)(xii)."*

The Union contends the discipline imposed is unwarranted, unjustified and excessive in the circumstances. Based on the evidence presented, the Union also contends the Company has failed to meet the burden of proof required to impose the ultimate penalty of dismissal.

The Union further contends that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. Arbitral jurisprudence has demonstrated that advancing straight to dismissal with discipline assessments from the Company, even in cases much higher alleged misconduct, is unjust and over reactive and is unwarranted. The excessive level of discipline assessed to Engineer Payne must certainly be considered discriminatory when compared to other cases similar in nature.

The Union contends the Company has failed to consider the mitigating circumstances surrounding the incident and his positive work record when determining the appropriate discipline.

The Union requests that Engineer Payne be reinstated to active service and that he be made whole for all wages with interest and benefits lost in relation to his time withheld from service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has not responded to the Union's request.

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

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary
D. Pezzaniti	– Manager, Labour Relations, Calgary

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
H. Makoski	– Vice General Chairman, Winnipeg
R. Pfaff	– Local Chairman, Edmonton
C. Payne	– Grievor, Edmonton

AWARD OF THE ARBITRATOR

The question to be decided here is whether Mr. Payne's termination should be mitigated in favour of some lesser penalty given the relative seriousness of the infraction and, in the Union's submission, principles of progressive discipline.

The incident involved was serious. Eighteen cars, left inappropriately secured on one track, started to move downhill (a slight grade but sufficient for uncontrolled movement). They were stopped when they sideswiped the locomotive unit just before a switch, derailing the locomotive. This had the potential for personal injury as well as the significant property damage it caused. If the moving cars had not been stopped by the locomotive, they could have continued, down a main line track, through a nearby uncontrolled intersection with Highway 15.

Both the locomotive engineer, Mr. Payne, and the conductor, Mr. Rob Hansford, were involved in the derailment and both were dismissed. Mr. Hansford did not grieve. The first issue to be considered is, between these two, whose failures were the more significant, recognizing however that operating rules are specifically designed to provide fail safe procedures between crew members.

The task at hand was for the crew; Mr. Payne in the locomotive, and Mr. Hansford on the ground, to back their 18 cars into a side track, cut the locomotive and run it round to the other (east) end of the cars, all this to clear the main track for an oil train about to pass through. The complaints is that they failed to properly plan the movement, failed to properly leave the cars appropriately secured, and to check that braking arrangement, and failed to properly respond once the cars started to move.

The Company says inadequate job briefing and communication is established in that they had failed to discuss the use of handbrakes, failed to discuss the grade of the tracks, and failed to discuss how the cars would be placed in emergency. The grievor's "I can't recall" answers to those and related questions supports the view that even if these matters were discussed somewhat, there was no clear plan for doing the job.

The replies concerning what the grievor checked, heard or understood about what the conductor was doing during the job show a lack of adequate attention or communication. The rules differ somewhat if they were "switching" or "doing a run

around". Either way the procedures were not followed. Neither recognized that they had failed to put the cars into an emergency state. Again, the grievor's "I don't recall answers" do not assist him. Clearly, he did not adequately confirm that the cars were properly left in emergency. He acknowledged that once the cut was made, neither he nor Mr. Hansford were close enough to the cars to react if they started to move.

If the task was more properly a "run around" then the rules required the application of a significant number of handbrakes, which was neither discussed nor carried out, and leaving the angle cocks fully open.

The Union asserts that the plan was to leave the cars with the emergency brakes applied. Mr. Payne heard Mr. Hansford after the cut say more than 15 cars were being left in emergency. He heard the sound of air exhaust, which indicated to him that the brakes were applied, what he did not hear, and thus know, was that both angle cocks were closed at the point of cutoff, bottling the air in the braking system, preventing the brakes from being applied in emergency mode. Mr. Payne did not hear the next part of Mr. Hansford's communication, a request to apply the emergency brakes through the TIBS. The Employer's position is that both proceeded on what turned out to be false assumptions, without adequately checking, the one with the other. This establishes negligence. To this the Union argues:

> The investigation has proven that this incident/accident was by no means the product of attempting a short cut by the employees. Nor is it an example of willful negligence or disregard to the rules or safety of the crew. It is clear that there was an unprecedented chain of events … an unfortunate misinformation based on the physical indicators at the time, and however mistaken, the facts of the matter

> and the employee's submissions point out that the task was performed with intent to properly follow procedure. The employees did not willingly disobey the rules.

I recognize that, when the movement began, Mr. Hansford was in a better position to observe and react than Mr. Payne, since he was on the ground, but at some distance away, while Mr. Payne was in the locomotive facing westward. However, this too reinforces the need for adequate engineer to conductor communication as opposed to a reliance on assumptions.

The Union acknowledges some grounds for discipline, leaving the question as to whether termination was excessive in all the circumstances. The Employer maintains it was appropriate and urges that no alteration should be made if the penalty imposed is "within the range of reasonable responses in all the circumstances". See: *Sheet Metal Workers' International Union Local 473 v. Bruce Power LP* [2009] CanLii 31586 (O.L.R.B.).

The Union advances several mitigating factors. First, it says the conduct was not wilful, only miscommunications and errors of judgment. It refers to CROA 2356 for a description of the types of cases that warrant outright dismissal. There, Arbitrator Picher said:

> Outright discharge for a violation of Rule 292, generally coupled with other rules violations, is revealed in a relatively limited number of cases (see **CROA 474, 681, 745, 1479, 1505, 1677 & 2124** [reduced to a suspension]). In each of the cases involving an imposition of outright discharge by the company there has been some aggravating factor. For example, in **CROA 681 and 2124** the employee discharged for passing a stop signal had committed his second

> offence against the rule. In **CROA 745** a locomotive engineer was dismissed where a violation of Rule 292 was found to also involve a violation of Rule G, resulting in a collision and two fatalities. Serious collisions were also involved in **CROA 1479 and 1677**, while in **CROA 1504** the discharge of the locomotive engineer was motivated, in part, by his falsification of an employee statement intended to evade his responsibility. More recently, employers have again used the assessment of suspensions for violations of rule 292 of the UCOR and rule 429 of the CROR (See, e.g.,**CROA 2126, 2161, & 2267**.)

The Employer refers to **CROA 4471** where Arbitrator Flynn observed:

> While, fortunately, no one was injured during the incident and no damage was caused, **the importance of properly securing equipment remains of utmost importance**. The potential consequences are high, as was highlighted in the tragic Lac Megantic disaster, where the improper testing of handbrakes – with air brakes still applied – was one cause of the event.

I accept that the fact there was substantial damage here, and the grievor had very long service distinguishes her decision to set aside the termination in favour of a 40 day suspension.

The Employer also relies on **CROA 4171**, where Arbitrator Picher upheld the termination of a locomotive engineer who had failed to secure a single car or to verbally confirm the same with the crew. The individual was assessed 50 demerits under the no longer employed Brown system, and was terminated for the accumulation of points, not that incident alone. The grievor's conduct was aggravated by his failure to report the incident, and by having been involved in two prior collisions.

The Union refers to six cases which it suggests are analogous and support a mitigating of the penalty here. They are **CROA 3744, 2989, 3166, 3299, 4304** and **4481**. The Union further argues that, in the case at hand the Employer has failed to give due weight to the appropriate use of progressive discipline, as applied in **CROA 4294** and **4419.**

The grievor is 34 years old. He has 9½ years with the Company and this is essentially his only adult job. While 9½ years is described by the Employer as short term and an aggravating factor, I accept the Union's assertion that this is still a significant length of service, involving an investment by both the Employer and the grievor. He became a locomotive engineer in 2012. The grievor has only one item of formal discipline on his record, involving a five day suspension in 2016. The cause of the suspension reads:

> 5 Day Suspension (May 4 – May 8, 2016) and are required to obtain a passing grade on a written rules test before being placed back into service, for multiple rules violations from December 2, 2015 to March 9, 2016.
>
> Violation of: Train and Engine Safety Rule Book, T-11, Item 2, GOI Section 5 items 16.0 and 17.0, Rule Book for T&E Employees – Section 2, Item 2.2 C (iv) and Section 14, Item 14.3D.

The grievor's record is not such as would suggest immediate dismissal or that another rule breach should automatically lead to termination. This incident was serious and potentially a threat to public safety. The termination will be mitigated, but only to provide the grievor with one chance to show that he can be a safe and productive employee. Deterrence remains a serious factor given the nature of the offence. I direct

that the Company reinstate the grievor forthwith without loss of seniority, but without compensation for any wages or benefits lost.

August 15, 2017

ANDREW C. L. SIMS
ARBITRATOR