CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4580

Heard in Edmonton, September 13, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal in regard to the termination of Locomotive Engineer W. Jonas of Moose Jaw, S.K.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Engineer Jonas was dismissed from company service for the following reasons: *Please be advised that you have been Dismissed from Company service for breaching the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline record and the culminating incident of: Failure to fulfill your contractual obligation as evidenced by your failing to lock locomotive CP2293, failing to test the hand brake effectiveness, leaving the unit CP3086 in isolate instead of run and with its lights on, while working as the Locomotive Engineer in Swift Current, SK on September 15, 2016. A violation of GOI Section 4 - Item 2; GOI Section 4 – Item 3.2 A, B, C & E; GOI Section 1 - Item 1.1; Train & Engine Rule Book for Employees Section 2.2 and CROR General Notice.*

The Union contends it is clear that there are absolutely no circumstances disclosed on the evidence that approach the bond of trust on which Engineer Jonas's employment depends. There is neither evidence nor allegation of any dishonesty, deceit, misrepresentation or fraud on Engineer Jonas's part. The Company has failed provide any evidence or examples of dishonesty whatsoever that would indicate dishonest conduct or deceit on Engineer Jonas's behalf and the Union cannot agree there is cause for discharge related to breaking the bond of trust.

The Union contends that the Company has violated their own Efficiency Manual titled Efficiency Test Codes and Descriptions for Train & Engine Employees. Under the heading of Introduction, it clearly states "Efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results."

The Union contends the incident as stated is not worthy of the ultimate penalty of dismissal and the Company has failed to provide any evidence necessary to sustain the discipline as

described on the Form 104. The Union further contends the dismissal of Engineer Jonas is unjustified, unwarranted and excessive in all of the circumstances. It is further our position this wrongful dismissal constitutes a violation of Section 230 of the *Canada Labour Code.*

The Union requests that Engineer Jonas be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

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

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Pezzaniti	– Labour Relations Manager, Calgary
S. Oliver	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Edwards	– General Chairman, Calgary
H. Makoski	– Vice General Chairman, Winnipeg
L. Daley	– Vice General Chairman, Revelstoke
B. Weber	– Local Chairman, Moose Jaw
W. Jonas	– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

Mr. W. Jonas began service with CP in 1990. The incident giving rise to his termination occurred on September 15, 2016. He was operating as a Locomotive Engineer along with Conductor Nick Dumoulin. They set over their two locomotives into the Swift Current shop track to be ready for use with an incoming train. After taking some steps, subsequently established to be inadequate, Mr. Jonas left the locomotives and went into the station.

Within an hour or so, Trainmaster Marshal Karn conducted an efficiency test by examining the locomotives. He found they demonstrated rule violations, as described below. He then arranged a download of the Qtron locomotive activity recording system and this indicated that no handbrake effectiveness test had been performed (although the

handbrakes were on). He contacted the grievor in the station and, after a brief discussion of his findings, told him he had failed the efficiency test.

Four days later, the Company gave the grievor a Notice of Investigation, following which he was dismissed.

The Union repeats its usual objection to the use of efficiency testing as a stepping stone into the disciplinary process. The policy "Efficiency Tests Codes and Description for Trains and Engine Employees" reads, in part:

> A efficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action, efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results.

This policy, while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage.

The violations giving rise to discipline are as follows:

- The fuel pump in CP2293 was left closed (on)
- The front door of CP2293 was left unlocked
- For both units:
    - They were left isolated rather than in the run position
    - The generator field switch was left closed (on)
    - All lights (excluding headlights) were left on

- While the handbrakes were applied, no handbrake effectiveness test was undertaken.

The failure to perform the handbrake efficiency test is the most serious violation of those listed above, although it is not a cardinal rule violation.

The grievor admitted he had forgotten to lock the engine door, but noted that the locomotive was going to be used soon after by an incoming crew. He agreed too that he did not lock the second locomotive, but at the time felt the rules did not require locking anything but the controlling unit.

The grievor's explanation as to why the engine was left isolated is "that's what the rule previously was, but I was corrected" by the Trainmaster. He conceded he was not as up on the changes to these rules as he should have been, but was aware of them now.

The significance of leaving the locomotive in isolation rather than the run position is that if any of the key systems run down, like brake pressure, the unit will restart automatically as needed.

The grievor admitted, on the day in question and during the investigation, that while he had applied the handbrakes, he had forgotten to perform the handbrake effectiveness test. He denied however, that he had mislead Conductor Dumoulin. He only said "yes" in answer to the inquiry as to whether he had secured and locked the power. No intentional misleading is established by Mr. Dumoulin's statement or the grievor's position.

Mr. Jonas' record prior to 2012 consisted primarily of absenteeism and sick leave related issues. There was a 10 demerit penalty in 1998 for failing to ensure a crew member was on the leading car, resulting in an accident. There was a further 10 demerit infraction in 2001 for failing to test the effectiveness of handbrake equipment, resulting in a derailment.

On March 15, 2015, the grievor received a five day suspension (3 days served) for improper train handling. His career total was 80 demerits, although he only held 5 on his record at the time of dismissal.

The most recent and most serious discipline was for failing to stop at a stop signal on April 7, 2016, which ultimately resulted in a time served suspension that ended on July 18, 2016. The Employer argues that, since his negotiated reinstatement only occurred a couple of months before this incident, the grievor should have been extra cautious, and that this is an aggravating factor. The Union, in contrast, suggests the time off called for some remedial training which, since it did not happen, is a mitigating factor. The Employer also notes that the reinstatement agreement expressly required the grievor to "strictly comply with all of CP's safety policies, procedures and work practices." The Employer's argument seeks to characterize this contractual commitment as a form of last chance agreement. While the agreement provides a significant warning, it is not, in my view, the equivalent of a non-grievable "last chance" agreement. Further, a breach of this clause is not alleged as a ground for this termination.

At the end of the investigation the grievor offered the following comments as to his mistakes that day:

> Q51 Do you have anything you wish to add to this investigation?
>
> A Yes – I would like to apologize for my lack of attention to detail on the date in question. And as per the memo from Trainmaster Karn, it seems to infer that I was apathic about my job performance on the previous day during my debriefing. I would like to point out that this was certainly not the case. And this is not an excuse for my actions, but I feel my mind was elsewhere. My 9 year old grandson Jake has been diagnosed with ewing-*sarcomma* (cancer) which for a year he will be going through chemo every week. On the day in question after I had taken my call for 401-14 I got news that Jake was in Regina and had negativity reacted to the chemo. His whole body had swelled up, and they weren't having any success reducing the swelling. I had already taken my call and did not want to book off on call. When I got to Swift Current I was worried about what was happening. I was in rush to get to the station to get an update on Jakes condition. In the future I will make an extra effort to keep my personal distractions from affecting my performance at work.

While no doubt is cast on the veracity of this account, the Employer makes the valid point that, if too distracted for work, an employee has a right and duty to book off if they are unfit to work. It refers to **CROA 681** where Arbitrator Weatherill said:

> The grievor had no excuse to offer for this failure which can only be attributed to inadvertence. It may be that the grievor's mind was on certain family problems which he is said to have had at the time. Understandable as those may be, they cannot be allowed to relieve someone in the position of engineman from the requirement of strict compliance with the Uniform Code of Operating Rules, and especially with the rules in question here.

The Employer notes particularly for this case that this incident was not an isolated offence in the grievor's work history, as shown by his record and recent reinstatement. It also urges consideration of the seriousness of these infractions, particularly the failure to perform the brake test. It characterizes this as the type of reckless and negligent behaviour that justifies termination, similar to those in **CROA 3738**.

The Union argues that termination for this offence undervalues the principles of progressive discipline and is out of line with the penalty in similar circumstances. It also notes that the Conductor received no discipline, although I place little weight on that given Mr. Jonas' answer to his question. The Union refers to a 7 day suspension given for a similar infraction. It refers to **CROA 3938** where an employee with a lengthy disciplinary record had a 30 demerit penalty reduced to 10 for an analogous offence. Similarly, in **CROA 4384**, discharge was changed to a 7 day suspension for a failing to perform a handbrake check.

I find that, despite the grievor's record and particularly his very recent reinstatement, outright termination is too severe a penalty for this long term employee. I accept as a mitigating factor the grievor's worries about his grandson at the time in question. I also take into account that the Employer justified the termination in part by its view of the grievor actively mislead his Conductor which I find was not established. In my view, given the grievor's ready admission of what occurred and his willingness to accept corrective action at the time, this is not an employment relationship incapable of restoration. A two month suspension is substituted for termination with the grievor to be made whole except for the two month's pay.

October 18, 2017

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