

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4381

Heard in Calgary, March 11, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of discipline and discharge to Conductor R. Nass.

JOINT STATEMENT OF ISSUE:

The instant dispute involves two assessments of discipline including discharge.

10 Day Suspension - Following an investigation, on August 19, 2013 Conductor Nass was assessed a 10 day suspension "for knowingly choosing to ignore Safety Rules and Procedures in the application of a vertical wheel handbrake, thereby jeopardizing your personal safety and risking serious injury or death, simply because you felt it was easier to do so, a violation of the Safety Rule Book for Field Operations, T-14 Handbrakes, Safe Work Procedures: Applying All Vertical Wheel Hand Brakes, while working as a Conductor on Train RS1, on August 10, 2013, at Coquitlam, B.C."

The Union contends that the penalty assessed is unwarranted, unjustified and excessive in all the circumstances including mitigating factors evident in this matter. The Union further contends the discipline assessed is discriminatory and contrary to the Collective Agreement and progressive discipline. The Union requests that the discipline be removed in its entirety and that Conductor Nass be made whole. In the alternative, the Union contends that 10 day suspension is excessive penalty and seeks an order reducing this penalty.

The Company disagrees and denies the Union's requests.

Discharge - Following an investigation, on November 12, 2013, Conductor Nass dismissed "for failing to inspect RS3 at Port Moody, October 30, 2013, a violation of CROR 110 while working RS 21.

The Union contends that the investigation was not conducted in a fair and impartial manner per the requirements of the Collective Agreement. For this reason, the Union contends that the discipline is null and void and Conductor Nass be made whole. The Union further contends that the penalty assessed is unwarranted, unjustified and excessive in all the circumstances. The Union requests that Mr. Nass 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 disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.) S. Smith
Labour Relations Officer

There appeared on behalf of the Company:

L. Smeltzer – Labour Relations Officer, Calgary
J. Bairaktaris – Director, Labour Relations, Calgary
B. Medd – Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
D. Fulton – General Chairman, Calgary
D. Edward – Vice General Chairman, Medicine Hat
J. Mnatiuk – Local Representative, Coquitlam
R. Nass – Grievor, Coquitlam

AWARD OF THE ARBITRATOR

The grievor, Conductor Robert Nass is 46 years old and a 23 year employee of the Company.

This Award deals with two incidents. Both violations occurred as a result of proficiency tests that were performed by the Company. The purpose of proficiency tests are to ensure compliance with the CRO Rules.

The first discipline, a ten day suspension, was issued for failing to properly apply a vertical wheel handbrake.

The discharge, approximately three months later, was for a violation of Canadian Rail Operating Rules (CROR) 110 which requires inspection of passing trains and transfers. The relevant portion of the Rule is:

110. Inspecting Passing Trains and Transfers

(a) When duties and terrain permit, at least two crew members of a standing train or transfer and other employees at wayside must

position themselves on the ground on both sides of the track to inspect the condition of equipment in passing trains and transfers. When performing a train or transfer inspection, the locomotive engineer will inspect the near side. When a group of wayside employees is present, at least two employees must perform the inspection.

EXCEPTION: Crew members of passenger trains are exempted from the above requirements except when standing at meeting points in single track territory. However, every effort must be made to stop a train or transfer when a dangerous condition is noted.

(b) Employees inspecting the condition of equipment in a passing freight train or transfer must, when possible, broadcast the results of the inspection.

(c) Every effort must be made to stop a passing train or transfer if a dangerous condition is detected. Each crew member of a train or transfer must be alert at all times for a stop signal or communication given by an employee. The report to the train or transfer being inspected must state only the location of the dangerous condition and what was observed and not speculate as to the cause.

(d) When a crew member is located at the rear of a train or transfer, a front crew member must, when practicable, notify the rear crew member of the location of employees in position to inspect their train or transfer.

The grievor has no active demerits at the time of the incident and thirty career demerits. The Company relies on the grievor's above average injury rate.

On August 10, 2013 the grievor was observed applying a vertical wheel handbrake on a box car while standing on the ground. The grievor was approached by the Trainmaster, Mike Lovett, and advised that he had failed a proficiency test. The grievor said it was easier to apply the brake from the ground due to his height. The grievor told Trainmaster Lovett that he applied three handbrakes; the first two were higher and he climbed up on them to apply. The third was lower and so he applied it from the ground. The grievor confirmed to Trainmaster Lovett in this conversation that he would ensure that he would adhere to the rule from now on.

The Company explains there are certain types of cars where hand brakes can be applied from the ground but this was not one of them. The Company says that the grievor's personal safety was at risk by applying the handbrake in this way. It asserts that the grievor knowingly violated a safety rule and it reviewed the importance of the rule and the consequences of non-adherence.

The Company emphasizes that the grievor has suffered a high number of workplace injuries. It asserts that he is "prone to accidents" and is in a safety critical position. The Company maintains that the grievor knew that he was in violation of safety rules which is culpable behavior.

The Union contends that given that the third handbrake was lower, the grievor was justified in applying it from the ground. It relies on an extract from the Safety Rule Book for Field Operations dated March 31, 2012 which provides in the section under Hand Brakes Item 8 that: "Do not apply hand brakes from the ground unless the bottom of the handbrake wheel is at shoulder height or below and 3-point protection is applied and/or cars are secure".

The Union says that the Company has not provided evidence that the handbrake wheel was not at shoulder length and as a result the grievor was in fact performing the task properly. The Company says that the grievor did not refer to this description before the hearing and did not rely on it.

The Union also relies on the fact that an uneven and unfair penalty was assessed against the grievor. In **CROA&DR 4139** an assessment of twenty demerit points was found appropriate for a failure to properly secure a train and to properly apply handbrakes which the Union asserts was a more serious offence.

Having considered the material presented, a ten day suspension is excessive. The grievor readily admitted that he understood what the Company expected of him in this regard and committed to adhering strictly in future. He had some explanation for his conduct (this brake was lower), and had applied two handbrakes properly.

On October 30, 2013 Mr. Nass and his crew violated CROR 110 by not performing a pull-by inspection as required. Mr. Nass was in the second locomotive and the conductor, Conductor Inkster on the leading locomotive.

The grievor said he performed the pull by inspection by looking out the window. He said that a ditch and construction prevented him from safely getting off the train. Mr. Nass said that he believed Conductor Inskter was conducting the pull by inspection on the north side of the train as that was their practice when they worked together. Conductor Insker had in fact not done this.

In the result the crew failed the proficiency test. Conductor Inkster was issued a three week suspension and the Locomotive Engineer who was also part of the crew, a seven day suspension.

The Company submits that the pull by inspection was shortly after the hand brake incident. Additionally, it asserts that the grievor ignored the rule and its requirements and was engaging in unsafe and dangerous “short cuts”. It suggests that Mr. Nass wilfully violated an important safety rule. The Company relies on **CROA& DR 3924, 3712 and 3711**.

The Union contends that the discharge was excessive. It asserts that Mr. Nass had a good reason not to do the pull-by inspection as he could not safely get off the train. It says that he reasonably believed that Conductor Inkster was conducting the pull by from the north side. This is confirmed by Conductor Inkster called out “Ok on the PK” once the train had passed.

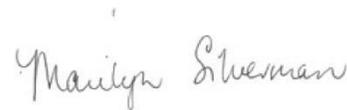
The discharge of the grievor for his failure to complete the pull-by inspection was excessive. I accept that he could have given himself more time to get off the train and/or gone to the north side even if he thought Conductor Inkster was there. In that way the pull-by inspection could have been done. Pull-by inspections are crucial to rail safety and the Company is entitled to rely on its employees to conduct them. In this case, the grievor could have been expected to be more diligent and I am not satisfied that his efforts or explanation in that regard are entirely sufficient. In the investigation material the grievor

himself admitted that he did not plan ahead to find a proper inspection location. Discipline is warranted.

However, the grievor was treated more harshly than the two other men on the crew. The jurisprudence from this Office is that discipline in the range of fifteen to twenty demerit points is appropriate for failure to perform a pull-by inspection, (see **CROA& DR 3711, 3712, 3924, and 4342**). Finally, Company's suggestion that the grievor operated in any sort of wilful manner in respect of either of these incidents is not borne out by the facts or the material. In the circumstances, twenty demerits are substituted for both the ten day suspension and the discharge.

The grievance is allowed in part. The Arbitrator directs that the grievor be reinstated into employment forthwith without loss of seniority and with compensation for all wages and benefits lost. The grievor's ten day suspension and discharge are to be replaced with twenty demerit points.

March 20, 2015



MARILYN SILVERMAN
ARBITRATOR