

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4466**

Heard in Edmonton, May 11, 2016

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

- A. Appeal of the 30-day suspension of Conductor Daniel Ibrahim.
- B. Appeal of a 14-day plus five (5) day suspension, a (30)-day deferred suspension and termination of Daniel Ibrahim.

**THE UNION'S EXPARTE STATEMENT OF ISSUE:**

A. Following an investigation, on September 4, 2015, Conductor Daniel Ibrahim was assessed a "30-day suspension without pay for your recent efficiency test failure on July 31, 2015".

After reviewing the statement taken on August 20 @ 12:50, it has been determined that the record as a whole contains substantial proof that your efficiency test failure(s) demonstrated that your actions were in violation of:  
"CRT6 Coupling/Uncoupling"

The Union contends that Conductor Ibrahim's suspension is unjustified, unwarranted and excessive in all of the circumstances in this matter. The assessment of a disciplinary suspension is contrary to the principles of progressive discipline and the educative, not punitive, purpose of such.

The Union requests that the discipline be removed in its entirety and that Conductor Ibrahim be made whole. In the alternative, the Union contends that the 30-day suspension is an excessive penalty and seeks an order reducing this penalty.

The Company disagrees and denies the Union's request.

**B. 14-Day plus 5 Day (19 day) Suspension**

Following an investigation, on August 21, 2015, Mr. Ibrahim was assessed a 14-day suspension without pay for "violation of Attendance Management - Northern & Southern Ontario Policy, Operating Bulletin No. S- 090 between May 5, 2015 and August 12, 2015.

In addition, your 5 day deferred suspension that was administered on May 4, 2015 for attendance has been activated. Therefore your total combined suspension is nineteen (19) days."

The Company did not respond to the Union's Step 1 or Step 2 within the prescribed time limits.

The Union's position is that a 14-day suspension plus 5-day suspension for a total of 19-days in this matter is excessive in all circumstances and is in violation of the Canada Labour Code as well as the Collective Agreement.

The Union requests that the grievance be allowed, the 19-day suspension be removed from Mr. Ibrahim's record and that Mr. Ibrahim be ordered whole including lost earnings/benefits incurred with interest during the suspension. 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.

### **(30)-Day Deferred Suspension**

Following an investigation, on September 25, 2015, Yard Helper Ibrahim was assessed a (30)-day deferred suspension for "not reporting the damage you caused to the hotel accommodations that CP provided during your stay on July 27, 28 2015 at the Red Pine inn Alliston."

The Union contends that a (30)-day suspension is excessive and unwarranted in all circumstances as well as a violation of Collective Agreement Article 70.04 and 70.09. The Union requests that the discipline be removed in its entirety, that Yard Helper Ibrahim 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.

### **Discharge**

In addition, following an investigation, on November 13, 2015, Yard Helper Ibrahim was dismissed from the Company's service with the following notification, "Please be advised that you have been dismissed from Company Service as you have breached the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline record and the culminating incident of failing to conduct a proper job briefing, failing to ensure the route was lined for your movement and subsequent striking of a derail in track 61 resulting in the derailment of CP 2261 at Oshawa, ON during your tour of duty on assignment XYR OSH on October 17, 2015 at approximately 08:50.

The above referenced incident is a violation of: General Notice; General Rule A (i), (iii), (iv), (v), (viii); Canadian Rail Operating Rules (CROR) 104.5; Train and Engine Safety Rule T-26; Rule Book for Train & Engine Employees User Manual Section 14, paragraphs 14.1 and 14.2.

The Union's position on the dismissal of Mr. Daniel Ibrahim is that the penalty "dismissal" is excessive in all circumstances. The Union further contends Mr. Ibrahim did not receive a fair and impartial investigation.

The Union requests that the discipline be removed in its entirety, that Yard Helper Ibrahim be ordered reinstated forthwith 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.) B. Hiller**  
**General Chairperson**

**FOR THE COMPANY:**  
**(SGD.)**

There appeared on behalf of the Company:

B.Scudds

– Assistant Director Labour Relations, Toronto

There appeared on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
D. Ibrahim	– Grievor, Toronto

### **AWARD OF THE ARBITRATOR**

The Grievor was hired by the Company on September 27, 2007. Prior to the incidents presently disputed, the grievor's discipline record shows that he has been issued a caution for not being available for work on December 9, 2011. He also received a forty-eight day suspension for breaking CROR rules and therefore directing his movement over a derail causing a derailment in December 2013.

#### **Attendance Management (14 plus 5 days suspension)**

Concerning the violation of attendance management, the Company alleges that beside the absence on July 6 to July 9 and for which the Grievor provided a Doctor's note, the grievor booked off four times covering six days between May 5 and July 18. The Company sustained that the Grievor did not provide information to substantiate his absence and that he was never approved for a personal leave.

The Company's Attendance Management Policy for Southern Ontario provides that an employee attendance will be monitored and intervention may occur when some irregularities occur such as booking sick or unfit on call or after accepting a call or unauthorized absence. In the present case, the record shows that the Grievor booked off sick or unfit.

During the investigation held in August 2015, the Grievor explained that he booked sick on May 5, 2015 because of a sore back. He also reported that for his absence on June 20 to 22, 2015, he tried to reach Mr. Elen as agreed but left a message. Later that same day, the office called him for work and that he tried to explain that he had an agreement with Mr. Elen and that he could not go to work. He had to meet his lawyer on the 21<sup>st</sup>, and had to attend in court on the 22<sup>nd</sup>. Finally, he booked back on when he woke up on the 23<sup>rd</sup>. Regarding the absence on July 12, 2015, the Grievor could not provide any explanation because he did not recall this event. Finally, for the absence of July 18, 2015, the Grievor reported that he booked unfit because he felt tired after a long shift.

The evidence reveals that the Grievor did provide reasons to justify each of his absences. It also reveals that when asked to provide more details, during the investigation, the Grievor gave a *bona fide* explanation that has not been contradicted in any way. On the contrary, the evidence shows that the Grievor was aware of his obligation and provided a medical note for a short absence (three days) during that period of time, even if the Company had not asked for one.

Non-culpable absences cannot be disciplined when they appear to have been the consequence of genuine incapacity.<sup>1</sup> While the Company may have had some reason to doubt the legitimacy of the Grievor's absences as those absences were all taken during a short period of time, the Company failed to establish any evidence to contradict the reasonable explanations provided by the Grievor. Therefore, the

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<sup>1</sup> See : CROA&DR 4340 and 4369.

Company failed to establish a just cause and therefore a fourteen-day suspension is not justified.

Concerning the five-day suspension, the evidence shows that the Company failed to respect Article 70.04 of the Collective Agreement. The Company did not advise in writing to the Grievor of its decision, within twenty days of the date that the investigation was completed and therefore the suspension shall be considered as not assessed.

For all those reasons, the grievance is allowed and the Grievor shall be compensated for all loss of benefits and the suspensions should be erased from the Grievor's record employment.

Efficiency Test failure (30 day suspension)

On August 20, 2015 the Grievor was required to attend an investigation surrounding a failed efficiency test during his tour of duty on July 31, 2015. The Company alleges that the Grievor was attempting to make a coupling but that the cars did not couple properly due to butted knuckles. The Grievor separated the cars by 20-25 feet and asked for a three point protection. Assistant Trainmaster Bastra intervened, because the distance of 50 feet was not respected.

During the investigation, the Grievor explained that the presence of the Trainmaster had no bearing on his adjustments (cancelling the three points and afterwards pulling ahead another 30 to 35 feet). In support of this allegation, the Union submits the memo written by Trainmaster Bastra. He then reported the following:

“On July 31<sup>st</sup> at 11:01 I observed Mr. Ibrahim making a joint with a cut of cars ex. VS 16 to VS 17. The joint did not make and couplers were misaligned. Mr. Ibrahim told Engr. Borne to stretch ahead. He requested the movement to stop and three point applied with approximately twenty feet of separation between the train and cu of cars to tie on. At this point I told Mr. Ibrahim to stretch the train ahead to give himself at least fifty feet between the cars before obtaining three point to align the couplers. I questioned why he would attempt to use less than the distance prescribed by the rule and he stated that it was easier to visually align the couplers. I stated that he could stop the movement less than the prescribed fifty feet to look and make a judgment on the distance the coupler would have to be moved and then get the fifty feet before fouling the equipment to adjust. I talked to Mr. Ibrahim about the dangers of not having the fifty feet and that a minute longer in the procedure was acceptable rather than putting himself in danger of serious injury or fatality”

It was also demonstrated that the Grievor never fouled the track while the distance between the movement and the stationary cars was less than 50 feet.

The evidence shows clearly that the Grievor changed his procedure after Trainmaster Bastra's intervention. The undersigned sees no reasons to doubt the sequence of events reported by Trainmaster Bastra. And according to the report filed by Trainmaster Bastra, the Grievor never said what he did intend after a visual to extend the distance to 50 feet. On the contrary, the Grievor explained that it was easier to align the couplers within a shorter distance. Such spontaneous declaration has more weight than the one given at a later date during the investigation. I therefore conclude that the Grievor was engaged in an unsafely procedure and given the seriousness of his

behaviour, a discipline assessment was appropriate. I also retain that he did not foul the track while it was unsafe and that he followed the Trainmaster's instructions and corrected his procedure. Therefore, the grievance is allowed in part. A suspension of fifteen days is more reasonable in all of the circumstances of this incident.<sup>2</sup> The Grievor shall therefore be compensated for all loss of benefits and his record of employment shall be corrected accordingly.

Failing to report damage to a lodging facility (30 day suspension)

On September 9, 2015 the Grievor was required to attend an investigation for damage to a Company provided facility on July 27-28, 2015.

The evidence reveals that during Grievor's stay at the hotel provided by the Company, he was sick, and the bed sheets and the mattress pad were stained with fecal matter or vomit. The Grievor left the hotel without reporting the situation. Given the state of the bed sheets and the mattress pad, the hotel staff decided to destroy them and claimed the cost one-hundred-thirteen dollars. When informed of the claim, the Grievor immediately paid. The Company sustains that the Grievor should have informed at least the hotel of the situation before departing and claims that a suspension of thirty days is, in the circumstances, was appropriate.

As stated previously, the Company sustained that the Grievor failed to report a damage that he had caused to the premises. In order to report damage, a person must

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<sup>2</sup> See CROA&DR 3846.

be aware of it. In the present case, the assessment of the extent of the damage appears to be quite subjective. It is not as clear as an example of a broken light. Stained linen can be laundered, but the hotel staff felt that it was not worth it. On the other hand, based on the decision taken by the hotel staff, it can be presumed that the linen were quite soiled beyond the point of being cleaned, as they discarded the items.

In any event, the Grievor could have advised the hotel of the situation before departing, given the extent of the stain, but he did not do so. Does it mean that he committed a fault? The undersigned does not think so. Perhaps, it would have been safe to do so but given the nature of the incident, I do not see any fault in the Grievor's conduct. I am satisfied with the fact that at the time of his departure, the Grievor was not aware that he had caused a permanent damage within the premises. There are no rules that obliged the Grievor to declare such an incident. The suspension is therefore clearly unjustified and the number of days of the suspension (30 days) is totally unreasonable. Therefore the grievance is allowed and the suspension shall be removed of the Grievor's record and he shall be compensated for all loss of benefits.

#### Failing to conduct a proper job briefing (dismissal)

On October 27, 2015, the Grievor was required to attend an investigation in connection with a tour of duty on October 17, 2015.



The Company reports that the Grievor was working as a helper and during his tour of duty, the crew was pulling out of track 56 and it was decided that they would couple up to track 62. Grievor advised his conductor that the switch was lined for track 62. The switch for track 62 was lined, however, the switch for track 61 was not lined for the route. As the engines reversed, they diverted toward track 61, over a derail and the engine derailed.

The Company adds that at no time during the discussion of the crew did anyone acknowledge or discuss who was going to ensure that the track 61 switch was properly lined. The Company sustains therefore that the Grievor simply had to look at the switch target to identify that it was not properly lined. Finally the Company acknowledges that the improper job briefing led to this derailment and that the Grievor and the foreman were equally culpable for this incident that was entirely avoidable.

During the investigation, the Grievor explained that Mr. Lawson, the foreman, asked him to line the track 62 and to protect the road way. The Grievor reported that at the time Mr. Lawson was backing up the movement, and that he had his back to the movement protecting the roadway. Therefore, he did not notice that the switch for track 61 was misaligned as he was 60 to 90 feet away. Finally, immediately after the locomotives jumped the derail, the grievor tried to advise the Locomotive Engineer, Mr. Grondin, to stop, but his radio was cancelled out with Mr. Lawson.

The Conductor Mr. Lawson had the responsibility to lead the briefing confirmed during his investigation that he changed the original plan discussed during the briefing. While he was coming out of track 56, he decided to pull track 62 first instead of 63. He therefore asked the Grievor to pull track 62 which he did.

This investigation conducted with Mr. Lawson also reveals that the later did not conduct a proper briefing when the plan was changed from the initial job briefing and some confusion may have resulted in the communication between Mr. Lawson and the Grievor. In any event, it was establish that the Grievor did obey to the instructions that he understood and he acted accordingly.

At the hearing, the Company acknowledges that the Grievor was not in control of the movement but added that everyone on the team was responsible for the job, including the Locomotive Engineer. Nevertheless, the Company added that the Locomotive Engineer Mr. Grondin, was not disciplined because he could not see the situation (track 61).

On November 13, 2015, the Grievor was dismissed for the following reasons detailed in the letter of dismissal:

“(…)  
Please be advised that you have been DISMISSED from Company Service as you have breached the bond of trust necessary for continued employment with the Company as evidenced by your prior discipline record and the culminating incident of failing to conduct a proper job briefing, failing to ensure the route was lined for your movement and subsequent striking of a derail in track 61 resulting in the derailment (....)”

In cases such as the present, where the Company's actions involve grave consequences for the Grievor's employment, arbitrators hold the Company to a strict burden of proof, as stated by Arbitrator Picher:

"While the Arbitrator really appreciates the importance of rule A (iii), and the concerns which the Corporation legitimately brings to a situation of this kind, a factual conclusion to sustain the assessment of a penalty as serious as forty-five demerits must, of necessity, rest on a compelling evidentiary basis."<sup>3</sup>

In assessing the appropriateness of discipline in this instant case, two main factors are to be considered: is the Grievor's actions part of the originating cause of the derailment, did the Grievor consciously or deliberately commit a wrongdoing<sup>4</sup>.

The Arbitrator is satisfied that the evidence reveals that the Grievor followed the instructions given by Mr. Lawson and that those instructions were changed in the course of the movement. No link between the derailment and any conscious or deliberate wrongdoing by the Grievor was demonstrated. The allegations of the Company relies essentially on a presumption that the Grievor should have seen that track 61 was not in line and should have therefore intervened in time. But according to the Grievor's testimony, he could not see in time the track 61, as he was checking the road, and nothing in the evidence allows the Arbitrator to doubt the truthfulness of his declaration.

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<sup>3</sup> CROA&DR 2559, page 3.

<sup>4</sup> See CROA&DR 1677, page 10.

Furthermore, assessing a discipline measure to the Grievor while the evidence reveals that he could not see the situation in time appears to be discriminatory at its face while another member of the same crew, the Locomotive Engineer was not disciplined because he could not see track 61. Disciplinary discrimination is prohibited as stated by Arbitrator La Charité:

“Discrimination: Arbitrators have generally been sensitive to the basic principle that similar precept of fairness and justice. Accordingly, in assessing the reasonableness of a sanction imposed on an employee, arbitrators have regarded the penalties invoked by the employer in similar circumstances in the past for such behaviour. Accordingly, when an employee is able to prove that other employee who engaged in the same conduct for which he was disciplined were either not disciplined at all, or suffer much less severe disciplinary sanctions, arbitrators generally will find the employer to have discriminated against that employee even though it may be established that the employer did not act in bad faith or did not intend to discriminate against her personally.”<sup>5</sup>

Also, it was established that for the same incident, the Conductor Mr. Lawson, who was responsible for conducting the briefing was assessed a thirty-day suspension, while the Company recognized that “the improper briefing led to the derailment”.

In summary, the Grievor was not in control of the movement, he was not responsible for ensuring the proper switches were in line and when he noticed the situation, he tried to advise. The discharge assessed to the Grievor is even more unsustainable when viewed with the penalties assessed to the other two employees who were part of the same team. For these reasons, the grievance is allowed and the Grievor should be reinstated.

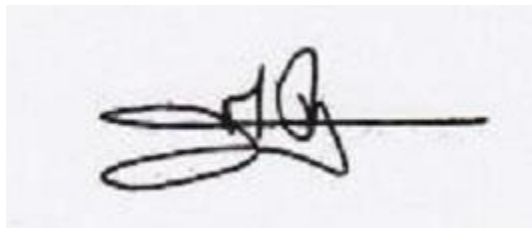
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<sup>5</sup> B.C.Rail and United Transportation Union, Locals 1778 & 1923, Ad hoc Case no 305, page 9 ; See also CROA&DR 2487.

The Grievor shall be reinstated to his employment forthwith with no loss of seniority and be compensated for all wages and benefits lost.

I retain jurisdiction in the event of any dispute between parties respecting the interpretation or implementation of this award.

May 17, 2016

A handwritten signature in black ink, appearing to read 'Maureen Flynn', is centered within a light gray rectangular box. The signature is stylized with loops and a long horizontal stroke extending to the right.

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MAUREEN FLYNN  
ARBITRATOR