CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4552

Heard in Calgary, May 9, 2017

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

On November 15, 2015 employees J. Russell (QCTO) and S. Reed (CTO) were involved in an incident while operating GO E731.

JOINT STATEMENT OF ISSUE:

Following an investigation and statements held on November 23, 2015, the Company issued letters to each of the grievor's, dated December 10, 2015, informing them that they were each to be suspended for 30 days without pay for failure to comply with CROR rule 106 and CROR General Notice.

The Union appealed the Company's action at Step 2 of the grievance procedure by letters dated January 9, 2016 on the grounds that the discipline was excessive and failed to take into account important mitigating circumstances. The Union requested that the discipline be removed from the employees' records with redress for any loss of wages and/or benefits.

The Union failed to receive a response to the Step 2 grievance by July 20, 2016 and wrote the Company escalating the grievance to Step 3.

By letter dated August 10, 2016, the Company responded to the Union's Step 2 grievance and declined the Union's appeal by stating: "*The Company believes today as it did when issuing the original discipline that the 30 day suspension was warranted given the circumstances.*"

On August 11, 2016, the Company and the Union met to discuss the grievances in accordance with Article 8, Section 8.6. During this meeting the Union took the position that a copy of important evidence used during the investigation was not provided to either the Union or the members either before the investigation or after, and that this represented a violation of the employees' right to a fair and impartial investigation. In fact, the sought-after evidence was only supplied to the Union during the month of October of 2016.

The Union also argued that the employees' work history at the time of the incident was such that it should have mitigated against the amount of discipline assessed.

Further the Union argued that the employees were neither trained nor informed in any meaningful way to deal with the circumstances that led to the incident. The Union made the point that the Company had clearly acknowledged that the employees lacked the appropriate training inasmuch as they engaged in a training blitz immediately after the incident, delivered to all operating employees that specifically targeted the circumstances for which the grievor's were disciplined.

The Company's position at this meeting was essentially to reiterate their position as outlined in their Step 2 grievance response.

The Step 3 meeting ended without resolve and the Company has declined to issue a Step 3 response.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) G. Vaughan **(SGD.) A. Ignas**
General Chairman **Manager, Human Resources**

There appeared on behalf of the Company:
D. McDonald – Counsel, Norton Rose Fulbright, Toronto
A. Ignas – Human Resource Manager, Toronto
D. Mitchell – General Manager, Toronto
R. Doan – Manager Train Operations, Toronto

There appeared on behalf of the Union:
M. Church – Counsel, Caley Wray, Toronto
G. Vaughan – General Chairperson, Toronto

AWARD OF THE ARBITRATOR

The grievor, Mr. Reed, is a conductor (Commuter Train Operator) with 1 ½ years of seniority. Mr. Russell is an engineer (Qualified Commuter Train Operator) with almost 4 years of seniority. The two grievors reported for duty at 16:54 on November 15, 2015.

The grievors operated a GO train from the Willowbrook Maintenance Center to the Bathurst North Yard, after a stop at Union Station. As they approached the Bathurst North Yard, the GTCC initially directed the grievors to go to track number #4. The GTCC then directed the grievors to go to track number #3 because GO train E-124 was occupying track #4. The grievor's had to pass the switch point for track #4 before they arrived at the switch point for track #3.

After entering the Bathurst North Yard, the grievors realized that there might be insufficient room for them to safely past E-124, which was on the opposite side of where engineer Russell was controlling his train. The grievors attempted to contact E-124 in order to ask them to pull up but there was no response. At the same time, the grievors received a call from the GTCC and the TMD inquiring about the delay in parking their train on track #3. The grievors told the TMD, but not the GTCC, that they were not familiar with the area and were taking their time to make sure of their route before initiating any movement. The grievors decided that engineer Russell would operate the train slowly forward while conductor Reed would position himself along the track. Conductor Reed would then advise engineer Russell if there was sufficient room to pass E-124. Engineer Russell was operating blindly and completely reliant on conductor Russell for direction at the time.

As the movement crept forward, E-124 was sideswiped by the grievor's train causing some $14,600 in damages. Conductor Reed immediately advised Engineer Russell to stop the train. Conductor Reed then placed an emergency call to Mr. John Snow at the TMD as well as to the GTCC advising of the collision with E-124. The grievors were subsequently disciplined with a 30 day suspension for breaching CROR Rule 106. Neither of the grievors were familiar with fouling point identification.

The Company pointed out that all conductors and engineers are trained to look out for equipment that may be fouling their track. Equipment is "foul" in circumstances like the present where it is too close to a switch such that it prevents the safe passage of equipment passing it on another track. Employees are to stop the train well in advance of equipment suspected of being foul. The Company maintains that the grievors were reckless and violated a number of safety standards, and in particular CRO Rule 106 in that: they continued to advance the train despite their awareness that train E-124 may be foul; they did not contact the GTCC to advise that the equipment was suspected to be foul or whether an alternative track was available. The Company also asserts that given the recklessness of the grievors, and the absence of any supervisor consultation when they had clear doubts about the safe passage of their train, the quantum of discipline is appropriate. In that regard, the Company submits that it is expected that employees will at all times demonstrate reasonable judgement and carry out their duties in a safe manner without taking any unnecessary risks, as occurred here.

The Union notes that the grievors have no prior discipline. In addition, the Union argues that neither Mr. Reed nor Mr. Russell had any training in identifying fouling points. Subsequent to the incident, the Company addressed this lack of experience of some of its conductors and engineers, including the grievors, by having them attend a slideshow entitled "Fouling Point Identification & Sideswipe Prevention." Further, the Union submits that the grievors were completely honest in providing their statements to the investigator. In that regard, they immediately stopped the train and placed an emergency call to the GTCC and the TMD regarding the incident. In the Union's view, the Company should have taken steps to provide specific instructions on fouling as part of their ongoing training and not after-the-fact as a response to an incident of this kind.

The grievors are jointly responsible for having made a series of decisions which led to the unfortunate sideswiping of another GO train. The arbitrator had the opportunity to observe the incident from a video presented at the hearing. It shows conductor Reed reviewing the area near the switch and gauging whether there was enough room for their equipment to pass. The decision to proceed towards the switch and pass by track #4 without further consultation with their supervisors falls squarely on the shoulders of the grievors. The grievors well knew of the risk of possibly sideswiping the other GO train before they decided to head towards the switch.

The arbitrator agrees with the Company that this is not a case where a lack of training was material to the outcome. The grievors made a judgment call knowing the facts and yet nevertheless risked the possibility of sideswiping the GO train. Nor should the subsequent course offered on Fouling Point Identification be viewed as a mitigating factor in assessing the penalty. Rather it is part and parcel of the Company's due diligence obligations related to concerns for both equipment protection and the personal safety of its employees.

The main issue concerns the quantum of penalty assessed to the grievors for breaching the CROR safety rule and causing the accident. Counsel for the Company stressed the premeditated nature of the grievors regrettable decision to proceed when they knew there was likely insufficient room to pass by E-124. This was clearly a mistake on the part of the grievors but I do not agree that it should be regarded as recklessness on their part. Recklessness in my view carries an element of wilful disregard which I believe is absent here. The grievors felt they could squeeze by E-124. They were almost successful but unfortunately scraped the front end of the other GO train as they were passing by and caused paint and some other minor damage, all amounting to less than $15,000. Their actions were careless and demonstrated bad judgment but the evidence does not support a finding that they were unconcerned with the consequences of their decision to proceed towards the switch, which is the hallmark of recklessness.

I agree with the Company that arbitrators should not second-guess management's decision if the penalty is within a range of reasonable responses to the events. That being said, it is my view that a penalty of a 30 day suspension is outside the boundaries of a reasonable response to what in my view is a case of bad judgment by two employees who should have consulted with their supervisors about an equipment foul. Neither of the grievors have any disciplinary record. Nevertheless, there was a clear safety rule violation which calls for a significant penalty to deter others from similar choices in circumstances of this kind.

The penalty of 30 days will be substituted with a suspension of 15 days for each of the grievors. I will retain jurisdiction should any issue arise in implementing the award.

May 15, 2017

JOHN MOREAU
ARBITRATOR