

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4387

Heard in Montreal, April 16, 2015

Concerning

BOMBARDIER TRANSPORTATION LTD.

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

On March 21, 2013 Mr. Gudnason was involved in an incident while employed as a Qualified Train Operator (Locomotive Engineer) while operating GO 270.

JOINT STATEMENT OF ISSUE:

Following an investigation and statements held on March 27, 2013, the Company issued a letter to the grievor dated April 16, 2013 informing that a 30 day suspension would be assessed against his record as follows:
"This letter is in reference to an investigation held on March 27, 2013 regarding an alleged failure to comply with CROR Rule 2 iii, CROR Rule 106, and GO Manual Sections 2, item 2.2, paragraph 3.1.11, Section 4 item 4.6, Section 5 item 5.1, Section 5 item 5.7, General Rule A (i), General Rule A (iii), General A (x) and General Notice while operating as a Train Operator A on GO 270 on March 21, 2013.
The investigation revealed that on March 21, 2013 you were in fact in violation of the rules and policies cited above.
As a result this non-compliance, the following will be assessed against your personal record:
Suspension without pay for thirty days to be served from March 22nd, 2013 to April 20th, 2013 inclusive. This discipline will remain on your personal record for 730 calendar days.
In addition, you will be ineligible from performing work as a trainer. You are further advised that any future conduct, which is similar in nature, may result in further disciplinary action up to and including dismissal.
The Union appealed the Company's action on the grounds that the discipline was excessive and requested the discipline and restrictions be removed from the grievor's record and he be compensated for any loss of wages.
The Company declined the Union's request.

FOR THE UNION: (SGD.) G. Macpherson General Chairman	FOR THE COMPANY: (SGD.) A. Ignas Manager, Human Resources
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There appeared on behalf of the Company:	
M. Horvat	– Counsel, Norton Rose Fulbright, Toronto
A. Ignas	– Manager, Human Resources, Toronto
R. Doan	– Manager Train Operations, Toronto
T. Lavigne Theroux	– HRBP, Montreal

And on behalf of the Union:	
D. Ellickson	– Counsel, Caley Wray, Toronto
G. Vaughan	– Vice General Chairman, Toronto
P. Gudnason	– Grievor, Toronto

AWARD OF THE ARBITRATOR

This grievance concerns the Company's issuance of a thirty-day suspension to Qualified Commuter Train Operator ("QCTO") Gudnason (the "grievor") for failing to comply with the numerous rules and policies cited above. The Union takes the position that the discipline imposed was excessive in all the circumstances and requests that the restriction imposed on the grievor, which precludes him from performing work as a trainer, be removed.

The facts are as follows. On March 21, 2013, the grievor was assigned to train Throttle Trainee Pulsifer ("TT Pulsifer") for the trip commencing at Bramalea Station heading to Union Station with a departure time of 07:36 hours. At the time of the incident described below, the grievor was aware that TT Pulsifer had completed 75 trips as a throttle trainee – four of them had been with the grievor. Following the incident, TT Pulsifer was discharged from his employment with the Company, which discharge was later rescinded with a suspension. The Commuter Train Operator ("CTO") in the cab with TT Pulsifer and the grievor at the time of the incident - CTO Russell - was not issued any discipline.

The train was scheduled to depart at 07:36 hours. While passengers were still boarding the train, TT Pulsifer released the brake early at 07:35:16. He engaged the throttle three seconds later, at 07:35:19 hours. TT Pulsifer did so without having heard the requisite "2 to go." The door lights on the dashboard were extinguished at the time - meaning that a train door was still open. At 07:35:26 hours the throttle was returned to idle and was engaged again at 07:35:34. The brake was reapplied at 07:35:45 hours. The entire incident, from the time TT Pulsifer released the brake until it was reapplied took 29 seconds. In the result, the train moved approximately 50 feet at a busy boarding time. According to Customer Service Ambassador Deshevy ("CSA Deshevy") people were running along the platform and jumping on the train.

TT Pulsifer had no explanation for why he had released the brake and engaged the throttle thereby allowing the commuter train to move forward before its departure time. There is no dispute that TT Pulsifer was under the supervision of the grievor when this happened.

At the time TT Pulsifer released the brake and engaged the throttle, the grievor was behind TT Pulsifer doing a job briefing with CTO Russell. Neither the grievor nor CTO Russell had checked the time to ensure that the train did not depart ahead of schedule. The grievor heard the release of the brake and the engagement of the throttle. When he heard the brake release, the grievor checked the CTC light, which was green. The grievor then realized TT Pulsifer was unable to load the train. The grievor saw that the door lights were extinguished. CSA Deshevy then said "2 to stop," the grievor pointed out the door lights were extinguished, CTO Russell said "stop" and the grievor directed TT Pulsifer to apply all brakes.

In the grievor's investigative statement taken March 27, 2013, he acknowledged that he had not heard the requisite "2 to go" in the cab when TT Pulsifer released the brake. Neither had CTO Russell. However, the grievor had assumed that TT Pulsifer had heard it. The grievor took full responsibility for having missed "that key responsibility." He expressed regret for the incident and relief that no passengers were injured in the circumstances. In response to the question as to whether there was anything the grievor would do differently in the future, the grievor responded: "if given the opportunity to throttle train again, I would make trainees be absolutely certain that they have permission to proceed. I would ensure that both brakes were applied and the reverser was centered to immobilize the train until the entire crew was certain we had permission to proceed."

As a result of the incident the Company made revisions to Go Manual 4.6 (Communicating Signal) and 5.1 (Door Closing Procedures). Among the changes is the requirement that all crew members in the controlling cab must voice communicate their acknowledgments of receiving the signal from the CSA that it is okay to proceed.

The parties agree that there are no analogous cases on point. The Company highlights the severity of the potential consequences of this incident – which put the safety of employees and passengers at risk. The Company emphasizes the importance of the proper supervision of a trainee and the trainer's obligation to correct obvious errors in actions and performance. It relies upon **CROA&DR 4125** where twenty demerits were imposed on the grievor who had allowed a trainee to remain asleep in the cab. The Company also referred to **CROA&DR 3768** where, for an eight minute period while the trainee had control of the train the terminated locomotive engineer in that case focussed on his personal problems and paid no attention to the train. It collided with a stationary train causing a substantial derailment. This was not the first time the locomotive engineer been pre-occupied with personal matters. The Arbitrator upheld the discharge of this long-term employee with a "less than impressive record."

In **CROA&DR 2556**, where a train passed a stop signal with two LE's on board, the Arbitrator underscored how all members of the crew were responsible. The Company also directed me to **CROA&DR 3266**, where the trade Union, on the facts in that case, did not persuade the arbitrator that the crew who passed a stop signal were deserving of differential disciplinary treatment. One of the crew had assumed the aspect of a signal, without having made a verification call. Similarly, in the Company's submission, the grievor had an obligation to verify the "2 to go" signal indicating that the crew had permission to proceed, and that it was inappropriate for him to assume that TT Pulsifer had heard the signal.

In support of its position that the discipline in this case is excessive, the Union argues that short of not allowing TT Pulsifer to be at the throttle, there was nothing the grievor could have done to prevent the train from leaving the station early. The Union says that it was reasonable for the crew - both the grievor and CTO Russell - to have assumed that TT Pulsifer had received the "2 to go" signal, especially since the grievor was aware that TT Pulsifer had performed seventy-five previous trips, some of them with the grievor. The Union also explained that the sound of the "2 to go" signal is different in every engine, and that this was the grievor's first tour of duty on the engine in question. The Union further submitted that it is not unusual not to hear the "2 to go" signal. The Union submits that it is almost unimaginable that a TT would commit the error that he did, and indeed TT Pulsifer had absolutely no explanation for his conduct.

The Union also argues that the grievor has been singled out and treated significantly more harshly than CTO Russell who received no discipline for his part in the incident, whereas the arbitral case law holds the safe operation of the train to be the joint or shared responsibility of all crew members. Finally, the Union points to an incident involving QCTO McKinlay that took place approximately six months after the event in this proceeding. In that case McKinlay commenced the train's departure with the doors to the train still open. McKinlay, who had approximately the same years of service as the grievor, received a three-day suspension.

Decision

There is no question that, as the QCTO on the train, the grievor was primarily responsible for the train's operation. Moreover, the grievor, not CTO Russell, was TT Pulsifer's trainee. As TT Pulsifer's trainer, the grievor was responsible for TT Pulsifer's actions. The grievor acknowledged this in his statement.

I am not unsympathetic to the fact - and I accept - that in light of TT Pulsifer's training combined with his experience performing seventy five trips, it would be "almost unimaginable" that a trainee would disengage the brake and apply the throttle prior to the train's scheduled departure time, and without permission. TT Pulsifer's inability to explain his conduct underscores just how inexplicable and unforeseeable his behaviour truly was.

Nevertheless, the record reveals that the grievor failed to ensure that the train did not depart ahead of time (which is every operating employee's responsibility – see Go Manual 2.2 para 3). Most fundamentally, the grievor did not react quickly enough to bring the situation under control, because he wrongly assumed that the "2 to go" had been given when in fact he himself had not heard the signal. Because of his incorrect assumption, precious time elapsed unnecessarily, with the train moving and the doors open, putting employees' and passengers' safety at considerable risk.

At the time of this incident, the grievor had approximately five years' service with the Company. He had been a trainer for the Company for two years. Approximately one week prior to the incident, the Company issued a one day suspension to the grievor when another trainee under the grievor's supervision caused the train he was operating to hit a stop block.

Without diminishing the severity of the incident, and the implications it may have had for employee and passenger safety, I find that, on the totality of the material before me, the Company's disciplinary response was excessive in all the circumstances. The factors that I have taken into account in arriving at that conclusion are as follows. First, the grievor took full responsibility as a trainer for TT Pulsifer's error. Secondly, the error was not one that a person of TT Pulsifer's experience would normally make, and in fact there was no explanation offered for why he did what he did. Thirdly, while the grievor had charge of TT Pulsifer, I am somewhat troubled by the differential treatment of the grievor as compared to CTO Russell, who as a crew member also bears some responsibility for the movement of the train in circumstances. Fourthly, and related to the third factor, I note the relative lightness of the penalty the Company imposed upon McKinlay in circumstances that are not all that different than the facts in this case. I making this observation, I have not lost sight of the fact that the grievor recently received discipline for failing to adequately supervise a trainee under his charge, whereas that was apparently not the case in the McKinlay case.

Fifthly and finally, though the Company is correct in asserting that the changes to the GO Manual do not diminish the grievor's responsibility for the incorrect assumption he made, nevertheless had those changes been in place at the time of the incident there would have been one more safeguard against the premature movement of the train.

In all the circumstances, the grievor's thirty day suspension is to be replaced with a seven day suspension with compensation to be made to the grievor for all losses in light of the substituted penalty. While it may have been appropriate to preclude the grievor from acting as a trainer for a period of time after the incident, over a year has now passed and that prohibition is properly removed. Finally, reference to CROR Rule 2 iii, GO Manual Section 1.11, Section 5 item 5.7 and General Rules (i) and (x) is to be removed from the letter issued to the grievor on April 16, 2013.