CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4781

Heard in Gatineau and via Zoom Video Conferencing, July 13, 2021

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

Dismissal of W. Mailman.

JOINT STATEMENT OF ISSUE:

By letter dated July 9, 2019, the grievor was informed as follows; *"This letter is in reference to an investigation held on July 10, 2019, in connection with an alleged Rule 43 Violation, while working as a Qualified Commuter Train Operator on T3806 June 25th, 2019.*

The results of this investigation revealed that you entered a Rule 43 Slow Track Protection on Weston Subdivision on Track 1 between 13 and 13.4 for 30mph at approximately 59mph, which is in violation of CROR Rule 43 (a), Rule 106. The investigation goes onto reveal that you were aware that you entered the Slow Track Protection at a speed in excess of 30mph, but chose to not report until you arrived back at crew centre which is in violation of CROR General Rule A (iii) and (iv), as this left a potentially dangerous track condition that could have affected other movements.

As a result of these violations, the Company has no alternative but to terminate your employment effective July 9, 2019".

By letter dated October 9, 2019 the Union filed a Step 3 grievance which reads as follows; *"It is the Union's view that the Company has interfered with the grievor's right to a fair and impartial investigation by predetermining the quantum of discipline prior to the taking of his investigation. The Company-issued letter of dismissal, dated one day prior to the grievor's statement of July 10, 2019, indicated this is also the effective date of his termination.*

The grievor was presented with the Company letter in a meeting with Assistant General Manager Doan on August 9, 2019. It is our understanding that during this meeting, the grievor inquired with Mr. Doan as to the Company's rationale in assessing him a greater penalty than

those of his fellow crew members from the June 25, 2019, tour of duty. We also understand that Mr. Doan indicated the grievor's discharge is predicated on a previous suspension.

A review of our records leads us to believe the suspension cited was served between August 14 and October 12 in 2015. As the Company knows, the provisions of Article 9.0, clause 9.2, provide for specific durations of discipline remaining on an employee's file. It is the Union's belief and position that the Company has knowingly violated the grievor's rights as afforded to him under Article 9.0, in its entirety.

Accordingly, the Union believes that the grievor should be immediately re-instated and made whole for all loss of earnings and/or benefits.

In the alternative, and without prejudice to our positions outlined above, we believe that the dismissal of the grievor is excessive, and request that the penalty of dismissal be substituted with one more appropriate given the circumstances.

For the reasons stated as well as any other provisions of the collective agreement and/or relevant legislation as may be applicable, the Union maintains its positions as outlined above."

By letter dated August 26, 2020, the Company responded at Step 3 declining the Union's appeal.

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

There appeared on behalf of the Company:

D. McDonald	– Counsel, Norton Rose Fullbright, Toronto
A. Ignas	– Manager, Human Resources, Kingston
T. Alexander	– Senior Manager Operations, Toronto
R. Doan	– General Manager Operations, Toronto

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
G. Vaughan	– General Chairperson, Toronto
S. Keene	– Advisor, Toronto
S. Borg	– Local Chairperson, Toronto
W. Mailman	– Grievor, Paris

AWARD OF THE ARBITRATOR

1. The Grievor was discharged for entering a slow track protection area limited to 30 mph at approximately 59 mph on June 25, 2019, and for failing to report the incident promptly, creating a safety risk for subsequent trains. The failure to comply with the slow track protection order was a violation of Rules 43(a) and 106 of the Canadian Rail Operating Rules (CROR). The failure to report the incident promptly was in violation of CROR General Rules A (iii) and (iv). The Union withdrew its allegation that the

investigation was not fair and impartial. The issue to be determined is whether the discharge was excessive, considering the lower discipline imposed to the other crew members. This includes determining whether the Grievor's discipline history can be relied upon, specifically a safety violation dating back to 2015, considering the sunset clause in the collective agreement.

2. The Grievor was employed as a Qualified Commuter Train Operator (QCTO). On the morning of the incident, he was working with a Commuter Train Operator (CTO) and a CTO trainee. The crew was assigned to a Go Transit train, travelling from Kitchener to Union Station. As required, the crew had a job briefing before operating on each subdivision during their tour of duty. Notably, before operating on the Weston Subdivision, they discussed that a slow track protection order limiting speed to 30 mph was in place on Track 1, between miles 13 and 13.4. This was properly identified in the Grievor's Daily Operating Bulletin (DOB).

3. Based on information received from the foreman, the crew expected the train to be lined up on Track 2, which was not subject to the slow track protection order. When it reached the area in question, the crew did not notice that the train was effectively lined up and operating on Track 1, and therefore failed to slow down to 30 mph, as required by the slow track protection order. The CTO eventually noticed a flag marking the beginning of the slow track protection area and called it, leading the Grievor to apply the brakes. The train entered the area at 59 mph, and by the time it slowed down to the 30 mph speed limit, it was approximately three coach lengths passed the flag.

4. During the investigation, the Grievor stated he was very familiar with that section of the track, having operated on it at least "hundreds" of times. He indicated he confused the main track and the service track, leading him to believe he was on Track 2 (not subject to the slow track protection order), instead of Track 1. He acknowledged there was no valid reason for this confusion and said, referring collectively to the crew members, including himself, that they had a "brain cramp".

5. The procedure to follow in the event of a slow track protection violation is to report it promptly, by the quickest available means. As explained by the Company, prompt reporting is required to ensure safety. In this case, the slow track protection order was in place due to the degraded track condition. Travelling at excessive speed on this track could have caused a derailment or further damage to the track, resulting in unsafe conditions for subsequent trains. If the crew had reported the speed violation promptly, the Company would have determined what level of protection, if any, was required until an inspection could be performed. That may have entailed precluding any further movement on the track until an inspection confirmed that it remained safe. According to the Company, this was particularly important, as the incident occurred during a busy time for passenger train service, meaning that the consequences of a derailment could have been catastrophic.

6. During the investigation, the crew members stated that, after the incident, they conferred and agreed to continue their route and report the violation at the end of their

trip, to avoid disrupting the morning passenger train service. During his statement, the Grievor said he now understood the risk involved with this decision and the importance of the obligation to report promptly. He also apologized for putting public safety at risk.

7. Further to the investigation, the three crew members were disciplined for the slow track protection violation and for their failure to report it promptly. The trainee was removed from the CTO training program and returned to his prior position, without the possibility to restart the training for a period of six months. The CTO was assessed a 90-day suspension, representing 60 days for the speed violation and 30 days for the failure to report it promptly, along with certain conditions applicable to her return to service, including a focus employee status for one year. The Grievor was discharged.

8. The crux of this matter is the difference in the discipline assessed against the crew members, specifically between the Grievor and the CTO. The Union submits that the Grievor's discharge should be reduced to the equivalent assessed against the CTO, i.e. 90-day suspension and one year focus employee status. It contends there are no aggravating factors justifying the disparity in the discipline assessed against these two employees.

9. The Company submits that it was justified in assessing more severe discipline against the Grievor, for two reasons, both relating to the speed violation. The Company did not argue that the failure to report should warrant more than the 30-day suspension

assessed to the CTO. For this reason, my analysis focuses only on the speed violation through the slow track protection area.

10. First, the Company argues that the Grievor had a greater level of responsibility than the CTO in ensuring compliance with the speed limit, as he was the one operating the train. That argument is not persuasive in the circumstances of this case, and the Company did not cite any rule or precedent to support it. While some of the QCTO and CTO roles differ, they are both trained on the CROR and are both responsible to ensure the safe operation of their train. In this specific case, my view is that the Grievor and the CTO were equally responsible for the speed violation.

11. Secondly, the Company contends that the Grievor's discipline history justifies more severe discipline than that assessed against the CTO. Specifically, it relies on the fact that, in 2015, the Grievor was assessed a 60-day suspension for a Rule 42 violation, i.e. movement of his train through a planned protection order without obtaining authority from the foreman. The Union objects to the admissibility of the Grievor's discipline history, through the suspension letter dated September 18, 2015, filed in evidence by the Company, for the purpose of establishing the appropriate penalty for the June 2019 violations. The Union relies on the sunset clause under article 9.2 of the collective agreement, which reads as follows:

> The Company shall remove disciplinary documents from the employees file from the date of issuance of each offence on the following basis:
>
> (…)
>
> Suspension of more than 2 days after 730 calendar days

The Company replies that the Grievor's discipline history relating to safety violations is relevant to determining the appropriate penalty, considering the Company's safety obligations under the law, and the fact that the June 2019 slow track protection violation was the Grievor's second cardinal rule violation in a four-year period.

12. Article 9.2 clearly sets out that disciplinary documents shall be removed from the employee's file 730 calendar days after a suspension of more than two days. The clause is not ambiguous. The suspension letter dated September 18, 2015, is inadmissible, as it was issued well over 730 days prior to the June 2019 incident.

13. On the issue of assessing the probability of a reoccurrence in a safety-sensitive environment, Arbitrator Doucet made the following comments in *Unifor, Local 5080 v Twin Rivers Paper Co. Inc.*, 2018 CanLII 99677 (NB LA), para. 114:

> But, the most important question to be addressed is whether there is a probability that the grievor will repeat the same type of offence if reinstated. The question I must ask myself is to what extent is it likely that the grievor, if returned to the workplace, can be relied upon to conduct himself in a way that is safe for others? In other words, to what extent is it predictable that the misconduct demonstrated in this case will be repeated? This element of inquiry is required because the employment relationship will be incapable of reparation if the grievor is likely to render the employer incapable of fulfilling its obligation to provide a safe workplace under the *Occupational Health and Safety Act*.

14. The same question arises in this case, i.e. to what extent is it likely that the Grievor will repeat the same type of offence, if reinstated? In reviewing this question, I note that, at the time of the incident, the Grievor had 11 years of service, which is not insignificant.

He had a clean discipline record, meaning he was discipline-free for at least 730 days (two years). During the investigation, the Grievor took responsibility for the speed violation and the failure to report it promptly. He did not make excuses for his inattention regarding the slow track protection order, which he was not able to explain and thus qualified as a "brain cramp", nor did he try to minimize the consequences it could have led to. He stated that he had his own system in place to ensure compliance with stop signals and Rule 42's and indicated he would be revaluating those, as a result of the June 2019 incident, to include speed restrictions and therefore avoid future violations of this nature. I am persuaded that the June 2019 incident has heightened the Grievor's level of consciousness to that required to operate safely.

15. I note that the Grievor's case is distinguishable from the case law cited by the Company. Notably, in **CROA&DR 4278**, the Arbitrator upheld the discharge further to the Grievor's second stop signal violation (Rule 439), which were both the result of the Grievor's inattention, and where the second violation occurred less than two years after he was reinstated and requalified further to his first violation. In the case at hand, there is no reoccurrence of the same violation. Also, the Grievor's 2015 and 2019 safety violations did not involve the same rule and were clearly committed well outside the sunset period. Further, perhaps partly due to the sunset clause negotiated by the parties under the collective agreement, there is no evidence before me that the 2015 violation was the result of the Grievor's inattention. Finally, and significantly, based on the CROA jurisprudence submitted by the Union, violations relating to excessive speed generally lead to a less severe penalty than running through a stop signal.

16. While the discipline assessed against crew members may differ depending on the context, I see no reason to impose a greater penalty on the Grievor than on the CTO in this case. The nature of their respective errors, resulting in the rules violations, was the same. In the absence of distinguishing factors, I see no justification for a disparity in the discipline imposed. And certainly not such a great disparity, i.e. 90-day suspension versus discharge.

17. After careful consideration, I am satisfied that the Grievor is committed to and able to raise his level of attentiveness to that required to ensure his safety and the safety of rail workers, trains, passengers and the public in general, notably by avoiding future speed violations. I am also convinced that he now understands the importance of prompt reporting and would act appropriately should a similar situation present itself in the future. Therefore, I am not persuaded by the Company's assertion that the bond of trust required in an employment relationship is irreparably broken by the Grievor's conduct. I find this is an appropriate case for reinstatement. I reach this conclusion without in any way minimizing the seriousness of the Grievor's slow track protection violation. On the contrary, the Grievor should take this reinstatement as an opportunity to demonstrate that he understands the critical importance of remaining focussed at all times, even in areas where he has operated hundreds of times.

18. The grievance is allowed. I direct that the Grievor be reinstated in his position, that his discharge be substituted for a 90-day suspension, representing 60 days for the speed

violation and 30 days for the failure to report it promptly, and that he be made a focus employee for a period of one year. I also direct that the Grievor be subject to any training and other reasonable terms and conditions the Company deems appropriate to ensure that he can operate safely.

19. I remain seized with respect to any and all disputes arising from this decision.

September 3, 2021

JOHANNE CAVÉ

ARBITRATOR