CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4621

Heard in Edmonton, March 15, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 2 discipline assessments and 3 dismissals of J. Zahariuk of Winnipeg, MB.

JOINT STATEMENT OF ISSUE:

The instant matter involves five separate assessments of discipline, four assessed as a Conductor and the other as a Locomotive Engineer.

1. Seven (7) Day Suspension

Following an investigation Mr. Zahariuk was issued a 7 day suspension described as "*For the violation of CROR General Rules, Item A, Sub Items (iii), (vi) & (viii), and Safety Rule T-26, while working as the YSE on Yard Assignment PG26 being observed by a Company Officer not checking the points and not returning the keeper on the NC08 switch, in Winnipeg Yard on September 28, 2015*."

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 ought to be removed in its entirety and Mr. Zahariuk be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline regarding many the allegations outlined above. The Union further contends that Mr. Zahariuk's 7 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter.

It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Zahariuk is made whole for all associated loss 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.

2. Fourteen (14) Day Suspension

Appeal of the 14 day suspension assessed to Conductor Joseph Zahariuk of Winnipeg, MB.

Following an investigation Mr. Zahariuk was issued a 14 day suspension described as *"For stepping on a rail and applying a wheel type hand brake from the ground, a violation of Train and Engine Safety rule book T14 and T20 while working as Foreman on P32-11 November 12th, 2015 in Winnipeg Yard*."

The Union contends that Mr. Zahariuk's 14 day suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that the discipline be removed in its entirety, and that Mr. Zahariuk is made whole for all associated loss 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.

3. Discharge (Conductor) – Run Through Switch – 37 Days

Appeal of the dismissal, and subsequent reinstatement to reflect suspension of Conductor Joseph Zahariuk of Winnipeg, MB.

Following an investigation Mr. Zahariuk was dismissed from Company service which was described as "*For running through East pounders switch in Transcona yard while protecting the point, working as YS on job PT21-19 on March 19, 2016 at Winnipeg yard*."

The Company unilaterally reinstated Mr. Zahariuk to employment with the period of time from when he was held out of service until return to active service considered an unpaid suspension.

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 ought to be removed in its entirety and Mr. Zahariuk be made whole.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. In the alternative the Union contends Mr. Zahariuk's suspension is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter in addition to being contrary to the arbitral principles of progressive discipline.

The Union requests that the discipline be removed from Mr. Zahariuk's employment record without loss of seniority and benefits, and be made whole for all associated loss 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.

4. Discharge (Conductor) – Whistle at Crossing

Following an investigation, Mr. Zahariuk was dismissed which was described as "*Please be advised that you have been DISMISSED from Company due to a an accumulation of discipline culminated in the most recent incident in which you failed to comply with T&E Rule Book 7.4 (e) by not sounding the whistle until the crossing at Mission Street was fully occupied, while working*

as a RCLS Yard Helper on PS11-21 out of Winnipeg, Manitoba on December 21, 2016." The Company did not respond to all of the Union's grievances.

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 ought to be removed in its entirety.

The Union contends the Company has failed to meet the burden of proof required to sustain formal discipline related to the allegations outlined above. In the alternative the Union contends that Mr. Zahariuk's dismissal is discriminatory, unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline.

The Union submits the Company has engaged in the unreasonable application of the Proficiency Test policy and procedures, resulting in the discriminatory and excessive assessment of discipline.

The Union requests that Mr. Zahariuk 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.

5. Discharge (Locomotive Engineer) – Train Handling

Following an investigation Engineer Zahariuk was issued a letter from the Company informing him that he was dismissed from Company service for the following reasons; *Please be advised that you have been DISMISSED from Company Service due to an accumulation of discipline evidenced by your prior discipline and culminating safety record, and from the results of an investigative statement held with you on December 14th, 2016, as evident of your failure to operate you train in a safe matter due to your improper use of the locomotive dynamic brake on the CP8829 on November 24th, 2016 while working as a Locomotive Engineer on Train 3/321-23 out of Winnipeg, Manitoba"*.

The Union contends that the incident as investigated does not establish culpable behavior that would justify the ultimate penalty of dismissal. Further, the Union cannot agree that the Company met the burden of proof necessary to impose the ultimate penalty of dismissal. As a result, the Union contends the discipline is unjustified, unwarranted and extreme.

The Union contends that a result of seniority, Engineer Zahariuk experienced a lengthy period of time away from operating as a Locomotive Engineer on trains in road service. Numerous times he requested familiarization trips to assist him in becoming re familiar with the operations of trains in road service, the Company denied those requests.

The Union further contends that Engineer Zahariuk was not afforded a fair and impartial investigation as provided for in Article 23.04. The Investigating Officer did not allow the Union the opportunity to pose questions in regard to evidence put forward by the Company.

The Union further contends that the Company has violated their own Efficiency Policy Manual. The introduction specifically states that purpose of Efficiency testing is not for disciplinary action but rather to achieve the desired result. The Union contends that following the Efficiency Test the Company Manager reviewed the results with him and the desired results were achieved.

The Union contends the Company has failed to establish any culpable behaviour on Engineer Zahariuk's part that would justify discipline. Even should he be found partially culpable, there is no justification for discipline and outright dismissal.

The Union requests that Engineer Zahariuk's dismissal be removed from his record and that he be reinstated to his former position without loss of seniority or benefits, and made whole for all wages lost, with interest, in relation to the time withheld from Company service. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. Fulton -and- **G. Edwards**	**(SGD.) C. Clark**
General Chairperson for CTY and LE West	**Assistant Director Labour Relations**

There appeared on behalf of the Company:

S. Oliver	– Labour Relations Officer, Calgary
D. Pezzaniti	– Manager, Labour Relations, Calgary
W. McMillan	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY-W, Calgary
G. Edwards	– General Chairperson, LE-W, Calgary
D. Edward	– Senior Vice General Chairperson, CTY-W, Medicine Hat
H. Makoski	– Senior Vice General Chairperson, LE-W, Winnipeg
M. Yanchuk	– Local Chairman, LE-W, Winnipeg
W. Zimmer	– Local Chairman, CTY-W, Medicine Hat
J. Zarahiuk	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

Preliminary Issues

Three preliminary matters are addressed at the outset. While this is commendably advanced as a joint statement of issue, there is in fact no indication of any effort to narrow the issues, with each allegation simply being met with the phrase "the Company disagrees and denies the Union's request". Such general denials are less helpful than they might be.

Second, this is in fact five distinct grievances combined into one joint statement. The result is that, within the time allotted for one CROA appeal, the parties argued five cases, with a predictable shortage of time forcing the hearings into the evenings. It also requires what are in essence five sets of reasons rather than one. It is quite appropriate that such cases be heard consecutively, but you can't squeeze five pounds of sausage meat into a one pound sausage skin.

Third, arguments are repeatedly being advanced about the invocation of disciplinary sanctions as a result of efficiency testing. The Employer cites this arbitrator's ruling in **CROA 4580:**

> The Union repeats its usual objection to the use of efficiency testing as a stepping stone into the disciplinary process. The policy "Efficiency Tests Codes and Description for Trains and Engine Employees" reads, in part:
>
> > A efficiency test is a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of non-compliance for immediate corrective action, efficiency testing is also not intended to be a discipline tool. While this may be the corrective action required, depending on the frequency, severity and the employee's work history, education and mentoring will often bring about more desirable results.
>
> This policy, while obviously designed to emphasize its mentoring aspect, does not expressly preclude the use of "disciplinary tools" in certain circumstances. I have taken into account that this discipline arose from an efficiency test and the subsequent download of the Qtron data rather than from any accident or incident causing damage.

To the extent it might be assumed that this licenses formal discipline any time an efficiency test is failed, any such assumption would be wrong. The exception should not replace the rule, and not every efficiency test failure should be considered a candidate of discipline. Were that to be the case, there would be too great an opportunity for arbitrary, discriminatory, or targeted discipline. Concerns in this respect are heightened by the Employer's seeking to introduce efficiency testing records as part of a grievor's record, as more particularly addressed below.

The Grievor's Disciplinary Record

The grievor's record spans the period both before and after the abandonment of the Brown System of Discipline. At the time of the first incident, the grievor had no active demerits. He had never been disciplined for a cardinal rule violation. The 24 page document the Employer submitted to support the grievor's "record" is a comprehensive listing of safety reports, personal injuries, train accidents, efficiency testing, discipline, plus rides and evaluations. Without taking issue with the Employer's right to monitor these issues, it is not a record of discipline in the customary sense and runs the risk of being seriously prejudicial to the grievor and to the process. It consumed unnecessary time in the hearing to sort through just which items were in fact disciplinary, and in some cases to determine ultimate rather than initial penalties. The accidents section includes events, some of which are equipment failures and like incidents, carrying no adverse implications as to the grievor's conduct or abilities. The extensive listing of the "non-disciplinary" efficiency testing is, at best, unhelpful in most arbitrations. The parties would be well advised to agree, in advance of the hearing, and preferably in their joint statement of issue, on the grievor's operative disciplinary record.

Beyond that, the Employer's brief says:

> 7. As background information, prior to the events of September 28, 2015 that led to the assessment of the penalty of a 7 Day Suspension on October 22, 2015, the Grievor had accumulated a career total of fifty (50) demerit marks, as well as fourteen (14) train accidents – seven (7) of which involved derailments in the Yard and another four (4) incidents caused by switches being improperly lined, therefore demonstrating prior violations of GOI, CROR and Company Rules pertaining to switching duties. (Discipline History – Tab 3)

This indicates, in making its disciplinary decisions, the Employer relied upon the Brown system of demerits that had been forgiven, and upon his involvement in fourteen accidents as detailed in its comprehensive record. However, many of these accidents indicated no responsibility by the grievor. Only four attracted any discipline (3, points each, and one, with a caution). This is in addition to additional references to derailments and switches being improperly alleged without any indication of disciplinary consequences that might have been contested through grievances.

This indicates that, in assessing discipline, the Employer considered matters well beyond "the grievor's record". The Employer, in this brief and others, urges CROA arbitrators to follow *Bruce Power* where Arbitrator Gee of the Ontario Labour Relations Board said:

> "… the question arbitrators should ask themselves, when considering penalty substitution, is whether the penalty imposed by the employer is within the range of reason having regard to all the circumstances of the case.
>
> Arbitrators should not interfere with a penalty merely because, had they been the employer, they would have handled the matter somewhat differently."
>
> *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009 CanLii 31586 (ON LRB)

Such a "no tinkering" approach loses all force where the Employer has sought to assess and justify its discipline on the basis of matters that would never be accepted as part of the grievor's record in an arbitration context. The switch away from the Brown points system does not result in an abandonment of the general rules applicable to a

grievor's disciplinary record, as usefully summarized in Palmer and Snyder, *Collective Agreement Arbitration in Canada* (6th edition) at 10.101.

> 10.101. With regard to the record, arbitrators look for incidents which: (i) form part of the written record of the grievor, which is maintained by the employer; (ii) are known to the grievor, and (iii) were susceptible to grievance at the time the grievor was informed so that the employee had an opportunity to cleanse these items. The only exception, perhaps, is where one is considering evidence of past similar fact situations where no discipline was imposed. Consequently, matters removed from an employee's record during the grievance procedure or by arbitration cannot subsequently be used against the employee.

The grievor's record is as follows, recognizing however that all the points accumulated up to September 2015 had been eliminated by discipline free periods and the passage of time:

> 10/15/2004 10 demerits
> For your missed call while working on the Night Yard Spareboard when called for Assignment PG25 at 18:35 on September 23, 2004. You have a contractual obligation, while working the Yard Spareboard, to be available for a call during your time window unless on authorized leave, on rest, or off with a bona fide illness.
>
> 10/15/2005 10 demerits reduction
>
> 5/14/2007 10 demerits
> Failing to ensure switches connected with your movement were lined, resulting in WX01 west end switch being run through; a violation of the CROR rule 104(k), on April 30, 2007, Winnipeg, Manitoba.
>
> 6/14/2008 10 demerits reduction
>
> 2/27/2009 10 demerits
> For allowing cars to foul another track at the east end of FC03 track, resulting in the east end FC03 switch being run through; a violation of CROR Rule 114(a)(b), Winnipeg, MB, on February 6, 2009.
>
> 10/28/2009 10 demerits
> For your failure to ensure block indicator was not lit on CRO's panel indicating equipment occupying the curved section of track leading into

> Tracks NC18, NC19, and NC20 before releasing cars into these tracks, resulting in the derailment of lead truck on car JRSX6136 and damage to track; a violation of Canadian Rail Operating Rules General Rule A and MSA Best Operating Practices Humping instructions 2), in Winnipeg Yard on the Manitoba Service Area, October 23, 2009.
>
> 3/15/2012 20 demerits reduction
>
> 11/25/2013 10 demerits
> For excessive and patterned absenteeism, for being unavailable to work on July 12, August 1, 9, 30, September 4, 14, October 6, 19, 30 and November 7, 2013, a violation of the Attendance Management Policy in Winnipeg, MB.
>
> 10/01/2015 30 day deferred suspension
> For violating the Attendance Management Policy by missing calls, when called to work as a Locomotive Engineer on October 1, 7, December 23, and 31, 2015, as witnessed by the investigation done on January 19, 2016, while working as a Train and Engine Employee in Winnipeg, MB. This suspension will be recorded into your work record as such and subject to the following conditions will not be served at this time. In the event you have any incident within 12 months of the issuance of this letter, the discipline noted herein may be activated. In the event the discipline is activated as an actual suspension you will be required to serve the suspension in addition to discipline that may be associated with any infraction on subsequent to the one being assessed herein.

Seven Day Suspension

The notice of investigation given to Mr. Zahariuk on October 7, 2015 describes the alleged event:

> On September 28, 2015, at approximately 23:45, I was looking out the window on the third floor of the General Yard Office, observing the PG26-28 crew performing switching operations at the North switching area. While doing this, I observed Mr. Joseph Zahariuk line the NC08 divider switch, not check the points and not return the keeper. Mr. Zahariuk then lined the switch a second time and did not check the points and did not return the keeper. I waited until the crew completed the task they were working on and then I advised Mr. Joseph Zahariuk

> of my observations and the requirement to examine the points and return the keeper every time he handles a switch.

This occurred in the Winnipeg yard at night while the grievor worked as a yard foreman with a belt pack, assisted by helper R. Gordon. Lights on poles lit the yard. Mr. Zahariuk's point of observation was from three stories high, at a distance of between 450 and 650 feet.

This discipline arose from "Efficiency testing" not from any incident resulting from the alleged conduct. The Union raises a couple of issues beyond its customary objection to discipline arising from efficiency testing. It asserts that Trainmaster Ross approached the grievor about his entering into an "Admission of Responsibility". Such an admission would be in lieu of formal discipline and is provided for in the agreement. The grievor said in the investigation:

> I wasn't asked if I would sign it or not, Al [Ross] said that I was a good worker, and that he didn't believe this needed to go to an investigation, he said he talked to the guy upstairs and whoever said that if I signed an Admission an investigation would not take place. I was not offered anything to sign.

In the next few days, the grievor was retested on the same issue and passed both times, as well reporting a broken switch in the process. The Company presented no evidence to rebut this evidence which I accept as true.

The investigation, conducted by Trainmaster J. Mayman, took place on October 20, 2015. In addition to the grievor, she questioned Trainmaster A. Ross.

The Union argues that the conduct of the investigation was less than fair and impartial. The investigation, it urges, must as a minimum, "have, to any objective observer, an appearance of fairness and impartiality" (see **CROA 2934**). It asserts that Ms. Mayman displayed a pre-determined interest in a particular outcome. In particular, many of her questions reflect a reliance, despite the grievor's denial, on Trainmaster Ross' memorandum. For example, when asking a simple question about the type of switch, she felt it appropriate to add to the question a phrase, apparently accepting as beyond question the reported conduct, rather than treating it as a matter in issue.

> Q21 With reference to the evidence given to you prior to this investigation, specifically Item 2: Copy of Memo to file, written by Trainmaster Winnipeg Yard, Allen Ross, September 29, 2015, what type of switch was it, that you were observed to have not checked the points or replaced the keeper on?
>
> A21 A recor semi-automatic switch.
>
> Q22 With reference to your answer to question #21, were you in control of the movement or was your other crew member in control of the movement when you were observed to have thrown the NC08 divider switch and not checked the points or replaced the keeper?
>
> A22 The other guy was in control of the movement.

The investigating officer also at one point injected her own experience into the process. Note 10 reads:

> Note 10 Investigating Officer would like it noted that she has worked on the Third Floor and she finds it is easy to see the individuals walking and working around NC08 divider switch at night.

This approach raises questions about the degree to which the investigating officer approached the task with an open mind. Overall however, I do not find this process null

and void; the Union's objection in this respect turns more on the result and her willingness, despite the grievor's denials, to accept the plausibility of Trainmaster Ross' statement.

On the merits, the grievor threw the switch on two occasions. He is alleged to have failed to check the points once he did so, contrary to the Train and Engine Safety Rule Book – T-26 which reads in part:

> T-26 Switches
> …
>
> 2. Do not apply force with your foot on a switch/derail handle.
> 3. Prior to operating switches, check the switch rods and switch point for ice, ballast, or any other debris that may prevent the switch from lining freely. Check if the switch has been spiked.
> 4. Remove the switch point lock pedal, where equipped, before operating switch.
> 5. Ensure switch points fit properly prior to allowing a movement to pass.
> 6. Reapply the switch lock or keeper after the switch has been lined.

Mr. Ross' evidence and that of Mr. Zahariuk conflict on some important points. Mr. Ross says he could see where Mr. Zahariuk was looking, while Mr. Ross says his back was to Mr. Ross' point of observation. While I accept that Mr. Ross would be able to observe the operation of the switch, I cannot accept that he was able to observe, from that distance and even with binoculars, where the grievor was looking. He agreed there were times he could not see the grievor's face. Having received a fuller explanation of the workings of the NC08 switch, in contrast to the simpler hand operated switch, I am also left with doubt about just what error it was Mr. Ross observed. Notwithstanding this, I accept that there was poor practice to justify comment. However, I believe the initial

response was the more appropriate one; that of suggesting an Admission of Responsibility.

The Employer cites **CROA 4356** and **4424** as support of the seven day suspension. In **4356** the switch was of a different type which required locking. The grievor was a short service (and in fact probationary) employee, and the failure caused a preventable derailment. The termination was set aside, without pay and replaced with 25 demerits, although whether the grievor had been working elsewhere is not addressed. **CROA 4424** involved a derailment due to a switch being improperly aligned. The grievor received 20 demerits and was terminated as a result. The arbitrator found the grievor alone was not responsible for the derailment, but noted that even a 10 point penalty would have resulted in termination. She set aside the 20 demerits, but declined to award compensation.

The derailment involved, the grievor's records, and their length of service in those two cases are too distinct to be of assistance here. I set aside the seven day suspension which I find excessive and unjustified, and replace it with a written warning.

Fourteen Day Suspension

On November 12, 2015 the grievor was again working as a foreman in the Winnipeg Yard, switching cars. Once again, the discipline arises from an efficiency test, not any specific incident. At 6:45 a.m. Manager K. Hill is said to have observed the grievor

stepping on a rail between two cars, while standing on the ground, applying a wheel type hand brake on a hopper car that was still moving.

An investigation was held on November 23, 2015 with questions put to the grievor and to Manager Hill. The resulting discipline was:

> For stepping on a rail and applying a wheel type hand brake from the ground, a violation of Train and Engine Safety rule book T14 and T20.

The Union objects to the use of efficiency testing as a stepping stone to discipline. That is addressed above. I do not find this voids the discipline. It objects that Manager Hill was not qualified to do such efficiency testing. Here, he is essentially only a witness as to what, physically, occurred and I see no advantage to exploring his expertise further. This is particularly so in that the grievor both conceded and explained what he did wrong saying, with his answer to question 31:

> A31: I regret this unfortunate incident, I take pride in my job and perform it to the best of my abilities. The only thing I offer in terms of why this happened is that I have been typically working at the IMS terminal where the equipment I handled out there is the type of equipment that allow you to operate the hand brakes from the ground. So I believe I had just gotten into that habit. I have learned from this experience and will share with other employees my learnings so to assist in preventing it from happening to other crews. I apologize and if given a chance will ensure this never happens again.

The two rules involves were clear and understood. T-14 Hand Brakes reads:

> T-14 Hand Brakes
>
> 3. Do not apply or release wheel style hand brakes from the ground unless the bottom of the handbrake wheel is at shoulder height or below.

T-20 On or About Tracks provides:

7. Do not step on any part of:

- A rail

Beyond the comments I have already made, I do not find the Company is precluded from applying a disciplinary approach to what, in the Union's view, could have adequately been dealt with by the efficiency testing process. It is a factor I have taken into account in assessing the appropriateness of the penalty given the grievor's record and the customary principles associated with progressive discipline.

The Employer relies on **CROA 4483** and **CROA 4466** awards to justify a 14 day suspension. The Employer in **CROA 4483** had dismissed a grievor. The arbitrator substituted a 15 day suspension with back pay, said to be justified by the prior warning for the same thing, the grievor's record and the fact the grievor says "he took a calculated risk in passing between moving cars without sufficient clearance. I consider it a more serious breach than that observed here. In **4466** the arbitrator reduced a 30 day suspension to a 15 day suspension for failing to observe the 50 foot distance required by T-20 #4 because he felt "it was easier to align the coupler within a shorter distance". This was found to be a conscious violation of a rule about which he had recently been warned. It provides only modest support for the Employer's penalty here.

The Union, in turn refers to **CROA 4139** and **4381**. In **CROA 4139**, the arbitrator upheld a penalty of 20 demerit points for failing to secure his train and for improperly

applying hand brakes. The arbitrator noted that the grievor had violated a number of rules and had a poor record. In **4381** Arbitrator Silverman reduced a 10 day suspension for failing to properly apply a vertical wheel hand brake. He had applied it from the ground because it was easier done given his height. The facts are very similar. The arbitrator found the 10 day suspension excessive. However, she dealt with that offence and a further offence for which he was dismissed, together, substituting for the two 20 demerit points.

I find the 14 day suspension to be excessive based on the authorities above, of which **CROA 4381** is the most analogous and the grievor's seniority and record, (subject to the change to the prior incident) and my earlier comments. In its place I substitute a 3 day suspension, and a direction that the grievor otherwise be made whole.

37 Day Suspension – Run Through Switch

The Union maintains that the investigation into this matter lacked fairness and impartiality, that the charges were unproven, then and now, and the penalty of dismissal, even once reduced from dismissal to a 37 day suspension with conditions, was grossly disproportionate.

The factual circumstances were unusual. The crew doing the work in the yard on April 19, 2016 consisted of the grievor and Mr. R. Coutts. For reasons not disclosed, Trainmaster C. Lebowicky involved himself in the bargaining unit work undertaken that

day, giving direction and assuming responsibility of some of the tasks the grievors would otherwise have been expected to perform.

It is agreed that the remote controlled engine went through the East End Pounders switch which was improperly aligned.

All the grievor received with his investigation notice was a copy of the PT21-19 work lists; no memorandum from Mr. Lebowicky, the terminal Trainmaster who was somewhat involved, or any one else from management. Article 23 – Investigation and Discipline require:

> 23.01 When an investigation is to be held, each employee whose presence is desired will be notified, in writing if so desired, as to the date, time, place and subject matter.
> …
>
> (4) The notification shall be accompanied with all available evidence, including a list of any witnesses or other employees, the date, time, place and subject matter of their investigation, whose evidence may have a bearing on the employee's responsibility. (*emphasis added*)
> …
>
> 23.02 Clause 23.01(4) above will not prevent the Company from introducing further evidence or calling further witnesses should evidence come to the attention of the Company subsequent to the notification process above. If the evidence comes to light before commencement of the investigation, every effort will be made to advise the employee and/or the accredited representative of the Union of the evidence to be presented and the reason for the delay in presentation of the evidence. Furthermore, should any new facts come to light during the course of the investigation, such facts will be investigated and, if necessary, placed into evidence during the course of the investigation. (*emphasis added*)

Trainmaster Greenslade noted at the outset of his investigation:

> Note 2 Investigating officer … there is no evidence in the possession of this investigating officer at this time that has not already been made available.

He also noted:

> Note 5 The Union requests full disclosure of all evidence photographs, voice recordings, audio/video recordings, including any documentation whether paper or electronic, that has been utilized by, or is in the possession of the company, and which may have a bearing in determining responsibility.
>
> Note 6 Investigating Officer has given all information and documents included with the notification of this investigation to Mr. Zahariuk … that will be used to determine responsibility in this investigation, other than the completed investigation, which at its completion you and Mr. Zahariuk will be receiving a copy of.

He asked the grievor, at Q15, to describe the events leading up to and including the movement travelling through the East End Pounders switch. I reproduce the grievor's answer in full since, if the Investigator's answers were true, it is the only information upon which discipline could be based.

> We had to double our transfer to bring into Winnipeg, because we only had one engine we had to do it from the East end account the grade at the West end. We normally double from the West end. We wanted to use the mainline to pull back AQd11 to double onto AQD01 and Mr. Lebowicky call the Terminal Trainmaster who advised there was train coming in no the North track so we couldn't use the main line. So Craig decided he wanted to use the CEMR lead as a pull back. We both told Craig that we didn't want to use the CEMR lead because we were unfamiliar with it. Craig said to us he would walk the CEMR lead and ensure we were lined up and also that he would protect our point. I was parked at the crossing at Day St. when he stated he was almost finished walking and he said we were good for 20 cars to start. I started to pull and maybe pulled 5 cars lengths and then Trainmaster

> Lebowicky called me on the radio to advise he was at the switch and he waved his light to indicate where he was and he advised we were lined locked and checked for the route to be used. So we continued, it is a very tight curve at this location and I was looking ahead watching where we were going as I approached the switch I dimmed the headlight so as to not impair the Trainmaster vision. Riley was giving me car lengths to clear the divider switch to access AQD01 and he noticed we were blocking traffic at Day St. so he asked if I could pull far enough to clear the crossing and we would need 4 more car lengths. So I asked the trainmaster if we could pull 4 more cars and he said I've got your point and you are lined up to the Pine Falls Switch and good for seven more cars. I tried to verify the switch points on the Pounders switch as I approached but due to the curvature and the fact that Trainmaster Lebowicky's lamp was on, it reduced my vision of the switch points at the time. It was only when I was half a car length from the switch that I realized the switch was against me. When I saw the switch was against us, I stopped the movement one set of trucks past the switch. I then detrained and started to inspect the switch the Trainmaster came up to me and asked what I was looking at and he asked me if he thought he had banged the switch. I said I know you did. I showed him how the switch was facing towards Pounders. Trainmaster Lebowicky was visibly upset and threw his lamp on the ground. Then he screamed some obscenities and looked to the sky. He appeared very agitated and said it was all on him that made a mistake. He said he actually lined the switch against us. He said he had to call Assistant Superintendent Nick Walker and walked away. I was glad that I noticed the switch was against me at the last minute, even though we ran through it, fortunately we didn't reverse and derail. *(emphasis added)*

Notwithstanding this information, and despite Article 23.02, he did nothing to investigate and place into evidence Mr. Lebowicky's role in the run through. Instead, the grievor was simply notified he had been dismissed.

> "For running through East pounders switch in Transcona Yard while protecting the point."

Rules said to be violated were T & E Rule Book Section 14.1. Fouling other tracks and Section 9.1 Methods Non Main Track.

14.1 Fouling Other Tracks

(b) A movement must not foul a track until the switches connected with the move are properly lined, or in the case of semi-automatic or spring switches, the conflicting route is known to be clear.

EXCEPTION: A movement may foul a track connected by a hand operated switch provided that:

(i) neither the track occupied nor the track to be fouled are main tracks;
(ii) the conflicting route is known to be clear; and
(iii) the switch is properly lined before the movement passes over it.

(c) Equipment must not be left foul of a connecting track unless the switch is left lined for the track upon which such equipment is standing. (Emphasis added)

9.1 Non-Main Track
Other Than Non-Signalled Siding in CTC

(a) Unless otherwise specified in special instructions, when operating on non-main track, a movement must operate:

(i) prepared to stop:

- Within one-half the range of vision of equipment or a track unit;
- Short of:
  - a red or blue signal between the rails;
  - a switch not lined;
  - derail in the derailing position; and
  - end of track (Emphasis Added)

The Company's brief, in addition to these two sections canvassed CROR Rules 34 and 114. The general notice and CROR General Rules A(i)(iii)(iv)(viii)(ix)(x)(xi) and (xii), most of which were not alleged in the Form 104. The brief asserts at paragraphs 64 and 65:

> 64. The investigation… revealed that the Grievor violated the above mentioned Operating and Safety rules during his tour of duty while he was performing the duties of his YSE assignment and being responsible and in control of the movement of his train and, as such, he had the responsibility to stop short the switch improperly lined.
>
> 65. After a thorough review of all the facts and circumstances surrounding this matter and considering his previous disciplinary and train accidents records pertaining to similar violations … the Grievor was dismissed on May 5, 2016.

I have serious concerns about these submissions. It appears to draw on alleged and unproven violations not even relied upon for the termination. It asserts that the investigation revealed he was "responsible and in control of the movement" of his train. This totally ignores that, on the only information declared to be before the investigator, Trainmaster Lebowicky had injected himself into the work being done, and given instructions and answers that indicated that he, as a manager, had essentially taken control of the movement, misaligned the switch and communicated misleading information to the crew. He was a manager; whose instructions they were obliged to follow. This is not a situation where a crew might be thought to share the responsibility from whatever happens. They were effectively under the Trainmaster's direction, and he had, from the outset, proceeded in a way they advised against.

The submission speaks of a “thorough review of all the facts and circumstances” surrounding the matter. This implies there were considerations beyond the grievor’s exculpatory explanation and his evidence that the Trainmaster had spontaneously admitted full responsibility. What else was considered? Were the assertions of pre-investigation production untrue, or was there some additional information obtained and relied upon without the required disclosure under Article 23.01 or 23.02? In any event, I fail to see how the Investigating Officer paid any attention to the last sentence in Article 23.02 which requires new facts to be investigated and placed in evidence.

I have no difficulty in finding that this “investigation” was that in name alone, without any genuine inquiry into Mr. Lebowicky’s role. It falls far short of what is required by Article 23.04.

> 23.04 Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee’s responsibility is established by assessing the evidence produced.

I find the discipline imposed to have been null and void. Discipline was also unjustified on the admissible evidence that was produced. It is set aside with the direction that the grievor be made whole in all respects.

I recognize that the grievor received an offer to resolve the matter with the substitution of a 37 day penalty. The substandard nature of the investigation and the circumstances fully justify the rejection of that as a settlement offer, even though the termination was set aside unilaterally.

Termination for not Sounding a Whistle at a Crossing

On December 21, 2016 the grievor was working as a yard helper on train PS11-21. It was moving in and out of Winnipeg using a belt pack. On Christmas Eve, the grievor was called to an investigation, the only significant evidence provided being a brief report from Assistant Trainmaster K. Donohue.

> Mr. Joseph Zahariuk was observed December 21st 2016 at approximately 1250pm controlling an engine using RCLS over the crossing from St. Boniface yard going north while switching. Conductor Zahariuk failed to sound the whistle until the crossing was fully occupied, he stopped when the unit was half was through the crossing.
>
> Conductor Zahariuk was called down for a discussion post incident, the rule was explained and understood.

At the outset of the December 27, 2016 Investigation, the grievor offered the following rebuttal:

> "… I don't believe I was being proficiency tested by Kaila Donohue, GM Tom Jared did all the talking and said he videotaped the incident and asked if I wanted to see it. I believe I was intermittently blowing the whistle."

Right after this objection, the Union asked whether the grievor was retested. The Investigating Officer, apparently without material on the record before him, was able to answer "yes he was". This exchange then followed:

> At this point I will call Assistant train master Kaila Donohue to confirm this is her memo. Kaila is this Memo you provided regarding your observations of conductor Joseph Zahariuk, is this memo based on the true facts of your observations on December 21st 2016? She replies yet it is.
>
> Union note, union would like to ask Kaila Donohue who performed the testing.

> Investigating officer notes questions and feels not relevant to Statement
>
> Union objects to the company's refusal to ask such a simple question is unfair and not impartial.
>
> Mr. Zahariuk raised doubts about this issue to question 8 and as such the investigating officer has denied as is right to question this witness.

I agree with the Union's submission that "the arbitrary denial of [the] basic right to question the Company's keystone witness is an unjustifiable departure from the essential requirements of a fair and impartial investigation." Article 23.01(4) is set out above. Clearly General Manager Jared had been present and was an employee who was a witness whose evidence may have a bearing on the employee's responsibility as, of course, was Ms. Donohue.

The Company's position is that it was not obliged to allow further questioning of Ms. Donohue. It refers to the following extract from **CROA 2073**.

> As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met."

If the processes in this case are an indication, the Employer is giving too much attention to the “not intended to elevate the process” aspect of the quotation and far too little to the elements of fairness it enumerates. There are many CROA cases, authored as well by Arbitrator Picher, that confirms that fairness includes the right to question witnesses to know what evidence is being considered so as to be able, meaningfully, to provide rebuttal evidence.

The grievor’s statement that he was questioned by G.M. Tom Jared is not directly contrary to Ms. Donohue’s statement because she wrote her last sentence in the passive voice. However, the grievor’s evidence, which the investigator had no [disclosed] reason to doubt, was that it was G.M. Jared who spoke to him about the event and also said he videotaped the incident. The Company did not disclose a tape. It argues that the Union has not proved that it exists. The first and most obvious point is that an impartial investigator under Article 23.02 had a duty to investigate the proposition. However, even if that were not the case, the grievor’s unrebutted statement that Mr. Jared told him there was a tape is itself proof. Mr. Jared is a manager and his statement can be taken as an admission of the fact. The grievor’s evidence is sufficient, even aside from the requirements of Article 23.01, for an arbitrator to draw the adverse inference that neither the tape nor the evidence of G.M. Jared, would assist the Company’s case. All this makes it all the more important for the grievor to have been allowed to question Ms. Donohue.

The discipline is set aside entirely and the grievor is to be made whole in every respect as a result of a breach of Article 23.04.

Had I not found such a breach, I would have in any event found that, by failing to disclose, or place before this Board, evidence of G.M. Jared's involvement and any tape he possessed, an adverse inference was justified, and the onus of proof not met. Further, this is a case of the type alluded to above, whose efficiency testing is apparently being used beyond its purpose.

Termination for Use of the Dynamic Brake

On November 24, 2016, the grievor was the Locomotive Engineer on the lead locomotive operating from the Carberry Subdivision going west into Brandon, Manitoba. The trip was uneventful except that the crew had been told by the previous crew that the train had "a kicker" which is a faulty airbrake on a car that could cause the emergency brake to apply when the air brakes were used.

I note at the outset that (a) this incident arose, chronologically, before the whistleblowing incident reviewed above and (b) the grievor was working as a locomotive engineer at the time of this allegation.

The grievor was terminated on this occasion as a result of a locomotive download carried out by Trainmaster Greg Budd. He did so due to a warm wheel report during the trip. His report said, in material part:

> After reviewing the download of train 3321-23 it was observed that on several occasions Mr. Zahariuk was going from throttle positin to dynamic brake position without waiting the prescribed 10 seconds in the set up position as per section 1.38.2 of the GOI.

…

> I called Mr. Zahariuk and told him that I had completed a download review of his tour on 3321-23. I explained to him that his train handling was within compliance except that I noticed he kept going from throttle position to dynamic brake without waiting the required period of time. I gave Mr. Zahariuk the opportunity to explain to me the requirements when going from throttle position to dynamic brake in which he replied "I think you are supposed to pause for a sec". I then explained to Mr. Zahariuk that according to section 1.38.2 of the GOI he is required to wait a minimum of 10 seconds in the setup position when going from throttle to dynamic brake. He said "ok". I told him that I would be putting in a failure for non compliance and that he would be retested within the next seven days.

In fact he was not retested. In my view this was a case that could have been and should have been dealt with under the efficiency testing process. This is true particularly as the grievor had been working for two years in the yard where the locomotives generally do not have dynamic brakes. It was also his first run as a locomotive engineer for two years. He had been denied a familiarization trip he had asked for. The 10 second requirement is clear in the documentation and the grievor's answers showed he was insufficiently familiar with the requirement.

However, the Company chose to proceed with a formal inquiry. My concerns with that inquiry, while not quite as severe as the whistle blowing issue, are essentially the same. The grievor's Union representative asked to put the following questions to Superintendent Tygat:

> 1. Are you familiar with Engineer's Zahariuk experience as a locomotive engineer?
>
> 2. Were you aware that Engineer Zahariuk had not operated a train on the road in approximately 2 years?

> 3. When Joe Requested familiarizing why was he only allowed 1 trip?
>
> 4. Why was this investigation not handled informally?
>
> 5. Was there Damage done to the Locomotive?
>
> 6. Due to Engineer's Zahariuks inexperience do you not believe he was may have been nervous operating may have forgotten the instruction GOI 1:38.3?
>
> 7. Would mentoring, proper training and education be a more positive alternative considering Engineer's Zahariuks trip was with in Compliance except his use of Dynamic Brakes?

Some of these were pertinent questions, and the answers may have been such that would lead to a penalty much reduced from the termination decided upon. For the reasons given in the last case, I find this investigation failed to meet the standards required by Article 23.04 and I hold the discipline to be void. It is set aside and the grievor is to be reinstated and made whole in all respects.

I record the grievor's statement at the end of this investigation meeting.

> After this experience I'm terrified to be set up as a locomotive engineer again because how heavily scrutinized this trip has been. I feel as if I'm being targeted because of my past experience of unjustly being dismissed. I did not purposely try to not comply with the 10 second transition from idle to dynamic. I simply was trying to be cautious in handling the train as smooth as possible, especially when I was instructed to back up 9800' of train into polar point storage track with a known kicker on the train and my conductor riding the point.

From the totality of these five cases, I cannot discount the grievor's feelings. The discharge penalty applied three times in a row are now all set aside and the grievor is to be reinstated as directed above. In the last two cases particularly, the magnitude of the

penalty grossly outweighs the relative seriousness of the offences alleged. The Company relies on the decision in:

> *1367178 Ontario Inc. v. Healthcare, Office and Professional Employees Union Local 2220* (Knopf)

and its description of the culminating incident doctrine. However, Arbitrator Knopf's accurate description to the doctrine does not allow the Employer to rely upon the matters it refers to in its paragraph 132:

> 132. As previously stated, at the time of the events of September 28, 2015, which is the initial case of this submission where the Grievor had been assessed a 7 Day Suspension, the Grievor had accumulated a career total of fifty (50) demerit marks, as well as fourteen (14) train accidents – seven (7) of which involved derailments in the Yard and another four (4) incidents caused by switches being improperly lined up, therefore demonstrating prior violations of GOI, CROR and Company Rules pertaining to switching duties.

I refer back to the observations on the use of the grievor's record at the outset of these reasons.

I reserve jurisdiction to resolve any remedial issues that cannot be resolved by the parties themselves.

April 24, 2018

ANDREW C. L. SIMS, Q.C.
ARBITRATOR