

**IN THE MATTER OF AN ARBITRATION**

**(AH 720)**

**BETWEEN**

**TEAMSTERS CANADA RAIL CONFERENCE**

(the “Union”)

**AND**

**CANADIAN PACIFIC RAILWAY**

(the “Company”)

**RE: Grievances of Marc Lebeuf**

**ARBITRATOR:** John M. Moreau QC

**Appearing for The Union:**

Michael Church	- Counsel, Caley Wray
Wayne Apsey	- General Chairman, CTY East
Marc Lebeuf	- Grievor

**Appearing for The Company:**

Diana Zurbuchen	- Manager, Labour Relations
Jason Shaw	- Labour Relations Officer
Marika de Villiers	- Labour Relations Specialist

A virtual hearing was held on January 27, 2021

**EX PARTE STATEMENT OF THE UNION (September 1, 2019 incident)**

**DISPUTE:**

Appeal of the dismissal of Conductor Marc Lebeuf on October 29, 2019.

**STATEMENT OF ISSUE:**

Following an Investigation, Conductor Lebeuf was dismissed in total 3 times the same day as shown in his separate Form 104's on October 29, 2019, in this case as follows,

"A formal investigation was issued to you in connection with the occurrence outlined below: In connection with: "with your efficiency test exception for failing to apply a handbrake on a single car DTTX 74263 in Lachine Yard, while working as Conductor on train 113-01 September 1, 2019.

A formal investigation was conducted on October 2, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- General Operating Instructions Sections 4, Item 2 & 3

Please be advised that you are DISMISSED from Company Service, effective October 29, 2019, for failing to properly secure rail car DTTX74623 on track IR28 in Lachine yard while working as the Conductor on train 113-01 on September 1, 2019."

**UNION'S POSITION:**

For all of the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position is that the dismissal of Mr. Lebeuf was excessive and completely unwarranted as provided within our grievances.

This incident happens on September 1st but the Company does not investigate it until October 2nd then get a TLE to assess any discipline all the while performing further investigations. There is doubt what the Company was doing and can be looked at no more than a malicious act and complete abuse of Management Rights as they excessively and punitively punished Mr. Lebeuf. If this matter was so deserving of dismissal (which the Union vehemently denies) why did it take a month to investigate, all while Mr. Lebeuf continued to work. The investigation process itself should have been the education needed for Mr. Lebeuf to move on. It is clear Mr. Lebeuf had a target on his back.

It is clear to the Union as Mr. Lebeuf is the only employee investigated; handbrakes/car securement are a crew's responsibility, not just the Conductor. Both the LE and the Conductor must communicate between each other on the effective of a handbrake etc. that is the rule. Further as noted if a joint was to be made did both crew members check the joint as per the rule to ensure the joint made—NO. so why was the LE not part of any investigation or discipline. As also noted by the grievor he left the car as is and if it were to have an unintended movement the track sloped towards his cars, not away therefore the car would still be protected.

The Company dismisses Mr. Lebeuf and show on his Form 104 he violated Section 4, Items 2 & 3. Is it the Company's position that Mr. Lebeuf violated all of the clauses of both of these Items? This is no more than piling on which Arbitrator Simms dealt with in the past.

Mr. Lebeuf was dismissed for an E-Test fail, as provided within our grievances E-Test are for education and the fact that the crew has to have failed it equally, how can only Mr. Lebeuf be investigated and wrongfully dismissed. There is no doubt Mr. Lebeuf has been singled out. Mr. Lebeuf was not provided a fair and impartial process.

Again Mr. Lebeuf through the process would have received the education needed, that should have been the end of it. But the Company had a plan and executed it accordingly on October 29, 2019.

The Company did not respond to the Union's Step 1 grievance in violation of the CBA. The Company sent an email link to obtain their Step 2 response in violation of Arbitrator Weatherill's Awards. The Union is unaware of the Company position.

The Union requests that the dismissal of Conductor Lebeuf be expunged and he be made whole for his lost earnings/benefits with interest, without loss of seniority or pension.

The Union further request Mr. Lebeuf be compensated punitive damages in the amount of \$10,000, as it is absolutely clear he has been discriminated against and subjected to an unfair process as on October 29, 2019 Mr. Lebeuf faced 3 punitive wrongful dismissals.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has no position as none has been provided.

FOR THE UNION:  
Wayne Apsey  
General Chairperson  
CTY East, TCRC

July 19, 2020

**EX PARTE STATEMENT OF THE COMPANY (September 1, 2021 incident)**

Following an investigation, Conductor Lebeuf was dismissed as shown in Form 104 on October 29, 2019 as follows,

“A formal investigation was issued to you in connection with the occurrence outlined below:

In connection with: “with your efficiency test exception for failing to apply a handbrake on a single car DTTX 74263 in Lachine Yard, while working as Conductor on train 113-01 September 1, 2019.

A formal investigation was conducted on October 2, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- General Operating Instructions Sections 4, Item 2 & 3

Please be advised that you are DISMISSED from Company Service, effective October 29th, 2019, for failing to properly secure rail car DTTX74623 on track IR28 in Lachine yard while working as the Conductor on train 113-01 on September 1, 2019.”

**UNION'S POSITION:**

The Union has filed their own Ex Parte Statement of Issue.

**COMPANY'S POSITION:**

The Company disagrees and denies the Union’s request.

The Grievor’s culpability was established through a fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor’s past discipline record and his service. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Company maintains that the Grievor failed to properly secure rail car DTTX74623 on track IR28 in Lachine yard while working as the Conductor on train 113-01 on September 1, 2019. The

Grievor violated General Operating Instructions Sections 4, Item 2 & 3. The Company maintains that the rules violated were reviewed with the Grievor during the investigation statement.

The Company further maintains its right to utilize efficiency tests. The Company maintains its right to investigate, and where appropriate, assess discipline for rules violations observed through this process. The Union suggests the Company has failed to respond to the Step 1 appeal and in doing so have failed to fulfill the requirements of the Collective Agreement. With respect to the grievance process, the remedy for failing to respond is escalation to the next step of the process, which the Company has received and has responded.

With respect to the Union's claim for damages, the Company maintains that the Union's claims are unsubstantiated.

With respect to the Union's allegations that the Company has discriminated against the Grievor; the Company maintains that Union failed to prove such action throughout the grievance process.

The Company maintains that the Union did not object to the timelines of the investigation during the Grievor's statement, to do so now prejudices the Company after the fact.

Lastly, the Company maintains that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE COMPANY:

David Pezzaniti

Director, Labour Relations

CP

October 10, 2020

**EX PARTE STATEMENT OF THE UNION (September 9, 2019 incident)**

**DISPUTE:**

Appeal of the dismissal of Conductor Marc Lebeuf on October 29, 2019.

**STATEMENT OF ISSUE:**

Following an Investigation, Conductor Lebeuf was dismissed in total 3 times the same day as shown in his separate Form 104's on October 29, 2019 as follows,

"A formal investigation was issued to you in connection with the occurrence outlined below:

In connection with: “with leaving the property without authorization, while working as Conductor on train 651-720 on September 9, 2019.

A formal investigation was conducted on October 2, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- General Operating Instructions Sections 5, Item 7.1

Please be advised that you are DISMISSED from Company Service, effective October 29, 2019, for leaving the property without authorization and failing to preform a pull by inspection on your outbound train while working as the Conductor on train 651-720 on September 8, 2019.”

#### **UNION'S POSITION:**

For all of the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the Union’s position is that the dismissal of Mr. Lebeuf was excessive and completely unwarranted as provided within our grievances.

Mr. Lebeuf after briefing with his Locomotive Engineer (LE) that he would walk up to the Yard Office and book himself off-duty. His LE ensured he would get someone to look after his part of the inspection. The train did receive an inspection on both sides, there was no violation of the GOI as shown in the Form 104. Mr. Lebeuf did not steal any time. As shown Mr. Lebeuf’s LE was talked to by the Supervisor but the LE does not form part of any investigation process.

This incident happens on September 9<sup>th</sup> but the Company does not investigate it until October 2<sup>nd</sup>, while Mr. Lebeuf worked the entire time, then the Company got a TLE to assess any discipline all the while performing further investigations. There is doubt what the Company was doing and can be looked at no more than a malicious act and complete abuse of Management Rights as they excessively and punitively punished Mr. Lebeuf. If this matter was so deserving of dismissal (which the Union vehemently denies) why did it take a month to investigate. This was a matter that needed a simple discussion and should have been over in the same manner as the LE was talked to as they were a crew. It is clear Mr. Lebeuf had a target on his back.

The Company did not respond to the Union’s Step 1 grievance in violation of the CBA. The Company sent an email link to obtain their Step 2 response in violation of Arbitrator Weatherill’s Awards. The Union is unaware of the Company’s position.

The Union requests that the dismissal of Conductor Lebeuf be expunged and he be made whole for his lost earnings/benefits with interest, without loss of seniority or pension.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has no position as none has been provided.

FOR THE UNION:

Wayne Apsey  
General Chairperson  
CTY East  
TCRC

July 19, 2020

**EX PARTE STATEMENT OF THE COMPANY (September 9, 2019 incident)**

**DISPUTE:**

Appeal of the 2<sup>nd</sup> dismissal of Conductor Marc Lebeuf on October 29, 2019.

**EX PARTE STATEMENT OF ISSUE:**

Following an investigation, on October 29, 2019 Mr. Lebeuf was dismissed for the following,

In connection with: “with leaving the property without authorization, while working as Conductor on train 651-720 on September 8, 2019.

A formal investigation was conducted on October 2, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contained substantial evidence proving you violated the following:

- General Operating Instructions Sections 5, Item 7.1

Please be advised that you are DISMISSED from Company Service, effective October 29th, 2019, for leaving the property without authorization and failing to perform a pull by inspection on your outbound train while working as the Conductor on train 651-720 on September 8, 2019.”

**UNION POSITION**

The Union has filed their own Ex Parte Statement of Issue.

## **COMPANY POSITION**

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union suggests the Company has failed to respond to the Step 1 appeal and in doing so have failed to fulfill the requirements of the Collective Agreement. With respect to the grievance process, the remedy for failing to respond is escalation to the next step of the process, which the Company has received and has responded.

The Company maintains that the Grievor left work early without authorization and failed to perform a pull-by inspection on his outbound train while working as the Conductor on train 651-720 on September 8, 2019. The Grievor violated GOI, Section 5, Item 7.1.

The Company maintains that the Union did not object to the timelines of the investigation during the Grievor's statement, to do so now prejudices the Company after the fact.

Lastly, the Company maintains that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE COMPANY:

David Pezzaniti

Director, Labour Relations

CP

October 10, 2020

## **EX PARTE STATEMENT OF THE UNION (October 12, 2019 incident)**

### **DISPUTE:**

Appeal of the dismissal of Conductor Marc Lebeuf on October 29, 2019.

### **STATEMENT OF ISSUE:**

Following an Investigation, Conductor Lebeuf was dismissed in total 3 times the same day as shown in his separate Form 104's on October 29, 2020 as follows,

"A formal investigation was issued to you in connection with the occurrence outlined below:

In connection with: “with your tour of duty on train 651-759 on October 12, 2019.

A formal investigation was conducted on October 12, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- General Operating Instructions Sections 4, Item 6.1
- General Operating Instructions Sections 4, Item 3.1b(ii)
- General Operating Instructions Sections 4, Item 2.1e
- General Operating Instructions Sections 3, Item 2.3

Please be advised that you are DISMISSED from Company Service, effective October 29, 2019, for failing to properly secure cut of cars in FT05 and for failing to properly perform a locomotive brake test after picking up the CP8922 while working as the Conductor on train 651-759 on October 12th, 2019.”

**UNION'S POSITION:**

For all of the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the Union’s position is that the dismissal of Mr. Lebeuf was excessive and completely unwarranted as provided within our grievances.

The Company’s Form 104 the Union believes is flawed as shown within the grievances. The Company says he violated GOI Section 4, Item 3.1b(ii), Item 2.1e, as noted this has to do when cars are not left with an emergency brake application, the crews’ cars were left with an emergency brake application therefore rule does not apply. The Form 104 also showed Mr. Lebeuf in violation of GOI Section 3, Item 2.3, the crew was not in violation of the entire operating instruction but in violation of the “Note”. Mr. Lebeuf’s LE received 10-demerits for his investigation for violation of this rule, it is clear there is a double standard. As provided in relation to GOI Section 4, Item 6.1 Mr. Lebeuf explained his reasoning which he is not the first employee that has done this but he is dismissed.

Again, as shown within the grievances Mr. Lebeuf in fact violates 2 of the 4 operating instructions used to dismiss him where his LE received 10 demerits for 1 of the violations.

Further their was no unintended movement of any cars, as they crew was not leaving these cars behind but would be shortly lifting them again.

Again Mr. Lebeuf through the process would have received the education needed, that should have been the end of it. But the Company had a plan and executed it accordingly on October 29, 2019.

The Company did not respond to the Union's Step 1 grievance in violation of the CBA. The Company sent an email link to obtain their Step 2 response in violation of Arbitrator Weatherill's Awards. The Union is unaware of the Company's position.

The Union requests that the dismissal of Conductor Lebeuf be expunged and he be made whole for his lost earnings/benefits with interest, without loss of seniority or pension.

In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has no position as none has been provided.

FOR THE UNION:

Wayne Apsey  
General Chairperson  
CTY East –TCRC

July 19, 2020

**EX PARTE STATEMENT OF THE COMPANY (October 12, 2019 incident)**

**DISPUTE:**

Appeal of the 3<sup>rd</sup> dismissal of Conductor Marc Lebeuf on October 29, 2019.

**EX PARTE STATEMENT OF ISSUE:**

Following an investigation, on October 29, 2019 Mr. Lebeuf was dismissed for the following,

In connection with: "with your tour of duty on train 651-759 on October 12, 2019.

A formal investigation was conducted on October 12, 2019 to develop all the facts and circumstances in connection with the referenced occurrence. At the conclusion of that investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- General Operating Instructions Sections 4, Item 6.1
- General Operating Instructions Sections 4, Item 3.1b (ii)
- General Operating Instructions Sections 4, Item 2.1e
- General Operating Instructions Sections 3, Item 2.3

Please be advised that you are DISMISSED from Company Service, effective October 29th, 2019, for failing to properly secure cut of cars in FT05 and for failing to properly perform a locomotive brake test after picking up the CP8922 while working as the Conductor on train 651-759 on October 12th, 2019.”

### **UNION POSITION**

The Union has filed their own Ex Parte Statement of Issue.

### **COMPANY POSITION**

The Company disagrees and denies the Union’s request.

The Company maintains the Grievor’s culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor’s service and discipline record. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Union suggests the Company has failed to respond to the Step 1 appeal and in doing so have failed to fulfill the requirements of the Collective Agreement. With respect to the grievance process, the remedy for failing to respond is escalation to the next step of the process, which the Company has received and has responded.

The form 104 issued to the Grievor is not flawed as the Union suggests. The rules listed on the form 104 are a result of the findings from the fair and impartial investigation into the Grievor’s actions during his tour of duty.

With respect to the discipline assessed to the Locomotive Engineer, the Company maintains that each assessment of discipline is unique and must be looked at individually.

In regards to the allegations concerning efficiency testing, the Company maintains that it is in no way restricted from conducting a formal investigation based on the result of a failed efficiency test.

The Company’s position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

FOR THE COMPANY:

David Pezzaniti

Director, Labour Relations

CP

October 10, 2020

# **AWARD**

## **INTRODUCTION**

The grievor, as noted above, received three separate Form 104's terminating his employment on October 29, 2019 as a result of incidents that occurred on September 1, 2019, September 8, 2019 and October 12, 2019 respectively. All of the incidents involved alleged rules violations set out in the Company's General Operating Instructions. Each incident will be dealt with separately in this Award.

The grievor had 11 years of service at the time of his termination.

## **INCIDENT OF SEPTEMBER 1, 2019**

The grievor was part of a Conductor Only crew with Locomotive Engineer Robillard on September 1-2, 2019. The grievor was tasked with setting off a bad order car. Trainmaster Drouin was monitoring the grievor as part of an efficiency test at approximately 00:15. Trainmaster Drouin noted that the grievor did not make the joint on the train cars that were already on the track but instead left the bad car in emergency in the lead without applying the handbrake. Trainmaster Drouin, after applying the hand brake to the bad car, approached the grievor and advised him that an exception would be recorded on his file for his infraction.

The grievor admitted at his investigation some 30 days later on October 2, 2019 that he failed to apply a handbrake on the bad car. He felt that he had properly secured the uncoupled car because of the short distance between it and the other cars and

because the brakes were properly applied on the other cars at the time. The grievor admitted nevertheless breaching the rule requirements:

Q 14 Did you follow the requirements outlined in GOI section 4 item 3.2 when you left car DTTX 74623 in track IR 25 with no handbrakes and not coupled to other equipment?

A 14 Unfortunately No I did not.

He also added at the end of his interview that he was “very sorry” for the incident and repeated that he “did not feel he was doing anything unsafe”.

The Company maintains that the grievor’s responses at his investigation indicate that he felt he was operating safely throughout the incident. In particular, his comments that there were sufficient handbrakes already on the cars in the track IR 25 and that the bad car was only a foot from the stationary cars, indicate that the grievor “...thought he knew better than the rules governing the safety critical position” (para 21 of the Company brief). The Company pointed out that non-compliance with safety rules can result in equipment damage and serious injuries. The Company, overall, expects due diligence and compliance of employees in a safety-critical position and the grievor failed to meet this expectation. The Company also notes that the context of proficiency testing of the kind undertaken in this case originates from Transport Canada’s *Safety Management System Industry Guidance* guidelines and can be both an educational exercise and used as a disciplinary tool.

I do not disagree with the Union’s submission that a full investigation should typically include canvassing all members of the crew, particularly in Conductor Only circumstances as we have here. I do not believe, however, that the absence of an

interview with Locomotive Engineer Robillard undermined the investigation. The focus of the proficiency test involved the grievor's failure to apply the handbrake to the lone car. The grievor never faulted his Locomotive Engineer at his interview nor was any objection raised by the Union regarding the absence of a statement by Mr. Robillard. The grievor took full responsibility for the incident at his brief interview on October 2, 2019 and admitted it was his error alone for failing to apply the handbrake to the single car.

The individual facts of each case must be examined closely to determine whether discipline is appropriate, particularly in the context of an efficiency test where an employee is working in a safety-sensitive position. As Arbitrator Hornung noted in **CROA 4744** (as have several other arbitrators from this office), the efficiency testing process is to be used as an educational tool but does not preclude the Company from imposing discipline where the circumstances warrant. In my view, this is such a case. The grievor breached an important operational rule involving the failure to apply hand brakes. After consideration of all the circumstances, and despite the proximity of the bad car to the other secured equipment, I agree with the Company that the grievor's failure to apply the handbrakes as required under the GOI rules merits discipline.

I note in the cases cited by the Union that discipline of 20 demerits was imposed in several cases where there was a proven failure to apply handbrakes. In **CROA 4139** Arbitrator Picher assessed 20 demerits for the grievor's failure to properly secure his train and to properly apply hand brakes. Arbitrator Silverman in **CROA 4139** similarly assessed 20 demerits for a failure to apply hand brakes and a failure to perform a proper pull-by inspection. In **CROA 4431**, Arbitrator Sims also imposed a penalty of 20 demerits on a

Trainman who failed to verify with a fellow Yard Conductor that he had applied the hand brake to 3 cars which collided with trailing rail cars.

The grievor's disciplinary record includes a recent violation for a similar incident involving his failure to remove handbrakes correctly. The incident took place on December 27, 2018. The grievor was disciplined with 10 demerits. The grievor was also suspended for 19 days (5 days served, 14 deferred) for failing to adequately secure equipment for an incident which took place that same year on March 3, 2018.

The grievor's record is of concern, particularly given his safety-sensitive position as a Conductor. Although the grievor admitted that he made a mistake at his interview, it appears that he has not learned his lesson given his prior record of equipment rule breaches, including a similar handbrake rule violation that occurred less than a year before the current incident. The grievor's record is not so egregious, however, that he deserves to be terminated for this incident, particularly given his admission early on at his interview that he did not follow the rule requirements ("Unfortunately, I did not") and the fact that, similar to the facts in **CROA 4580**, his discipline arose from an efficiency test and not from an incident which caused damage to the rail cars or physical injury.

Under the circumstances, and bearing in mind the grievor's recent record for similar operational breaches, including hand brake GOI violations, a suspension of 10 days shall be substituted for the termination and he shall otherwise be made whole.

#### **INCIDENT OF SEPTEMBER 8, 2019**

There is no real dispute on the facts of this incident. The grievor was on a Conductor Only assignment with Locomotive Engineer McCord working from the St. Luc

yard in Montreal to Smith Falls. The crew made its way to the White's Crossing yard in Smith Falls without incident at 14:00 and received instructions that they would be held there until 16:00 before being able to pull into the station yard office area. The grievor asked his Locomotive Engineer if he would arrange for another individual to perform the final outbound train inspection so he could leave the yard and drive back to Montreal. The Locomotive Engineer agreed to arrange for another employee to perform the inspection with him once the train was handed over to the outbound crew from Smith Falls. The grievor then walked over to the yard office, booked himself off duty, and drove the three hours back to his home in Montreal.

Trainmaster Stephanie McKenney reported for work after the grievor had departed for Montreal. She asked Locomotive Engineer McCord about the whereabouts of the grievor. In her statement, Trainmaster McCord states in part as follows:

...I asked who authorized him to leave and he [Locomotive Engineer McCord] said he told him to go ahead. I then asked who was going to watch the other side of the pull by inspection. He replied that it was okay to only watch one side in Montreal so why not here. I stated that both sides needed to be watched and when the train pulled, I went out to watch the North side of the pull by inspection while locomotive engineer watched the south side.

The grievor appeared for his interview on October 2, 2019, the same day he was interviewed for the first incident described above of September 1, 2019. The grievor stated at his interview that he expected the Trainmaster would do the pull-by when she arrived and never thought to call the RTC or Trainmaster for permission to leave early. He stated in that regard:

Q 21. Referencing your answer to question 19, do you understand that you left the property without permission?

A 22. That was not my intent. I never thought to call the Trainmaster or the RTC for permission. As I stated before I just figured as in the past, the Trainmaster would be available to do the pull by inspection and I was safe to leave.

The Union notes that the grievor admitted at the conclusion of his investigation to making an error in judgement by leaving the property and that he should have called the Trainmaster and asked for permission to do so. The Union also underlines that the Company allowed the grievor to remain in his position for seven weeks before terminating him on October 29, 2019. More importantly, the Union argues that the grievor understood as a result of his conversation with his Locomotive Engineer that a pull-by inspection was to be done on his behalf. The grievor also assumed and expected from his past experience that the pull-by inspection would be performed by the Trainmaster.

I note that the grievor admitted at his investigation that he knew a pull-by inspection was required under GOI, Section 5, item 7.1. Further, his answers at the investigation, as the Union points out, indicate the grievor also knew from past experience that the Trainmaster would be the person called on to do the inspection. I agree with the Company's submission that the grievor's passing-off of responsibility to his Locomotive Engineer to find a replacement to perform the grievor's assigned duties, rather than seek permission directly from the Trainmaster or RTC, placed an unfair obligation on his fellow crew member and demonstrates a careless disregard for an important GOI rule. This was unacceptable conduct and in my view merits discipline.

Turning to penalty the grievor has a disciplinary record, most recently for GOI rule violations involving equipment. On the other hand, the grievor's 11 years of service and

admission of responsibility at the conclusion of his interview for his presumptive and one-off behaviour on September 8, 2019 are mitigating factors which lead me to substitute a penalty other than termination.

After consideration of all the circumstances, a suspension of 3 days will stand in the place of his termination for this incident and the grievor shall be otherwise made whole.

### **INCIDENT OF OCTOBER 12, 2019**

This is the second incident before me for which the grievor was disciplined for GOI rules violations which occurred while the grievor was being efficiency tested. In each of these cases, as the Union pointed out, the grievor was allowed to continue working until he was dismissed on October 29, 2019.

The grievor was working a Conductor Only road assignment on Train 651-759 from Montreal to Smith Falls on October 12, 2019, starting at 09:00. The grievor, and his Locomotive Engineer, Mr. R. McCord, were first instructed to perform other assignments, including setting out a bad order car. The crew was next assigned to go to the south end of the flat yard and be in a position to add their locomotive as a trailing unit onto inbound train 651-759. The crew, in performing the assignment, was required to take their power from the north end of the train and place it on the south end of the 44 cars on train 651-759. After uncoupling the power, the 44 cars were left in emergency brake mode with the angle cock open. The grievor then closed the angle cock at the north end of the track for reasons he explained at his investigation:

Q 20: Referencing your answer to question 19, was this method of securement you chose in compliance with GOI section 4 item 6.1(d)?

A 20: At first it was as we made the cut and pulled away towards track store lead and the 44 cars were in emergency with the angle cock open. As we were traveling on the store [h]eaded from north to south, I stopped at the north end in track FT05 and closed the angle cock.

Q 21: Referencing appendix B, your cut of cars and track FT05 was found with the angle cock closed at both ends is that correct?

A 21: Yes as per appendix B.

Q; 22: Referencing your answer to question 20, by closing the angle cock at the north end and the one at the south end closed would this be compliant with GOI section 4 item 6.1(d)?

A 22: After reading further into GOI section 4 item 6.1(d) today, unfortunately I was not compliant with the rule.

Q 23; Can you please explain why you chose a method of securement that is not in compliance with the GOI section 4 item 6.1 d)?

A 23: When I cut off I fulfilled the requirements of the cut of 10 or more cars left in emergency and the angle cock open and this was left this way for at least 5 minutes. I was instructed by the Trainmaster tower to close the angle cock on the north end. So on the way by I closed the angle cock not realizing this was now putting me in violation and nullifying my securement. It wasn't until Trainmaster Di Maurizio approach me and started to ask question[s] regarding the two closed that I realize that I had left the 44 cars in violation.

Q 24: Are you familiar and do you understand GOI section 4 item 3.1(a)(ii). When you cut away from the batch of cars at the North end of track FT05

A 24 Yes I am.

Q 25:Referencing your answer to question 24, did you comply with I section 4 item 3.1a (ii) when you cut away from the batch of cars at the North end of track FT05?

A 25: Yes we did do that, I let Engineer McCord know the batch was in emergency and the angle cock open.

...

Q29: Do you understand that with the angle cock closed at both end[s] of a batch of cars in emergency, you could still have air left in [a] the brake pipe and enough that it can start to cause an undesired release as air will start to backfill from both the auxiliary and emergency reservoirs into the brake pipe and start to charge the system?

A 29: I felt that, because I left the angle cock open for 5 minutes the[re] would be no chance of any air in the train line to cause an undesired release of the air brakes.

Trainmaster DeMauzio's observations are set out in his memo dated October 12, 2019 which reads in part:

At approximately 1105 I was making my way to the flat yard as to assist outbound train 651 – 759 if necessary. They were already in the process and travelling in the store lead from north to south. I notice that the north end angle cock on the last car of FT 05 was closed

I then drove my vehicle at the south end of the flat yard parked the truck next to the switch of FT04 and walked to the south end car FT05. Once arrived at the south end car I observed that the angle cock of the first car at the south end of track FT 105 was also closed and no handbrakes were applied.

I immediately called David Braun for assistance and remained in place. Mr. Braun immediately met me at the south end FT05 and was able to confirm that the keys were closed at both ends of track FT05 and no handbrakes had been applied at either ends.

Once Mr. Braun assessed my findings, the 651-759's inbound power was now coupled up to the single unit in question. The outbound 651 – 759 crew was performing the locomotive brake test and was observing the pistons of only one side of all 3 locomotives. Once ready to back to FT05, I asked Mr. McCord not to move until further notice.

Mr. Braun and I interviewed Mr. Lebeuf about our findings. He confirmed that both angle cocks were closed and no handbrakes were applied on FT05. After conversing and explaining the rules concerning bottling the air on railcars, Mr. Lebeuf was still diminishing the potential risk of a runaway train in the circumstances.

We then discussed the rules for locomotive brake test with Mr. Lebeuf and explained how it should be performed. He admitted the fact that he did not observe all pistons of all locomotives on both sides while executing the locomotive brake test. The conversation was also had with Mr. McCord and he acknowledged that both sides of the locomotive pistons were not properly tested as per the rule. A proper brake test was finally performed before continuing their task.

The grievor acknowledged that it was a mistake to leave the angle cocks closed at both ends of the set of 44 cars. The grievor explained that he felt the cars were secure because he had first left the angle cock open for 5 minutes before closing it on the instructions of the Trainmaster in the yard tower. Given this span of 5 minutes before the angle cock was closed, the grievor believed there was no chance of any air in the break pipe causing a problem, as he explained in his interview:

Q 29: Do you understand that with the angle cock closed at both end[s] of a batch of cars in emergency, you could still have air left in a brake pipe and enough that it can start to cause an undesired release as air will start to backfill from both the auxiliary and emergency reservoirs into the break pipe and start to charge the system?

A: I felt that, because I had left the angle cock open for 5 minutes the[re] would be no chance of any air in the train line to cause an undesired release of the air brakes.

The Union in argument focused on the fact that the grievor was acting on the instructions of the Trainmaster in the tower when he closed the angle cock at the north end. The crux of the Union's submission is that the grievor, having received these instructions, felt that he had acted properly under the circumstances by leaving the angle cock open for 5 minutes after the cars were placed into an emergency brake application. He judged that any air left in the trainline would have been removed after the 5 minutes and thus prevented an undesired break release. By taking the actions that he did the Union submits the grievor complied with GOI section 4, Item 6.1(d) to the extent that he closed the angle cock, under instructions to do so, after initially leaving it open. There was no intention on his part to the "bottle the air" as noted in Trainmaster DeMauzio's comments to the grievor after the incident. Further, as indicted in the Union's Step 2 reply, the entire assigned crew-which included Locomotive Engineer McCord and not just the grievor- were found to be in violation of the "Note" in GOI Section 3, which requires observing pistons on both sides of the locomotive to ensure they extend and retract properly.

The Company, in their brief at para. 41, sets out the importance of keeping the angle cock open, which is the key point in their submission:

41. The reason for requiring an angle cock to be left open is so that there can be a constant venting of the brake pipe. If the brake pipe is not properly vented, the air that bleeds off does not have anywhere to go. If there is enough air causing an imbalance in the system

the amount of pressure being applied to the brakes could reduce to a point where the brakes are ineffective and no longer have the power to hold the cars in place. Once this happens the cars could roll away under their own momentum.

I accept the Union's point that the grievor was acting under instructions from the Trainmaster to close the angle cock at the north end of the train. The grievor nevertheless took a calculated risk when he felt that letting 5 minutes pass by was enough time to ensure that all the air was bled out of the trainline and the air brakes would remain secure. I agree with the Company that the grievor knowingly created a "bottling of air" situation with the angle cocks closed at both ends of the train. By failing to apply the minimum number of handbrakes (rule GOI Section 4, Item 6.1), the grievor, as the Company noted, risked the cars rolling away on their own momentum. In my view, a disciplinary response was appropriate despite the events taking place in the context of an efficiency test. I note, in that regard, the comments of Arbitrator Hornung in **CROA 4744**:

*27. That said, the "...fact that the Grievor's breach of rules was observed as part of an Efficiency Testing Proces, does not preclude the Company applying a disciplinary approach" (CROA 4728)*

28. The problem for the Grievor her is that, although efficiency testing is not intended to be a disciplinary tool, the Policy makes it apparent that some corrective action may be required depending on the "frequency, severity and the employee's work history".

29. The frequency and Severity of Safety Violations in the Grievor's work history is a matter of concern. He appears to have a problem with following safety rules. Having regard to the same, the Company's determination to apply discipline is reasonable in the circumstances.

In terms of the appropriate discipline, the above comments of Arbitrator Hornung are pertinent to this grievor, who also appears to have a problem following safety rules. In addition, I note from the statement of Trainmaster Braun that, despite the clear explanation of the potential dangerous consequences of his actions, the grievor replied

to Trainmaster *Braun* “... *that the risk of an undesired release was almost nonexistent and “...expressed his disagreement with the points I was bringing forward minimizing the gravity of the situation”.*

The grievor’s disciplinary record, as noted earlier, contains similar equipment offences. It includes a failure to secure equipment on March 3, 2018 for which he received a 19-day suspension (5 days served, 14 days deferred) and a further incident involving the improper release of brakes on December 27, 2018 for which he received 10 demerits.

I also have concerns about the grievor’s work attitude, as displayed in his misplaced comments to Trainmaster Braun at the time of the incident. Nevertheless, it is my view that the termination penalty imposed on the grievor, an 11-year employee, for the GOI breaches for this incident, is excessive.

The grievor’s termination shall be substituted with a 30-day suspension. He shall be reinstated to his former position and otherwise made whole.

I shall reserve jurisdiction should the parties require my assistance in the implementation and finalization of this award which deals with the three incidents of September 1 2019, September 8, 2019 and October 12, 2019.

Dated at Calgary, this 9<sup>th</sup> day of February, 2021



**JOHN M. MOREAU, Q.C.**

**ARBITRATOR**