

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

**CASE NO. 4810**

Heard via Video Conference and in Ottawa, Ontario, April 12, 2022

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Trainperson D. Demaray.

**UNION EXPARTE STATEMENT OF ISSUE:**

On September 24, 2020, Trainperson Demaray was dismissed from Company Service as shown in his Employee Notification Letter as follows:

"A formal investigation was issued to you in connection with the occurrence outlined below: "For riding in a Locomotive stairwell while going over a public crossing on September 2, 2020."

The formal investigation was conducted on September 4, 2020 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of this investigation, it was determined the investigation record as a whole contains evidence proving you violated the following:

- Train & Engine Safety Rule Book Section T-24 Item 8 Avoid riding on the bottom step of equipment when going over road crossings at grade.
- Rule Book for Train & Engine Employees Section 2 Item 2.2 (a) Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.
- Letter of Expectations dated July 16, 2020.
- CROA No. 4746 dated June 11, 2020 Item 18(b) The Grievor will be reinstated at the last Step.

In consideration of the decision stated above, you are hereby DISMISSED from Company Service September 24, 2020.

As a matter of record, a copy of this document will be placed in your personnel file."

Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position is that the Company has wrongfully dismissed Mr. Demaray.

On his second day of full return Mr. Demaray received a dismissal from this day. The Union will not copy and paste every aspect of our grievances here but in going over all the facts Mr. Demaray received undue scrutiny from Company Management. If Mr. Demaray was in fact in violation of a very minor incident it should never [have] attracted a formal investigation.

The Company alleged Mr. Demaray did something wrong and immediately handed a Notice to Appear for an investigation 48 hours later. In fact, he gets the NTA then the Trainmaster talks about the alleged violation.

Mr. Demaray attended the investigation and provided his reasoning behind the alleged violation. As shown in our grievance the Union breaks down the Rule and its wording. Mr. Demaray complied as per the wording.

The Union submits the investigation was improper, not a fair and impartial process as evidenced by the Investigating Officer continually inserting himself into the investigation.

Mr. Demaray was targeted, faced undue scrutiny, did not receive a fair and impartial process as provided in Article 39.05, and in the end received punitive, discriminative, harassing, dismissal from Company Service.

As noted in our grievances the Company even resorted to piling on alleged violations. As shown in our Step 2 grievance the following (it must be noted the "avoid" being located on the bottom step only applies at crossings, it must be further noted an employee can be on the side of equipment on the ladder at any time (when safe) but you are to "avoid" being on the bottom step only at crossings).

In other words, as Mr. Demaray provided in his statement, he believed he was following the rule and was being safe, the above clearly backs his position.

The Union maintains the Company believed the conditions of the Arbitrator's Award gave them the ability to look to find, no matter how small it might be, something they could use to dismiss Mr. Demaray again. The Union further asked the Arbitrator to look at the timelines provided with the Step 2 grievance which provides a telling tale.

The Union further goes on to argue and shed light on what the Superintendent stated;

"After reviewing the transcript it was clearly proven Mr. Demaray violated Train and Engine Rule T24 which prohibits employees from riding in the footboard of a locomotive over a crossing."

This statement made by the Superintendent is very misleading, the Rule does not state what he has written. There is no mention of the word "prohibits", there is no mention of the words "footboard of a locomotive".

The Rule actually reads;

"8. Avoid riding on the bottom step of equipment when going over road crossings at grade."  
(Emphasis added)

Again, the Union stands by its position not even the Company has proper understanding of the alleged Rule violated.

Mr. Demaray has faced discriminatory actions by CP, Mr. Demaray has been wrongfully dismissed as CP has violated his rights provided in Article 39.05, he has not received a fair and impartial process. Again, we must also state the Company's hybrid discipline policy is also under separate grievance.

The Company has unreasonably, improperly, and in a discriminatory fashion assessed discipline, the Company has wrongfully dismissed Mr. Demaray based on all of the facts.

The Company did not respond to the Union's Step 2 grievance; therefore, the Union is not in possession of any further position of the Company on the matter and this leaves the Union at a disadvantage. The Union reserves the right to object, should the Company expand its position

at Arbitration. The Company has stated that the Union has expanded its position in our Step 2 grievance, again it must be noted that the Company did not respond to our grievance to challenge any such position, and further the Union is allowed within the grievance steps to provide any further facts, arguments, positions as the Company is in position to respond at said step.

The Union requests that Mr. Demaray's dismissal be expunged and he be returned to work forthwith, and be compensated with interest all loss of wages, benefits, and without loss of seniority, pension.

The Union asks that Mr. Demaray be allowed an atmosphere when he can work without facing undue scrutiny, discrimination and harassment.

The Union provides (this is a clear case of what purports a violation of rights by discrimination, harassment, undue scrutiny, punitive punishment) wherein directly affecting the well-being of Mr. Demaray and those of his family that damages ought to be awarded.

The Union request damages as provided;

- 1) \$10,000.00 in general damages for breach of the just cause provisions in the Collective Agreement,
- 2) \$25,000.00 in aggravated damages for the Company's bad faith and malicious intent,
- 3) \$25,000.00 in punitive damages owing to the Company's harsh, vindictive, reprehensible decisions in handling Mr. Demaray,
- 4) \$10,000.00 for breach of the Mr. Demaray's rights under the employment contract.

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

### **THE COMPANY'S EXPARTE STATEMENT OF ISSUE:**

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The Union grieved the dismissal.

The Company disagreed with the Union's contentions and denied the Union's requests.

The Grievor was reinstated by arbitration decision CROA 4746 dated June 11, 2020. This decision provided that the Grievor would be reinstated at the last Step. During the Grievor's return to work meeting it was made clear that he was being returned to work as a last chance and any

rules infraction would jeopardize his employment. A follow up letter was also sent to the Grievor stating as such.

A review of the fair and impartial investigation into the incident confirmed the Grievor violated Train and Engine Rule T24. Based on the determination of culpability for the rule violation and the Grievor's discipline standing, the Grievor was properly assessed discipline as dismissal.

Regarding the grievance procedure, the Company maintains the Union acknowledges Article 40.04 and has progressed to the next step of the grievance procedure. The Company reserves the right to object should the Union attempt to expand upon any argument related to the grievance correspondence or Article 40.

The Union has expanded upon its argument in its Step 2 Grievance including its requested resolve that the Company submits is contrary to the sound principles of labour relations. Specifically with respect to damages, damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment, as established in the notable *Honda Canada Inc v. Keays Supreme Court of Canada* decision. In **CROA 4605**, Arbitrator Clarke distinguished in his award that in order to claim for damages, the party claiming such must make a compelling argument to support this claim. The Union has failed to support its allegation of such conduct and the Company maintains the request for damages is without merit.

The Company must request the Union withdraw its inflammatory and spurious allegations and remarks submitted through the grievance procedure.

The Company maintains the discipline assessed was fair, appropriate, warranted and just in all the circumstances and requests the Arbitrator be drawn to the same conclusion.

**FOR THE UNION:**

**(SGD.) W. Apsey**

General Chairperson

**FOR THE COMPANY:**

**(SGD.) L. McGinley**

Assistant Director Labour Relations

There appeared on behalf of the Company:

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| E. Allen    | – Labour Relations Officer, Calgary            |
| L. McGinley | – Assistant Director Labour Relations, Calgary |
| T. Gain     | – Legal Counsel Litigation and Labour, Calgary |

And on behalf of the Union:

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|------------|-------------------------------------|
| M. Church  | – Counsel, Caley Wray, Toronto      |
| W. Apsey   | – General Chairperson, Smiths Falls |
| D. Demaray | – Grievor, London                   |

**AWARD OF THE ARBITRATOR**

**Overview**

1. The Grievor is a Conductor. He was initially discharged from his position in July 2019. The Union grieved the initial discharge and, on July 3, 2020, in accordance with the arbitral award in **CROA 4746**, the Grievor was reinstated on terms and conditions.

2. In rendering his award in **CROA 4746**, Arbitrator Hornung issued a strong warning to the Grievor about future misconduct. The Arbitrator wrote:

This [reinstatement] should be understood by the Grievor to be a last chance opportunity to show his employer that he can work in a compliant and safe manner as required by his position.

3. On September 2, 2020, during his second full day back in service following his reinstatement, the Grievor was disciplined and ultimately discharged for riding a locomotive stairwell while going over a public crossing.

### **The Facts**

4. On September 2, 2020, the Grievor operated two switches, which required his locomotive to occupy and go over a public road crossing.

5. After operating the first switch, the Grievor entrained on the ladder of the locomotive and he instructed the movement ahead to the second switch. There is no dispute that, as the movement travelled to the second switch, the Grievor remained on the ladder. The Grievor states that he was in a safe position, with traffic stopped and the crossing protection of lights, gates, and bells activated.

6. The Company disciplined and ultimately discharged the Grievor for a violation of paragraph 8 of T-24 Riding Equipment. Paragraph 8 of T-24 states: "Avoid riding on the bottom step of equipment when going over road crossings at grade."

## Analysis

7. The Company takes the position that Arbitrator Hornung's award is akin to a last chance agreement and any misconduct by the Grievor automatically justified the termination of his employment. The Union disputes this and, in any event, submits that there is no basis for discipline in the circumstances of this case.

8. Rule T-24 sets out a range of conduct related to riding equipment, some of which is specifically permitted and some of which is specifically prohibited. In addition, under T-24, some conduct (such as riding on the bottom step when going over road crossings – paragraph 8), is not specifically permitted or prohibited, but rather to be “avoided” or done only “when conditions permit.”

9. In T-24, paragraph 8's use of the word “avoid” is significant. It does not create a strict prohibition but suggests that employees can exercise judgement and that, in some circumstances, it may not be inappropriate to ride on the bottom step of equipment when going over road crossings at grade.

10. The Company submits that an employee's obligations under T-24 must be interpreted in light of section 2, Item 2.2(a) of Rule Book for T&E Employees. That provision states:

Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.

11. There certainly is an obligation for employees to obey the rules. Moreover, where there is some ambiguity or discretion in terms of what is required, I accept that employees should exercise their judgement and behave in a way that is safe.

12. However, section 2.2(a) does not, as the employer suggests, require the employee to take the “safest” course of conduct in all circumstances. Nor does it subject employees to discipline if they complied with the rules, behaved in a way that was safe, but chose a course of action that might not have been “safest” in all of the circumstances.

13. There is no evidence to suggest that the Grievor’s conduct in this instance was unsafe. Indeed, the Trainmaster who observed him on the ladder remarked that there was no imminent danger.

14. In these circumstances, there was no basis to discipline the Grievor. His behaviour was not prohibited by any rule and it was not unsafe. It might have been open to the Company to discuss the situation with the Grievor and provide guidance about when to avoid riding on the ladder. However, there was no basis for discipline and this incident should not have led to the Grievor’s discharge.

15. Given my conclusion that discipline was unwarranted, it is not necessary to address the Union’s allegations that the investigation was unfair and impartial.

16. The Grievor is reinstated forthwith with full compensation and without loss of seniority. In all other respects, the Grievor’s reinstatement is subject to the terms and

conditions set out in Arbitrator Hornung's award in **CROA 4746**. The two-year period referred to in paragraph 18 of **CROA 4746** will not include the period between September 24, 2020 and the date of the Grievor's reinstatement following this award.

17. The Union submits that the Company's conduct in this case was egregious and should attract an award of damages. Although I have no hesitation in finding that the decision to discharge the Grievor was unreasonable and inappropriate, I cannot conclude that the Company's conduct rose to a level where damages would be warranted.

18. I remain seized and retain jurisdiction with respect to the application, interpretation, and implementation of this award.

April 22, 2022



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**MICHELLE FLAHERTY**

**ARBITRATOR**