

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Railway Company

(CP)

Dismissal of Conductor Azubike Igbelina

Arbitrator: Graham J. Clarke
Date: February 10, 2023

Appearances:

TCRC:

K. Stuebing: Legal Counsel
D. Edward: Sr. Vice General Chairman TCRC CTY West, Medicine Hat, AB
B. Wiszniak: Vice General Chairman TCRC CTY West, Regina, SK
T. Haug: Local Chairman, Calgary, AB
A. Igbelina: Grievor, Calgary, AB

CP:

A. Cake: Manager, Labour Relations, Calgary, AB
C. Clark: Manager Labour Relations, Calgary, AB

Arbitration held via videoconference on January 26, 2023.

Award

BACKGROUND

1. On March 22, 2022, the parties signed a Memorandum of Settlement (Appendix 2) revising the arbitration process in Article 41 of their collective agreement. The arbitrator agreed to hear 4 Ad Hoc cases in 2022 and a further 8 in 2023 on the condition that the parties would plead no more than 2 cases per day.

2. On December 4, 2020, CP dismissed Conductor Igbelina for a rule violation involving 3-point protection. Mr. Igbelina had just over 2 years service and 25 demerits on his disciplinary record. CP argued that the seriousness of the violation justified the dismissal.

3. The TCRC argued that the discipline was excessive considering that it arose from a single “efficiency test”¹ (ET). It noted that, despite the incident, CP still required Mr. Igbelina to complete his assigned duties afterward. The TCRC requested the discipline be removed in its entirety or that the arbitrator intervene and mitigate the penalty.

4. For the reasons which follow, the arbitrator substitutes a written warning for Mr. Igbelina’s termination. The ET in question, given all the circumstances, did not justify dismissal. Moreover, a contested 30-day suspension on Mr. Igbelina’s record had been overturned by a different arbitrator just 10 days before the parties argued this case. Mr. Igbelina’s termination for the ET failure occurred on his first full tour of duty after returning from that suspension.

CHRONOLOGY OF FACTS

5. The arbitrator has considered the entire Record and merely highlights some of the key facts below for ease of reference.

6. **August 7, 2018:** CP hired Mr. Igbelina.

¹ Also known as a “proficiency test”.

7. **August 2020:** The only discipline on Mr. Igbelina's record² came from 2 separate incidents. The first occurred on August 2, 2020 (10 demerits for safety rule violation T-11) and the second on August 13, 2020 (15 demerits for leaving cars behind).

8. **October 3, 2020:** CP suspended Mr. Igbelina for 30 days for his alleged responsibility for a sideswipe incident. A different arbitrator later overturned this discipline on both procedural and substantive grounds.

9. **November 17, 2020:** On Mr. Igbelina's first complete tour of duty after serving the 30-day suspension, CP failed him on an ET because he had broken the plane of the rail with his torso without 3-point protection. This violated T&E Rule T-27. CP required Mr. Igbelina to complete the yarding of his train. CP then removed him from service.

10. **November 24, 2020:** CP conducted its investigation interview³, the salient QAs of which included:

15. Was this your first tour of duty returning to work after serving your thirty day suspension?

A. It was my first return trip west.

...

20. Referencing both Appendix 3: excerpt from CP's Train and engine safety rule book: T-27 "three point protection;" and Appendix 2; memorandum from Assistant Superintendent Kyle Leafloor where he states that "I don't believe he has a full understanding of the rules and how to apply them" have you read and fully understand Role T27 "three point protection."

A. Yes I have read it, but initially how I had interpreted the portion that states "breaking the plane of the rail with your torso," I interpreted that as breaking the plane with your entire torso. I also sought clarification from the CP training department; Greg Porter whom explained in details to me the meaning of the phrase and how that applies. He informed me that "any part of your body between your beltline and your shoulders that crosses the imaginary line over the rail, will require three point protection. I am fully away of the rule 100 percent now.

21. Referencing Appendix 3: excerpt from CP's Train and engine safety rule book: T-27 "three point protection;" Specifically item #1; bullet point #2; did you have confirmed three point contact before performing crossing the plane of the

² TCRC Exhibits; Tab 2

³ TCRC Exhibits; Tab 5

rail that is also referenced in Appendix 2; memorandum from Assistant Superintendent Kyle Leafloor?

A. No I did not but at the time I did not understand that I needed it.

22. With reference to Appendix 3; what is your understanding (in your own words) of when three point protection is required?

A. My own understanding now is when you need to step in between the rail or break the plane of the rail or within 15 feet of the end of equipment.

23. With reference to Appendix 3; what is your understanding (in your own words) of communicating and ensuring that 3-Point Protection has been applied for you between yourself and your Locomotive Engineer making it safe to go in between equipment?

A. You ask for three point protection, you get a confirmation back from the Locomotive Engineer or whomever is controlling the movement and then I acknowledge that three point protection has been provided to me before I do anything. (sic)

11. **December 4, 2020:** CP's Form 104⁴ terminated Mr. Igbelina's employment:

Please be advised that you have been DISMISSED from Company Service for the following reason(s):

In connection with your tour of duty on November 18, 2020 while working as the Conductor on Train 400-16, more specifically the rule violation observed by Assistant Superintendent Kyle Leafloor; a violation of Train and Engine Safety Rule Book, Section T-27 - 3 Point Protection.

12. **December 17, 2020:** The TCRC filed a grievance⁵ contesting Mr. Igbelina's termination. CP did not respond to this Step 1 grievance⁶.

13. **March 31, 2021:** The TCRC filed its grievance at Step 2⁷.

14. **May 27, 2021:** CP provided its response at Step 2⁸.

⁴ TCRC Exhibits; Tab 6

⁵ TCRC Exhibits; Tab 7

⁶ See article 40.04 of the collective agreement which then escalates disciplinary matters to Step 2.

⁷ TCRC Exhibits; Tab 8

⁸ TCRC Exhibits; Tab 9

15. **January 16, 2023:** In AH798⁹, Arbitrator Hodges overturned Mr. Igbelina's 30-day suspension.

16. **January 26, 2023:** The parties argued this case, along with a second unrelated one, before the arbitrator.

DECISION AND ANALYSIS

17. The *Canada Labour Code*¹⁰(*Code*) sets out arbitrators' remedial authority for disciplinary matters:

60 (2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

18. At arbitration, the parties put forward their best arguments to support their respective positions. The *Code* then requires the arbitrator to determine i) whether to intervene and, if so, ii) the just and reasonable penalty.

19. For several reasons, the arbitrator has concluded that a written warning should be substituted for Mr. Igbelina's termination.

20. First, on January 16, 2023, AH798 overturned Mr. Igbelina's 30-day suspension on both procedural and substantive grounds. While this occurred just 10 days before this arbitration and may have limited the parties' ability to revisit Mr. Igbelina's situation, AH798 significantly reduced his disciplinary record¹¹.

21. Second, the arbitrator cannot ignore the fact that CP conducted the ET on Mr. Igbelina's first full tour of duty¹² following the 30-day suspension. The arbitrator does not

⁹ [AH798](#)

¹⁰ [RSC 1985, c L-2](#)

¹¹ The parties dispute whether reliance on the record is appropriate since the Form 104 did not mention it. However, the TCRC has referred to it to support mitigation of the original penalty.

¹² Mr. Igbelina had gone from Calgary to Field B.C. The incident occurred on the return trip to Calgary.

need to conclude that CP targeted Mr. Igbelina to consider the proximity of these two events.

22. Third, arbitrators have often commented on ETs and their use in the disciplinary process. In AH695¹³, Arbitrator Moreau described ETs use in the railway industry:

Proficiency testing of employees (or Efficiency tests) is rooted in Transport Canada's Safety Management System Industry Guideline. It is a tool used to evaluate an employee's compliance with rules, instructions and procedures and to isolate areas of non-compliance for immediate corrective action. From the Company's perspective, the corrective action can take the form of verbal counselling through to disciplinary action. The Company also notes that these proficiency tests are often conducted randomly without the employee's knowledge.

23. CP's "Efficiency Test" manual¹⁴ describes ETs mainly as non-disciplinary educational tools designed to evaluate rules competence:

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. (sic)

24. In CROA 4603¹⁵, the arbitrator accepted that an ET can occasionally lead to discipline:

1. The TCRC grieves two separate disciplinary events for Mr. Jack Shewchuk, a Winnipeg conductor with 22 years of service. The first involves a 30-day suspension for allegedly failing to protect the point properly on January 22, 2016. The second concerns Mr. Shewchuk improperly entraining a box car on the trailing end. CP terminated Mr. Shewchuk for this latter incident, on the basis that it constituted a culminating incident.

2. Both incidents arose initially from efficiency tests, a practice to which the TCRC objects. This Office has found that efficiency tests do not necessarily exclude discipline if proper grounds exist: CROA&DR 4580 and CROA&DR

¹³ [AH695](#)

¹⁴ TCRC Exhibits; Tab 10

¹⁵ [Canadian Pacific Railway Company v Teamsters Canada Rail Conference, 2018 CanLII 933](#)

4591, though this context may be taken into account when evaluating discipline.

25. In CROA 4603, the arbitrator substituted written warnings for the 30-day suspension and the termination that CP had imposed.

26. In CROA 4621¹⁶, Arbitrator Sims cautioned that arbitrators must ensure that ETs are not used to target employees. Similarly, they do not form part of an employee's disciplinary record for arbitration purposes:

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.

27. CP remained fully entitled to plead that it still had cause for dismissal, despite Arbitrator Hodges overturning Mr. Igbelina's 30-day suspension. But its attempt during the hearing to file more ETs into evidence¹⁷ demonstrated Arbitrator Sims' legitimate concerns. These past ET tests never formed part of Mr. Igbelina's disciplinary record. He had never had a chance to contest them. They cannot be raised at arbitration to support CP's case for just cause.

28. CP satisfied the arbitrator that it could impose a minor disciplinary measure. But the appropriate penalty, given all the circumstances, was a written warning, much as other arbitrators have awarded in similar circumstances¹⁸.

29. Following the incident, Mr. Igbelina sought out further information and candidly admitted his error during his investigative statement¹⁹. These factors further make termination excessive.

¹⁶ [CROA 4621](#).

¹⁷ CP; Ex-07.

¹⁸ See the full discussions in [CROA 4523](#); CROA 4603; CROA 4621; and AH695.

¹⁹ TCRC Exhibits; Tab 5; QA 21-23

30. The arbitrator orders CP to reinstate Mr. Igbelina with full compensation and substitute a written warning for the termination.

DISPOSITION

31. For the foregoing reasons, CP will reinstate Mr. Igbelina, without loss of seniority and benefits, with full compensation including interest. A written warning will replace the termination currently in Mr. Igbelina's file.

32. The arbitrator retains jurisdiction for any issues arising out of this award.

SIGNED at Ottawa this 10th day of February 2023.

A handwritten signature in black ink, appearing to read 'G. Clarke', written in a cursive style.

Graham J. Clarke
Arbitrator