

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

CASE NO. 4549

Heard in Montreal, April 12, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The disciplinary assessment of a 30 day suspension, and outright dismissal of Conductor Brenda Brander of Lethbridge, AB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The instant matter involves two separate assessments of discipline;
30 Day Suspension

Following a formal investigation, Ms. Brander was issued a 30 day suspension described as "30 day Suspension from 1300 Thursday, November 6, 2014 to 1300 Saturday, December 6, 2014 for failing to ensure your movement was properly lined during the performance of your duties as Conductor on Assignment A17-1800 Churchill RS on November 5, 2014 resulting in the Churchill South Main Switch being run through, and then further resulting in two cars derailing when you took your movement northward back through the switch, Mileage 106 Taber Subdivision, a violation of CROR 114, CROR 106, CROR General Notice, CROR General Rule A."

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 Ms. Brander be made whole.

The Union contends the discipline assessed to Ms. Brander is excessive and unwarranted in all the circumstances, including an arbitrary application as well as mitigating factors evident in this matter. Accordingly, the Union requests the discipline be removed from Ms. Brander's employment record, and she be made whole for all loss. 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.

Dismissal

Following an investigation Ms. Brander was dismissed from Company service, which was described as "For failing to be attentive in your duties causing the West Main line switch to be run through at mileage 94.5 on the Taber Sub on January 12, 2016 while working on the A15-12."

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 Ms. Brander be made whole.

The Union submits that Ms. Brander was wrongfully held from service in connection with this matter, contrary to Article 70.05 of the Collective Agreement.

The Union contends that Ms. Brander's dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors. It is also the Union's contention that the penalty assessed is contrary to the arbitral principles of progressive discipline, and has been assessed in a discriminatory manner.

The Union requests that Ms. Brander be reinstated without loss of seniority and benefits, and that be made whole for all associated loss including 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.

FOR THE UNION:
(SGD.) D. Fulton
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

C. Clark – Manager, Labour Relations, Calgary

And on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
D. Fulton – General Chairman, Calgary
D. Edward – Senior Vice General Chairman, Calgary
G. Crawford – Local Chairman, Lethbridge
B. Brander – Grievor, Lethbridge

AWARD OF THE ARBITRATOR

Nature of the Case

1. CP hired Ms. Brenda Brander on February 21, 2011. She qualified as a conductor in August 2011 and as a locomotive engineer in 2014. TCRC has grieved two separate events: i) Mr. Brander's 30-day suspension from November 2014 and ii) her January 2016 termination.

2. For the following reasons, the arbitrator has decided to reinstate Ms. Brander in her employment. While CP did demonstrate that some discipline was warranted, the arbitrator has reduced that discipline for each event. This decision will also examine

TCRC's claim that CP failed to conduct a fair investigation, as well as CP's decision no longer to follow the Brown System.

Should Ms. Brander's discipline be overturned due to CP's investigations?

3. TCRC alleged that Ms. Brander's discipline was void *ab initio* because of the way CP conducted its two investigations. TCRC also argued that CP ought not to have held Ms. Brander out of service under article 70.05.

4. At article 70 of their collective agreement, the parties have negotiated a process designed to ensure fair and impartial investigations. For example, at article 70.01, CP has agreed to provide appropriate notice to the employee, including available evidence (s.70.01(4)). Article 70.03 allows the employee or a TCRC representative to be present at any witness interview.

5. Article 70.04 makes it clear that no discipline may take place without a fair and impartial investigation.

6. This Office has accepted that an irregular investigation, which can include withholding evidence, undermines an employee's substantive rights and renders that discipline void *ab initio*: [CROA&DR 3322](#). In a different context, but not unrelated to the issue of fairness, this Office found a failure to investigate a harassment complaint entitled an employee to a remedy: [CROA&DR 4521](#).

7. A proper investigation is also crucial to the parties' expedited arbitration process:

[CROA&DR 2073](#):

As previous awards of this Office have noted (e.g. CROA&DR 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. (emphasis added)

8. The parties in both their [Memorandum of Agreement Establishing the CROA&DR](#), and in their collective agreement, have mutually agreed that a fair investigation process will create a full written record for each CROA arbitration. This process replaces the days of oral testimony which would otherwise be necessary in an arbitration. CROA arbitrators then consider the parties' submissions, review the written record and issue decisions within 30 days.

9. That is the background with which to analyze the two separate investigations. The first investigation examined the events leading to Ms. Brander's 30-day suspension. At several places in the transcript, a TCRC representative objected to CP's questions. For example, one of the objections was on the basis that the question (QA 17) required Ms. Brander to admit guilt. While a written transcript cannot provide the full context that those

in attendance experienced, the arbitrator did not find TCRC's objection demonstrated that CP conducted an unfair investigation.

10. Q17 was an opened ended question about what happened ("Could you advise of the particulars of the events..."). Ms. Brander then described those events, including the fact that a derailment had occurred. The arbitrator does not see how this type of questioning impacted the investigation's impartiality. Moreover, Ms. Brander's answer appeared forthright and described what had occurred. Arbitrators often consider an employee's candour as a mitigating factor.

11. The arbitrator has also considered the allegation that CP failed to provide Ms. Brander with evidence given, for example, a comment in the transcript that "Company records indicated...". That transcript reference, however, was to rather notorious facts, such as when and with whom Ms. Brander was working on the day in question. That reference to company records is quite different from a situation where an employer might rely on prejudicial evidence about which an employee had never had a chance to comment: [CROA&DR 4521](#) and [CROA&DR 3322](#).

12. In those cases, the facts identified the undisclosed evidence.

13. Overall the transcript satisfied the arbitrator that CP's questions allowed Ms. Brander to give her recollection of the events in question. She and her TCRC representative similarly had the opportunity to add anything else they believed was relevant to the matter for the purposes of the record which potentially might come before

this Office. The arbitrator has not been persuaded that this first investigation rendered Ms. Brander's discipline void *ab initio*.

14. In the second investigation, a similar objection was made to a question on the basis that it asked Ms. Brander to admit guilt (QA 14). The arbitrator again concludes that an open-ended question asking Ms. Brander to describe the particulars of the event in question did not demonstrate partiality, especially in the context of a mutually-agreed investigation process under article 70 of the collective agreement.

15. TCRC also suggested that CP's investigation failed to inquire about several highly relevant mitigating factors (Union submission, U-1, Paragraph 69). As the above extract from [CROA&DR 2073](#) indicates, the investigation process is intended to be informal and expeditious. Relevant facts can be put on the record by either party, where necessary, to assist this Office in understanding the full context.

16. The arbitrator has not been satisfied in the present circumstances that CP's investigations rendered Ms. Brander's discipline void *ab initio*.

Impact of CP's decision to move away from the Brown System

17. In December 2015, CP advised that it would no longer be following the Brown System of discipline. CROA's jurisprudence has for decades applied the Brown System and developed unofficial "guidelines" regarding the appropriate demerit points for different

situations. The resulting disciplinary culture distinguishes the railways' process from those found in most other industries.

18. The parties advised at Ms. Brander's hearing that they are having ongoing discussions about discipline and the Brown System.

19. In [CROA&DR 4524](#), this Office noted that the parties may initially have a heightened obligation to provide full argument on appropriate discipline in a non-Brown world:

20. CP has satisfied the arbitrator that it had grounds to discipline Mr. Playfair for this rule violation which resulted in two cars derailing. CP has advised it does not wish to follow the Brown system any longer. Previous cases have suggested the appropriate types of penalties for this type of scenario. The parties in future cases will have to debate in detail appropriate penalties if the Brown system will not be followed so that consistent standards can be developed over time.

20. While this Office's arbitrators, who are all active in non-expedited arbitrations, will evaluate the discipline imposed for each specific case, the parties are invited to put forward arbitral authorities in support of their arguments. For discipline issued during a period covered by the Brown System, this Office will evaluate that discipline from that perspective.

Ms. Brander's 30-day suspension

21. The arbitrator has decided to substitute 15 demerit points for Ms. Brander's 30-day suspension. When CP imposed this discipline in 2014, the parties were still using the

Brown System. TCRC did not persuade the arbitrator that the principles from the KVP decision rendered Ms. Brander's 30-day suspension null and void. The Brown System was not a stranger to suspensions, which some employers have characterized as "final warnings". This Office has regularly examined both demerits points and suspensions within the context of progressive discipline.

22. The interview transcripts demonstrate Ms. Brander's candour when explaining what had occurred on the day in question. While CP suggested Ms. Brander expressed no remorse, the information she provided constituted a helpful recollection of the events.

23. CP seemingly made a significant mistake about Ms. Brander's past discipline record when it decided to impose a 30-day suspension. At paragraph 20 of its brief, CP wrote (Company Submission; C-1):

20. The Grievor's discipline record (Tab 3) provides 2 prior examples of failure to be attentive in her duties- both resulting in a run through switch. These amounted to discipline of 15 Demerits and a five (5) day suspension. Each discipline assessment for these similar violations has been progressive in nature.

24. The difficulty in CP relying on the 15 Demerits when imposing progressive discipline is that they had already been removed from Ms. Brander's discipline record (U-2). In August 2013, Ms. Brander had had those 15 demerit points removed from her record due to 12 months of active service without discipline.

25. The evidence moreover simply did not support the imposition of such a long suspension for the events in question. As mentioned, under the Brown System, a

suspension might serve as a final warning for employees who have already accumulated a significant number of demerit points. That simply was not the case for Ms. Brander.

26. Given these circumstances, the arbitrator reduces Ms. Brander's 30-day suspension to 15 demerit points. CP will compensate Ms. Brander resulting from the removal of her suspension.

Ms. Brander's termination

27. CP terminated Ms. Brander after it had provided notice in December 2015 that it would no longer follow the Brown System. Given Ms. Brander's past discipline, as clarified and modified above, the arbitrator has decided to substitute a 5-day suspension for Ms. Brander's termination.

28. The transcript confirms that Ms. Brander again demonstrated candour in her investigative interview. While the events provided a basis for some discipline, the investigation transcript did not suggest that Ms. Brander lacked rehabilitation potential. Rehabilitation is central to any progressive discipline system. While some grave events standing alone may justify termination, the point of progressive discipline in cases like that of Ms. Brander is to provide well-intentioned employees with an opportunity to improve.

29. While Ms. Brander received a harsher penalty than LE Harris, the arbitrator is satisfied that this resulted from significant differences in years of service and a pre-

existing disciplinary record. This decision has also modified that pre-existing disciplinary record.

30. When viewed in context, TCRC did not persuade the arbitrator that CP's decision to hold Ms. Brander out of service (article 70.05) vitiated her discipline. The arbitrator also was not directed to any authority how CP's reference to a non-existent switch would void the discipline.

31. The arbitrator orders that CP reinstate Ms. Brander forthwith. CP will substitute 15 demerit points for the 2014 30-day suspension it imposed. CP will substitute a 5-day suspension for Ms. Brander's 2016 termination.

32. The arbitrator retains jurisdiction, particularly regarding the calculation of the proper compensation owing to Ms. Brander.

April 26, 2017



**GRAHAM J. CLARKE
ARBITRATOR**