CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4341

Heard in Montreal, October 16, 2014

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the assessment of 40 demerits, 30 demerits and subsequent discharge for accumulation of demerits to Conductor Peter Krug.

JOINT STATEMENT OF ISSUE:

The instant matter involves two separate assessments of discipline.

40 Demerits

Following an investigation, on October 19, 2012 the Company assessed Conductor Krug 40 demerits "For failure to ensure the cars under your control were secured during switching resulting in the side collision and derailment of equipment on October 2,2012 while working the VK11-02 Road switcher, Kamloops Yard, Mile 128.3 Shuswap Subdivision, a violation of CROR General Rule C, CROR Rule 112,CROR Rule 106,CROR General Notice, GOT Section 14 Item 1.3 (a and b) and Safety Rule Book for Field Operations Section 3 Event Based Cardinal Rule Violation (1.6)."

The Union contends that the assessment of 40 demerits is unjust, excessive and unwarranted in all of the circumstances, including mitigating circumstances, pertaining to Conductor Krug's limited role in connection with the October 2, 2012 incident. The Union further contends that this extreme penalty is beyond the scope of discipline issued under similar circumstances in the past.

The Company disagrees with the Union's contentions and has denied the Union's request.

30 Demerits and Discharge

Following an investigation, on June 17, 2013 the Company assessed Conductor Krug 30 demerits "For booking rest past the assigned start times on May 14th and May 19th, 2013, of your 5 day per week assignment, in Kamloops BC, as evidenced by your absenteeism and work history; a violation of the terms and conditions of your Collective Agreement (Article 29.16) and Canadian Pacific's Attendance Management Policy." He was subsequently dismissed for accumulation of demerits.

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 Conductor Krug be made whole.

Further, the Union contends that the discipline and subsequent termination of Mr. Krug's employment is unjustified, unwarranted and excessive, and requests that Mr. Krug 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 with the Union's contentions and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. Olson	**(SGD.) A. Becker**
General Chairperson	**Labour Relations Officer**

There appeared on behalf of the Company:

M. Moran	– Labour Relations Officer, Calgary
B. Medd	– Labour Relations Officers, Calgary
M. Jackson	– Superintendent, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, Calgary
D. Edward	– Vice General Chairperson, Medicine Hat
G. Edwards	– General Chairperson, Revelstoke
J. Linnell	– Local Representative, Kamloops
W. Zimmer	– Local Representative, Moose Jaw
P. Krug	– Grievor, Kamloops

AWARD OF THE ARBITRATOR

The Company hired Mr. Peter Krug (the "grievor") in June 1988. At the time of his dismissal on June 17, 2013, for an accumulation of demerits, the grievor had 25 years service with the Company. His disciplinary record, without consideration of the grievances under review, stood at 10 demerits at the time.

In respect of the first incident, the Union argued that discipline was unwarranted. In my view the only issue is whether the quantum of discipline imposed was appropriate in all the circumstances for the reasons set out below.

The facts are not substantially in dispute. On October 2, 2012, the grievor was working as the Trainman on the Roadswitcher assignment at Kamloops Yard. He was working with Locomotive Engineer Gerry Mathieson (“LE Mathieson”) and Conductor Brian Clow (“Conductor Clow”).

The crew was switching railcars on Train 409 between tracks 4 and 10, and at the time of the incident the crew had already switched three loaded centrebeam cars onto track 4. As the next movement proceeded, the cars rolled eastward and collided with the trailing railcars of the switching movement. Two of the three cars derailed – the east end car leaning to the south approximately 45 degrees.

The initial fact-finding investigation revealed that the three centrebeam cars had been set off individually into track 4 by Conductor Clow. He was assessed with 40 demerits for his part in the incident. Conductor Clow admitted that he had not applied any hand brakes as was required. According to Conductor Clow, he had not applied the handbrakes because he was in the vicinity to observe the cars while switching between tracks 10 and 4. He had left the cars unattended briefly, which is when the three cars rolled.

At the time of the incident, LE Mathieson was on a west-facing locomotive with 40 trailing railcars. He was approximately 2000 feet away from the incident. The Company made no assessment of discipline against LE Mathieson.

The grievor was on the north side of the cars at the high switch lining the movement at the time the cars rolled. The record confirms that he was not in a position to see the cars on track 4. The grievor had assumed that Conductor Clow was ensuring that the equipment was being protected during the switching moves. He did not, however, inquire of, nor did he verify with Conductor Clow that the hand brakes had been applied when Conductor Clow left the cars unattended.

CROR Rule C states that employees must:

> (i) be vigilant to avoid the risk of injury to themselves or others;
> Crew members are jointly responsible for making verbal communication between each other and confirm it is properly understood whenever any of the following work activities apply to them:
> ….
> Hand brakes are applied or released
> …

General Operating Instructions (GOI) section 14 speaks specifically to hand brakes – leaving equipment, and states: “a single car must ALWAYS be left with the hand brake applied.” The GOI also states: “IMPORTANT: Crew members are responsible to inquire and confirm with each other that equipment is left in accordance with these instructions.”

The Company maintains that the imposition of 40 demerits in the circumstances of this incident should not be disturbed. The Union says that there was nothing that the grievor did or failed to do that contributed to the incident and that he should have been considered similarly situated to LE Mathieson who, as previously mentioned, received no discipline for the incident.

The Company relies on **CROR 3884** and **CROA 3974** to support the assessment of discipline imposed against the grievor. I have reviewed the two cases provided to me. Circumstances such as these present a challenge to an employer considering that as a general proposition like offenses should receive similar treatment where the application of the rules are the joint responsibility of the crew.

In **CROA 3884** the grievor, a Yard Service Helper (with fifteen months service and forty-five demerits assessed against him for four prior instances of discipline) was assessed with 30 demerits, when Yard Service Anderson (“Mr. Anderson”) with whom the grievor was working, was assessed with 40 demerits. They were engaged in beltpack switching (“RCLS”) when Mr. Anderson had directed the grievor to ride on the point.

Mr. Anderson and the grievor had shoved two cars into a track to form a joint with other standing equipment but Mr. Anderson had failed to ensure that the joint was securely made and that the cars – on sloping track – had the benefit of the application of hand brakes. When they pulled their power out of the track the two cars rolled back out of the track causing a collision with the side of their yard locomotive.

The Arbitrator declined to reduce the discipline against the grievor, who had followed Mr. Anderson’s direction to ride on the point of their movement, referencing the grievor’s independent obligation to respect all operating rules. The grievor had made no effort to verify that Mr. Anderson did in fact make a secure joint.

In **CROA 3974**, the grievor with only a few years service, was to secure the train at the conclusion of the crew's tour of duty. He left a train – with four locomotives, 26 loaded cars and 17 empty ones - with a fully released air breaking system on a 1% downgrade. The train rolled within minutes, reaching 20.7 mph before it derailed after travelling approximately 1.4 miles. Nine cars derailed, seven of which were loaded with gasoline. Three of those cars leaked. The damage exceeded $1.6 million. The Arbitrator upheld the grievor's discharge and gave particular consideration to the fact that the grievor, just months prior to the incident, had been assessed with a seven day deferred suspension for a violation of CROR rule 112 for failing to properly secure cars that had run out and fouled another track impacting other cars.

CROA 3884 is helpful to the extent that it reinforces that each member of the crew has an independent obligation to respect all operating rules. This may translate, as it did in **CROA 3884** to differing assessments of discipline against crew members. That differing assessment takes into account individual roles in the context of the joint responsibility to respect the operating rules. An employer also looks to mitigating factors, including an employee's individual disciplinary history in determining the appropriateness of any given penalty in all the circumstances.

There are some similarities between **CROA 3884** and the matter before me. However, in this case, the factual context amplifies the disparity in culpability between Conductor Clow and the grievor as compared to Mr. Anderson and the grievor in **CROA 3884**. In the circumstances before me, it is beyond controversy that it fell in the first

instance to Conductor Clow to apply the handbrakes on the cars. Primary culpability in respect of that failure lies with him. In this case, the grievor was no position to see the cars on track 4. Notwithstanding this, the grievor's failure to abide by the operating rules did play a part in the incident, as was the case with the grievor in **CROA 3884**. For this failure, he is liable to discipline, albeit less than Conductor Clow.

The grievor had 25 years of service with the Company at the time of the incident. Prior to consideration of the two matters now before me, the grievor's career demerits stood at 10. However, 30 demerits had been imposed in August 2011 for rules violations resulting in a side collision. Those 30 demerits were subsequently reduced by 20 demerits the following year, as the grievor had been discipline free for one year.

Having regard to what I see as a significant disparity in culpability for the rules violations between Conductor Clow and the grievor in the factual circumstances of this case, and considering the entirety of the grievor's record, I direct that the 40 demerits imposed by the Company be substituted with 20 demerits.

I turn now to the second matter before me – the Company's imposition of 30 demerits against the grievor for booking rest past the assigned start times on May 14 and May 19, 2013, in respect of his five day per week assignment.

The facts are not in dispute. The grievor, after working two nights in a row on "RS30" tied up on the morning of Monday May 13, 2013 at 05:50 hours. He booked 32

hours rest. He had successfully bid on a new RS30, scheduled Fridays through Tuesdays. The grievor was therefore lined up to work at 10:00 hours on May 14, 2013.

The Company relies on Article 29.16 of the collective agreement to support its position that the grievor was precluded from booking rest in the circumstances. Notwithstanding this, it had become standard practice at the Kamloops terminal for employees to book rest following a change in assignments, and the Company had tolerated this practice for some time prior to the incident involving the grievor.

On May 18, 2013, the grievor tied up at 20:00 hours. He then booked 15 hours and 25 minutes rest, putting him past the scheduled start time for his assignment commencing the following morning, May 19, 2013 at 10:00 hours.

In his investigative statement, the grievor stated that he had been told in February 2013 to ignore the bulletined start time, because it would be staggered five hours after that time, which would make it 15:00 hours for the third, fourth and fifth days of the five-day assignment. The grievor expected that, consistent with that expectation, his start time would be 15:00 hours, but when he arrived at work, he learned that the assignment had not been set back. At that time the grievor was removed from service pending investigation.

During the grievor’s investigative statement, he explained that it was a conversation that he had had with Assistant Superintendent Tony DeGirolamo, who was

also the investigating officer, that led to his understanding that the new assignment – RS30 - would be run "as it had in the past" – which he took to mean that it would be staggered.

Now implicated in the grievor's explanation for his having booked rest as he had, the investigating officer responded as follows:

> Q:38 To clarify the situation, Mr. Krug you understand that when I advised you "it would be ran the same way as it was prior" that what I meant was that all the assignments would stay on, meaning RS 10, 20, 30, 40 and 50, and that the only change would be, that the jobs will be based on collective agreement, and that the company would anticipate crews giving notice to be in an off duty in 10 hours rather than working a full 12 hours?
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> A: No that's not what was meant because during the month of February when the Ducks switcher was on, you had a staggered start time, and once you eliminated the Ducks switcher it became a set starting time, so currently the Ducks switcher is still working and that's why the staggered time would be taking place.
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> Note: At this stage in the investigation the investigating officer [Mr. DeGirolamo] adds the following note: I recall driving Mr. Krug and Mr. Peereboom to the Mannix spur thought I do not recall the date. I recall that during this drive Mr. Krug did question me on how the "new assignments would be set up." I also recall advising Mr. Krug that the assignments would be "ran the same way they were when we cancelled the local rules for the first time" meaning all the assignments would stay on, and be based on collective agreement road switcher rates. This was a decision that was being made because of the "attempt" at running three road switchers (at 0700/1500/2300) during the period of time which the local rules were cancelled previously, which resulted in many extra yards being called. There was no intent during this conversation to advise Mr. Krug of the hours an employee would be required to work for duty, once the upcoming changes took effect, as this would ultimately be bulletined to crews interested in bidding the new assignments. This conversation took place casually and was based on a manager simply sharing information with the crew, on upcoming changes.

In denying the grievance, the Company's response dated October 28, 2013, relies on the fact that Mr. Krug had been "educated" on the reasons why his having

booked past his next day's shift on May 12, 2013 was not permitted, yet he did so a second time in the circumstances described above.

At the hearing, the Company inadvertently revealed that the "education" referred to above was said to have been imparted to the grievor by Superintendent DeGirolamo. At the hearing the grievor denied that this had been the case.

At Step 2 of the grievance procedure, by letter dated November 20, 2013, the Union raised for the first time that the investigation in this matter had been unfair and not impartial and that as such the investigation must be considered null and void. The Union took this position because the investigating officer, namely Superintendent DeGirolamo, essentially provided evidence, reproduced above, which related directly to the grievor's explanation for having booked off rest for 15 hours and 25 hours on May 18, 2013 putting him past the scheduled start time for his assignment commencing May 19, 2013 at 10:00 hours. The grievor's explanation, though unanticipated, brought the investigating officer's information into play. The investigation continued without objection.

Since the Union did not raise any objection to the situation as it then arose, I am unable to sustain its procedural objection. It was incumbent on the Union to raise its concern at the disciplinary investigation. By failing to make a timely objection, the Union deprived the Company of an opportunity to replace Assistant Superintendent DeGirolamo as the investigating officer.

This jurisprudence of this Office is clear to the extent that it is incumbent upon a grievor or his Union representative to raise any procedural objections at the time of a disciplinary investigation. In **Ad Hoc 521** Arbitrator Picher stated, in part:

> The arbitrators of the CROA Office have repeatedly held in the past that it is in fact incumbent upon a grievor or his or her union officer to raise any procedural objections at the time of the disciplinary investigation, rather than to "lie in the bushes" and raise such objections for the first time only during the grievance procedure and/or at arbitration. Indeed, saying nothing may amount to a waiver of the grievor's right to object, as was said in **CROA 2911**:
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> … It is not disputed that in the case at hand neither the grievor nor his Union representative made any clear and formal objection to the lack of meaningful notice at the time of the disciplinary interview. In the circumstances, I'm compelled to conclude that by failing to put the Company on notice of its intention to challenge the validity of the proceedings, the Union must now be taken to have waived its right to do so. There is obvious prejudice to the employer if a procedural objection of this kind is first raised at the arbitration stage months after the assessment of discipline. On that basis the Union's objection cannot succeed.

The Company could not have anticipated that the grievor would suggest that he had relied on a conversation with the investigating officer which had taken place well prior to the incident at issue as support for his honestly held belief that he was able to book off rest when he did. By saying nothing at the time of the disciplinary interview, and by failing to put the Company on notice of its intention to challenge the validity of the proceedings, the Union waived its right to do so. The Union's objection is therefore dismissed.

Notwithstanding the above, I am of the view that the imposition of 30 demerits was extremely excessive in all the circumstances. I note that the grievor was forthright during the investigation, answering all questions put to him quite candidly.

The practice of booking rest past one's assignment, when moving from one assignment to another was a long-standing practice in the Kamloops terminal. The Company was well aware of the practice, and tolerated it. I have no doubt that the grievor honestly believed that he was acting quite properly when he booked 32 hours rest in the early morning of May 13, 2013, having regard to that practice. No discipline was warranted against the grievor in the circumstances. Any reference thereto is to be removed from the grievor's record.

As for the grievor booking off rest on May 18, 2013, believing that that his assignment would be set back to 1500 hours as it had been in the past, I am unable to see how the alleged improper booking of rest incidents is related to the grievor's "absenteeism and work history." I appreciate that this grievor had broken service with the Company, which resulted in an agreement whereby the Company reopened his employment file in 2010, however, there was not one attendance or missed-call related infraction on the grievor's disciplinary record in over 25 years of service with the Company.

In all the circumstances, I am of the view that a letter of warning would have been sufficient considering the grievor's failure to attend by 10:00 hours on May 19, 2013. A letter of warning would have been consistent with the principles of progressive discipline for this transgression, albeit an innocent one.

The grievance is therefore allowed in part. I direct that reference to the grievor's booking rest past the assigned start time on May 14, 2013, together with any reference to the grievor's absenteeism and work history and the terms and conditions of his collective agreement be stricken from the grievor's record. The assessment of demerits for booking rest past the assigned start time on May 19, 2013 is to be substituted with a letter of warning.

Having regard to the above, the grievor's record is to be amended to reflect the substitutions to the Company's penalties as set out above. The grievor is be reinstated into his position with the Company forthwith, without loss of seniority and with compensation for all wages and benefits lost. His disciplinary record will stand at 30 demerits.

October 29, 2014

CHRISTINE SCHMIDT
ARBITRATOR