CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4641

Heard in Edmonton, June 12, 2018

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of twenty (20) demerit marks to Conductor S. Woodrow of Kamloops, B.C., for "violation of GOI 5.2, 5.3 on your tour of duty on March 16, 2017, on the M30251-15".

JOINT STATEMENT OF ISSUE:

On March 16, 2017 while working on M30251-15 Conductor Woodrow was the subject of a rules compliance test, whereby the radio talker message on a Wayside Inspection System detector was disabled. The testing officer determined that Conductor Woodrow did not contact the RTC to report the apparent malfunction.

The Company conducted an investigation and concluded that Conductor Woodrow had violated General Operating Instructions 5.2 and 5.3, and was deserving of the discipline of 20 demerit marks.

The Union submits that there were mitigating factors, and coaching and mentoring would have been sufficient to ensure future compliance. Conductor Woodrow had not previously been disciplined for any related rule violation. The Union's position is that the discipline should be expunged or reduced.

The Company disagrees with the Union's contentions. It points to Mr. Woodrow's admission of fault, and maintains the discipline assessed was warranted and appropriate in light of his discipline history.

FOR THE UNION:
(SGD.) R. S. Donegan
General Chairperson

FOR THE COMPANY:
(SGD.) D. Crossan (for) **K. Madigan**
Vice-President, Human Resources

There appeared on behalf of the Company:

D. Houle – Labour Relations Associate, Edmonton
K. Morris – Senior Manager, Labour Relations, Edmonton
C. Cousineau – Senior Manager, Law Department, Edmonton
S. Jones – Supervisor, Edmonton

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chair, Saskatoon
R. S. Donegan	– General Chair, Saskatoon
S. Woodrow	– Grievor, Chilliwack

AWARD OF THE ARBITRATOR

This discipline arises from an efficiency test. The grievor should have been listening for a confirmatory message as his train passed over a hot box detector. Management had disabled the messaging function for the test. The grievor maintains he was distracted "with all the trains coming and going and radio chatter". No harm arose from the incident. However, the train he was on was approaching a terminal in an urban area. It included five cars loaded with dangerous goods; hydrochloric acid and sodium hydroxide. It also included eight other cars with dangerous goods residue.

The Union asserts once again, that efficiency testing is to be used as an educational not a disciplinary tool. Discipline, if it is to follow a failed efficiency test, should be the exception not the rule. See: **CROA 4621**.

The grievor's Locomotive Engineer was assessed 15 demerits for the same incident. That too is being grieved. The Employer's only justificiation for the difference is the Locomotive Engineer's length of service and minimal prior record.

The initial investigation suggested that the Employer took exception to two features of the failed efficiency test; first the failure to initiate a call after 45 seconds when no response was heard and second, the failure to contact the RTC even after the crew was

told they had failed the test. The grievor recognized his fault on the first point, but believed no call-in was necessary once they learnt this was just a test. In my view this second aspect was not deserving of anything beyond coaching. The Company did not pursue this second aspect at the hearing.

The Employer relies upon **CROA 3889** - **3887** to support its imposition of 20 demerits. Arbitrator Picher had to address three incidents of discipline which cumulatively resulted in discharge. One of them was virtually identical to the case at hand. As an overall result, having set aside other discipline, the Arbitrator reinstated the grievor with full pay. However, of the one similar situation he said:

> The third incident under consideration involves the assessment of twenty demerits for the grievor’s failure to have reported a hot box which apparently failed to communicate with his train on January 14, 2009. In fact, the volume control on the hot box had been turned down by a supervisor who was performing an efficiency test of the grievor and his crew on that day. The only explanation that the grievor was able to give was that he was too busy at the time and simply did not notice that the hot box, of which he was aware, had not made a report. It was obviously his duty then to acknowledge and report what appeared to be a hot box failure, and to take whatever steps might be necessary to ensure the integrity of his own train.
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> In the Arbitrator’s view the assessment of twenty demerits was not unreasonable in the circumstances, and this aspect of the grievance must be dismissed.

The Union’s response to this case is that it is unique and has not been followed since.

The Employer argues that the 20 demerit assessment is also justified by a progressive approach to discipline, the grievor's record which includes a rule violation, and his short service.

The grievor's prior record involves a written reprimand in October 2016 for refusing a call, a 10 demerit assessment in November 2016 for violating Rule 114B and running through a switch, and a 15 demerit assessment in January 2017 for missing a call for assignment. After this incident, the grievor was subject to further discipline which led to his termination for excessive Brown system points.

The Union argues that several prior awards show a reluctance by CROA Arbitrators to uphold arguably high demerit penalties where to do so is to contribute to an employee's discharge. Twenty demerits, it asserts, is a very serious penalty amounting to "one third of a person's career". It sees this as particularly significant where it is imposed for a relatively technical violation following an efficiency test.

The Union refers to **CROA 4554** which it suggests is very similar. Arbitrator Moreau substituted a written warning for a 15 point penalty for a similar incident. However, the reasons the arbitrator described it as a "minimal breach" was the grievor's general compliance with the rule, frustrated by a co-worker mis-dialing the RTC number. In **CROA 4165**, the grievor had been terminated following a failed efficiency test. Arbitrator Picher set aside the termination, despite a long record over twenty-two years

of service, because “the matter which resulted in his termination was in fact a relatively minor offence.” He substituted a reinstatement without compensation.

CROA 4443 is cited as another example of demerits for a minor violation being reduced where they contributed to a termination. My reading of the case is that the arbitrator felt the assessment of 35 demerits, for a relatively minor violation, following an efficiency test, was excessive in its own right. The resulting termination was influential but not the prime reason for the reduction from 35 points down to 10. Much the same sense, of an excessive response, appears to be rationale **CROA 3661** where a 20 demerit penalty was reduced down to a written warning. The employee in that case had twenty-eight years of service with a very good record.

The Union urges that the circumstances disclose no intentional act of wrongdoing on the part of the grievor. He accepted his error and nothing suggests he had not learned from the experience or is incapable of pursuing a safe career in the future. The record does not disclose a negligent or careless employee. This was his first violation of the GOI provision in question and is not equivalent to a major rule infraction.

The Union expresses concerns that it took 38 days after the investigation meeting until discipline was imposed. This, it suggests, points to an undue level of scrutiny. Despite the delay, there is no evidence that the grievor was targeted for the efficieny test. Nothing before me, other than the time taken, points to any lack of *bona fides* and I am unable to conclude that the decision to impose discipline was taken for improper motives.

The Union urges me to consider that the girevor was motivated to pursue a career in railroading, exemplified by his having taken a conductor course from B.C.I.T. He also has strong reasons for wanting to get back to work in Kamloops, where he has two children living with his former spouse. To find work he has had to move to Chilliwack, but wishes to return to Kamloops.

It is not within the mandate of this arbitrator in this decision to deal with the appropriateness of the grievor's subsequent termination, albeit that the demerits assessed here have contributed to that result. The issue I am charged with is whether 20 demerits was appropriate or unjust. Like Arbitrator Picher in **CROA 3889 - 3887** my conclusion is that it was not unreasonable in the circumstances. I therefore dismiss the grievance.

July 10, 2018

ANDREW C. L. SIMS
ARBITRATOR