CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4642

Heard in Edmonton, June 12, 2018

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of twenty-five (25) demerits to Conductor Steven Woodrow of Kamloops, B.C. for "missed call for assignment W90651-21 on July 21, 2017" and his subsequent discharge for accumulation of seventy (70) demerits.

JOINT STATEMENT OF ISSUE:

On July 21, 2017, Conductor Woodrow missed a call for duty at 03:15.

The Company conducted an investigation and determined that Conductor Woodrow was culpable, and was deserving of the discipline of 25 demerit marks.

The Union submits that the circumstances of the instant case do not justify the ultimate penalty of discharge, and requests that the discipline be mitigated to a level short of discharge.

The Company disagrees with the Union's contentions, and maintains the discipline was progressive, warranted, and appropriate for the repeated occurrence of a missed call for work.

Accordingly, the Company denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. S. Donegan	**(SGD.) D. Crossan** (for) **K. Madigan**
General Chairperson	**Vice-President, Human Resources**

There appeared on behalf of the Company:

K. Morris	– Senior Manager, Labour Relations, Edmonton
D. Houle	– Labour Relations Associate, 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 is the second of two grievances involving Steven Woodrow. In **CROA 4641** demerits of 20 points were upheld, imposed for failing to react to a hot box failure, albeit management induced during an efficiency test.

Some two months later, with accumulated discipline of 45 Brown system demerits, the grievor missed a call for duty. He was assessed 25 demerits, bringing his total to 70. This resulted in his dismissal for an accumulation of in excess of 60 points.

The grievor is a short service employee. He began work in April 2015, was subsequently laid off for eighteen months, and recalled in September 2016. His record, all accumulated after this recall, 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;
- A 15 demerit assessment in January 2017 for missing a call for an assignment;
- 20 demerits (now upheld in CROA 4641) for the hot-box failure; and
- A 3 day suspension on July 4, 2017 for missing a call on May 28, 2017;

On July 21, 2017 the grievor knew he was liable to be called to work. The Crew Dispatcher made six attempts to call him using his landline and cellular numbers, leaving

messages. In response to questions during his investigation on July 27, 2017 the grievor offered the following:

> 10Q. Please explain for the record why you missed your call?
>
> A. I slept through the call and my phone was on silent mode. I was not at home when they called my landline.
>
> 11Q. Why was your phone on silent mode?
>
> A. I don't know, I can only assume the button got pushed in my pocket or my kids put it in silent mode accidentally.
>
> 12Q. Did you call anyone a Trainmaster or Crew office?
>
> A. I called Peter Sampson at approx. 600 am

The Employer looks on the grievor's reasons with some skepticism, noting particularly that, when he was disciplined for the May 28, 2017 incident, he offered up a very similar explanation, saying during that investigation:

> 10Q. Please explain for the record why you missed your call?
>
> A. I was sleeping and my phone was on the night stand. When I woke up and checked my phone I realized I missed a call for duty, I checked my phone and it was on the silent mode I must of inadvertently put it on silent mode by mistake.
> …
>
> 16Q. Mr. Woodrow, do you have anything further to add to this employee statement?
>
> A. I recently moved and I now have a landline to protect calls. I have furnished the company with my landline number in order to prevent missing calls.

In CN's view, the several prior incidents of discipline for refusing or missing calls were sufficient to put the grievor on notice of the need to make sure he could be reached.

He was admittedly aware of the standards expected of him and the importance attached to these standards by CN.

The Union argues, as an explanatory and mitigating factor, that the grievor was, at the time, going through marital and related child care difficulties. At the close of the investigation in this case, the grievor raised this point, saying:

> I have been in contact with EFAP to help me with my problems at home. I also talked to Peter about changing departments.

By way of a fuller explanation the Union asserts the missed shift was inadvertent. The grievor had been struggling with personal issues. He contacted Employee and Family Assistance and spoke with his supervisor. He had refused the call in January because his spouse had unexpectedly shown up and left him with his children and he was unable to arrange alternative care. The reason he was not at home on this occasion, and thus not available by landline, was because he was looking after his children at her house because she had been called into work. These matrimonial issues, the Union argues, are now resolved, settled by a regular visitation and custody arrangement that will allow the grievor to be reliably on-call in the future.

As in **CROA 4641**, the Union urges that Mr. Woodrow has shown he is committed to a career with the railroad. He trained at BCIT and maintained his interest in the position through his eightteen month layoff. He has a strong reason for wanting to return to Kamloops because his ex-wife and two children live there. Currently, he has to visit from Chilliwack where he had to move to find alternative work.

In the Union's view, a 25 point penalty is excessive, suggesting that similar discipline for other employees show a range topping out at 15 demerits. This penalty, it argues, is so out of the usual range that it constitutes discriminatory discipline, particularly as the Employer knew, in choosing this figure, it would result in termination. The Employer it notes, has chosen a disciplinary approach, and not an administrative discharge for undue absenteeism. As such, it bears the onus of proof.

The Union relies on **CROA 4524** where Arbitrator Clarke reduced a 30 day suspension to a written warning for missing three calls within a two month time span. That suspension had never been served, and the Arbitrator's ruling needs to be seen in view of the four other disputes that formed part of the same award.

In **CROA 3639**, Arbitrator Picher reduced a 7 day suspension down to 3 days for missing two calls. This was mixed with other, non-culpable, absences.

The Union also refers to **CROA 3190, 4627, 4201** all of which involved reduced, and lower, penalties for missed calls.

To support its argument of discriminatory discipline, the Union refers to Ad Hoc Case 305 where Arbitrator La Charité relied upon Brown and Beatty's description of the principle, at paragraph 7:4414 of Canadian Labour Arbitration:

> Arbitrators have generally been sensitive to the basic principle that similar cases must be treated in a like fashion, which simply reflects a

> universal precept of fairness and justice. Accordingly, in assessing the reasonableness of a sanction imposed on an employee, arbitrators have regarded the penalties invoked by the employer in similar circumstances in the past as tending to reveal the actual concern that management has for such behaviour. Accordingly, when an employee is able to prove that other employees who engaged in the same conduct for which he was disciplined were either not disciplined at all, or suffered much less severe disciplinary sanctions, arbitrators generally will find the employer to have discriminated against that employee even though it may be established that the employer did not act in bad faith or did not intend to discriminate against her personally.

See also **CROA 4466** and **3581**.

On this point of alleged discriminatory discipline, I note a fundamental difference of approach between the Union and the Employer. The Union, and arguably the Brown points system itself, sees an appropriate level of penalty for particular offences, less related to the Employee's past record. The Employer's submissions refer repeatedly to the notion of progressive discipline, with escalating penalties based on the Employee's prior offences. This, if accepted, justifies penalties for repeated offences that transcend any "penalty per offence" norm. This difference of view is increasingly significant given CROA's responsibility for adjusting cases between two major railroads, one that has rejected the Brown points system and the other that has not. There will no doubt be a point at which this difference will need to be explored further, but I find no need to do so here.

The Employer's position is that the grievor has been given opportunities, through escalating and progressive discipline and coaching to change his behaviour, but has demonstrated an unwillingness to do so. It emphasizes particularly its decision, just over

two weeks before this incident, to impose a three day suspension instead of points for a missed call. This was not characterized as a last chance option, but the Company suggests it was tantamount to that, and no additional opportunity is warranted. This three day suspension was not grieved.

In support of its case of a progressive discipline approach the Company refers to the comments of Arbitrator Picher in SHP480 where he said:

> Certainly within the railway industry, both in the Canadian Railway Office of Arbitration and in the presentation of grievances to arbitration within the shopcraft trades, parties generally rely upon the prior service and disciplinary record of employees, both good and bad, to advance their positions in relation to the appropriateness of discipline assessed for a particular incident. That is a process arguably essential to the administration of progressive discipline. I know of no principle which would prevent the Company from relying upon the grievor's disciplinary record, as it seeks to do in the instant case.

See also **CROA 4569.**

The Employer acknowledges that arbitrators have mitigated similar penalties for long service employees. See: **CROA 3353** and **3639**. However, it relies on **CROA 3884** to suggest that a poor record for a very short service employee is an aggravating factor.

While I agree with the Union that this particular instance was unintentional, it has to be seen against a backdrop of similar issues and clear warnings. In particular the Company's three day suspension just a couple of weeks earlier should have caused the grievor to be much more careful. The Company is justified in looking on the repeat "cell phone failure" excuse as weak.

I also recognize that marital and related child care issues between working spouses can present real problems in the short term. These, it appears have been resolved. I believe it would be fair in the circumstances to give the grievor one last chance to show that to be the case, and to resume his employment However, the time lost should not be at the Employer's expense. I set aside the 25 demerits and the grievor's termination and replace it with a time served suspension, without compensation. I remain seized of any other remedial matters that cannot be resolved between the parties.

July 10, 2018

ANDREW C. L. SIMS
ARBITRATOR