CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4732

Heard in Montreal, April 14, 2020

Concerning

ONTARIO NORTHLAND TRANSPORTATION COMMISSION

And

UNIFOR – LOCAL 103

DISPUTE:

The assessment of 60 demerits and subsequent discharge of Engine Attendant L. MacIvor of North Bay, Ontario for reporting to work on September 19, 2018, with the smell of alcohol on his breath and whereas, as a consequence, he was required to undergo a Breath Alcohol Test that indicated a Blood Alcohol Content of 0.047 at 11:43 a.m. and 0.039 at 11:59 a.m.

The discharge of Mr. MacIvor due to the misconduct described above, which resulted in the accumulation of 100 demerit points (Mr. MacIvor had 40 demerit points on his record at the time of the incident).

JOINT STATEMENT OF ISSUE:

The Union contends that at the time of this incident the Ontario Northland Transportation Commission did not have a specific drug and alcohol policy. The Union further contends that the manner in which this matter was administered was arbitrary and a departure from the past practices normally used in such circumstances and an affront to Mr. MacIvor's personal dignity at the workplace.

Lastly, the Union contends that the Commission failed to provide Mr. MacIvor with a fair and impartial investigation as contemplated under Rules 34.1 and 34.2 of the Collective Agreement.

The Union requests that the 60 demerits be expunged and that Mr. MacIvor be reinstated to service without loss of seniority and benefits, and that he be made whole for all lost earnings with interest during the period in time that he was discharged.

The Commission disagrees and denies the Union's requests.

FOR THE UNION:
(SGD.) B. Kennedy
National Representative

FOR THE COMPANY:
(SGD.) C. Mitic
Manager, Labour and Employee Relations

There appeared on behalf of the Company:

G. Ryans	– Counsel, Filion Wakely, Toronto
M. Van Ginkel	– Counsel, Filion Wakely, Toronto
D. Baker	– Director, Human Resources, North Bay

And on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
J. Krajc	– President, Unifor Local 103, North Bay
A. Mitchell	– Former President, Unifor Local 103, North Bay

AWARD OF THE ARBITRATOR

BACKGROUND

1. On July 19, 2000, the Grievor started working for the Company as a Gang Labourer. On or around April 16, 2003, the Grievor was transferred to the Support Services group covered by the Collective Agreement No. 12. At the time of his employment termination on October 31, 2018, the Grievor held the position of Engine Attendant.

2. The Company's brief states that as an Engine Attendant, one of the Grievor's main duties is to operate locomotives and other equipment within the confines of the Shop Tracks and other designated areas as directed. Engine Attendants are also responsible for ensuring that derails and obstructions are removed, switches are properly lined and that there are no conflicting train movements. The Company adds that the Grievor also regularly operates a Track Mobile.

3. The Grievor occupies a safety-sensitive position that requires operation of motor vehicles on a regular basis.

GRIEVOR'S DISCIPLINARY RECORD

4. On October 31, 2018, the Grievor was assessed 60 demerit points and his employment was subsequently terminated on September 19, 2018, for reporting working with the smell of alcohol on his breath and being belligerent.

5. Prior to this incident, the Grievor had accumulated 40 demerit points on his disciplinary record:

> 1. February 21, 2018: Issued ten (10) demerit points.
> **Reason to discipline:** Conduct unbecoming resulting from a conversation held with his supervisor February 2, 2018;
>
> 2. February 21, 2018: Issued ten (10) demerit points.
> **Reason for discipline:** Insubordination resulting from actions on February 6, 2018;
>
> 3. February 21, 2018: Issued ten (10) demerit points.
> **Reason for discipline:** Failure to protect his assignment, various dates over the last few months;
>
> 4. May 27, 2018: Issued ten (10) demerit points.
> **Reason for discipline:** Not following Policy HSP-027 Shop Switching Procedure on April 30, 2018 at the North Bay Car Shop Complex.

6. Therefore, as a result of the September 19, 2018, incident, he accumulated a total of 100 demerit points. The Company's Discipline Policy provides that "*a net total of 60 demerits points will result in immediate dismissal*".

FACTS

7. On September 19, 2018, the Grievor arrived at work at approximately 7:20 a.m. for his 8:00 a.m. assignment as Engine Attendant at the Remanufaturing and Repair Centre in North Bay believing he would be operating the Grove crane to take down the Christmas tree from off the roof of the Centre. During a morning briefing, he was

informed that he would rather be working as a Grondsman for the track mobile performing switching at the Car Shop complex. According to the Union's brief, as he went to start his duties, he noticed another bargaining unit member operating the Grove crane on top of the roof. He spoke with Supervisor Troy Hurrell about his own assignment. He thought he should have been operating the Grove crane as it is Engine Attendant's work. Then he went back to the Trackmobile to continue his duties.

8. According to the statement of Troy Hurrell, during the Company's investigation, two employees in the office asked him if he had seen the Grievor that was upset about his assignment. They added that he smelled alcohol. Around 9:15 a.m., Troy Hurrell met the Grievor and he could smell alcohol and observed that he was belligerent and demanding to use a crane to move the Christmas tree. Soon after, Troy Hurrell saw Senior Manager Operations, Dan Monfils, and they called the Grievor to Dan Monfils's office so that he could confirm Troy Hurrell findings.

9. Therefore, according to the Union's brief, at approximately 9:30 a.m. while performing his duties, the Grievor was summoned on the radio by Troy Hurrell to report to the office of Dan Monfils, the Grievor responded that he would finish his move and then walk over. Supervisor Hurrell did not object to the Grievor completing his work task before reporting.

10. On his statement of events dated September 19, 2018, Senior Manager Dan Monfils states:

> At 9:15 Troy came to see me and advised that he and two of his employees (Bamford, Yank) noticed that Lindsay MacIvor was in Troy's office arguing (Grove work ownership) and smelled of alcohol.
>
> At 9:30 I requested that Lindsay come to my office to discuss the Grove issue in order to give me the ability to confirm their suspicions. I confirmed from across my office that he did in fact smell of alcohol. I had Troy reach out to HR while I continued to talk to Lindsey. We had a discussion about the crane for some time to stall. Near the end of the discussion I asked him if he had partied the night before as he smelled of alcohol. He said he was out golfing the night before. I then told him he was to join me at the security shack where he'd be tested for alcohol.

11. According to the Union's brief, shortly after 10:00 a.m., Labour & Employee Relations Manager Cory Mitic showed up to the security shack and informed Dan Monfils that they would be escorting the Grievor to CannAmm Occupational Testing Services for alcohol testing.

12. According to the Company's brief, the Grievor arrived at CannAmm around 11:00 a.m. The test was taken at 11:43 a.m. and disclosed that the Grievor had a blood alcohol concentration of 47 milligrams of alcohol per 100 millilitres of blood (0.047%). After the test was completed, they returned to the Centre. They were then notified by CannAmm to return to complete follow-up test. This test was taken at 11:59 a.m. and showed a blood alcohol concentration of 0.039%[1].

[1] Tab 10 – Alcohol test results

13. According to the Union's Brief, after the follow-up test was completed, they returned to the Remanufaturing and Repair Centre. Cory Mitic escorted the Grievor to take possession of his belongings, called a taxi and on his way out gave him a Suspension notice pending the results of his tests from CannAmm and a pamphlet on Ontario Northland's Employee Family Assistance Program. The Grievor left in a taxi at approximately 12:30 p.m.

14. In a letter dated October 11, 2018, the Company summoned the Grievor to an investigation on the day after.

15. On October 12, 2018, during the investigation, the Grievor explained :

> A: The evening before, I went to the golf course, I asked if I could leave early troy said no problem, I left around 330pm. When I got to the golf course I had a glass of wine on the front nine. And on the back nine I was topped up again with one glass of wine. And then after my round of golf, we went into the club house we had another glass of wine. So I got home about 830ish. Took a quick shower and sat with my bride and celebrated my round of golf and the blue jays were on as well. I thind we shared two bottles of wine togerther. And that sums it up, we vere in bed by 11pm, my bride has to be up at 6am, so our standard time to go to bed is around that time.

16. Following the investigation, in a letter dated October 31, 2018, the Grievor was informed that he was being assessed 60 demerit points and subsequently terminated for registering a blood alcohol concentration of 0.047% at 11:43 a.m. and of 0.039% at 11:59 a.m.

DECISION

PAST PRACTICE AND DRUG AND ALCOHOL POLICY

17. The Union contends that there was no established drug and alcohol policy in place so that employees who reported working with alcohol on their breath would be sent for alcohol testing and that their employment could be in jeopardy. Perhaps, then, employees had a false sense of security that the Company, based on past practices, took a more relaxed approach.

18. For the Union, the Company has not been consistent with their practices on that subject and there have been occasions where employees have been sent home by taxi if they smelled of alcohol.

19. These statements are denied by the Company. The Union has acknowledged in their grievance at step 2 that it was on rare occasions: "*Past circumstances of this nature, although rare, would see employees questioned and if necessary, be sent home from workplace*".

20. Attending work while intoxicated, just like honesty and fighting in the workplace, falls into the category of offences where a specific written rule is not required for employees to know that the conduct is wrong. This is especially true given the sensitive nature of the Grievor's function and his obligation to regularly operate motor vehicles.

21. In the Case *Labatt Alberta Brewery* and *Unifor, Local 250A (Seveny)*[2], Arbitrator Clark writes :

> Employers do not require written policies setting out all of the potentially prohibited conduct that may lead to discipline. To use some obvious examples, in the absence of a written policy employees are not entitled to steal from the employer, bring alcohol to consume while working, physically attack their fellow employees or members of management, and it is the same with smoking marijuana in the workplace or reporting under the influence of marijuana.

22. In any event, the Company had a Discipline Policy in place at the time of the incident and the list of dismissible offences include "*The use of intoxicants of drugs on duty or subject to duty*" and "*drunkenness*". Therefore, the Discipline Policy informed all employees as to the seriousness of being intoxicated at work.

23. The Union makes reference to the Letter of Understanding (Lou £ 18 – Drug, Alcohol, Genetic Testing) stating "*This will serve to confirm our discussions during 2004/2005 round of negotiations and our commitment to not implement any drug, alcohol and genetic testing on active employees for employment of medical surveillance purposes''.* This letter refers to the imposition of random drug and alcohol testing and does not prohibit the Company from demanding a drug and alcohol testing when a reasonable cause occurs.

24. The Union did not demonstrate a past practice so that it could conclude that the Company had waived its right to send employees for alcohol testing when suspected of intoxication.

[2] 2015 CarswellAlta 2622

ALCOHOL TESTING

25. The Union submits that this is not a case of job-related misconduct that caused post incident testing. It contends that the Grievor was not in an inebriated state, nor was he intoxicated so that it caused slurred speech and an unsteady movement of his body, his walking or standing, or any impaired performance of his job duties.

26. For the Union, if Troy Hurrell and Dan Monfils were concerned that the Grievor was under the influence of alcohol or possibly intoxicated, they wouldn't have permitted him to continue working until he was summoned to report to the office of Dan Monfils.

27. The Union submits that three tests were taken and the first test was done shortly after 11 a.m. by urinalysis.

28. The Company denies that there was a test done shortly after 11 a.m. by urinalysis. Nothing in the documentation provided shows that there have been a first test by urinalysis. The alcohol test results report from *CANN//AMM occupational testing services* mentions the results of two tests done on September 19, 2018: Blood alcohol concentration of 0.047% at 11:43 a.m. and of 0.039% at 11:59 a.m.

29. The Union submits that drug and alcohol testing are *prima facie* discriminatory under Canadian human rights law, but employers may justify discriminatory practices and rules if they are a bona fide occupational requirement.

30. Also, the Union argues that this Office has recognized in many awards that the ability of a railway to conduct drug testing is an extraordinary incursion into the rights of privacy of its employees, and that testing must balance not only the employer's interest, but also maintaining and respecting an employee's reasonable rights to privacy.

31. The Company had reasonable grounds to believe that the Grievor was under the influence of alcohol.

32. Troy Hurrell said he could smell alcohol and observed that he was belligerent. Soon after, he saw Senior Manager Operations, Dan Monfils, so that he could confirm his findings. Dan Monfils requested the Grievor in his office and confirmed Troy Hurrell's suspicions.

33. Alcohol or drug testing can be considered as an infringement on the rights to personal integrity, dignity and privacy protected by the Charters. However, the employer may resort to it in certain cases, for example, if he has reasonable grounds to believe that an employee is under the influence of an intoxicating substance.[3]

34. In *Canadian Pacific Ltd* and *UTU (Hutchinson)*[4], arbitrator Picher writes :

> Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the

[3] *Syndicat canadien des communications, de l'énergie et du papier* c. *Goodyear Canada inc*., [2008] R.J.D.T. 24 (C.A.)
[4] 1987 CarsweIINat 1980 (CROA&DR Case No. 1703)

> employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.

35. Alcohol testing by the Company was appropriate in the circumstances.

INVESTIGATION PROCESS

36. The Union argues that the Company did not abide by the procedural requirements described in Section 6 Rule 34 (Investigations and Grievance Procedure) of the collective agreement No. 12, and neither was the process handled in a fair or impartial manner as the collective agreement mandates. The Union refers to decisions of this Office stating that a violation of the collective agreement regarding the investigation process could result in the disciplinary measure imposed being null and void *ab initio*.

37. The Union states that at the beginning of the Grievor's hearing of October 12, 2018, the Company submitted only one document as evidence that is the test results from CannAmm on September 19, 2018.

38. According to the Union, three days subsequent to the investigation, the Company presented additional documentation as part of the investigation. It presented a written statement dated September 19, 2018, by Senior Manager Dan Monfils, the statement of Supervisor Troy Hurrell and of employees Barry Bamford and Kevin Yank during the

investigation of October 11, 2020. For the Union, these documents should have all been presented before the commencement of the hearing.

39. Articles 34.1 and 34.2 of the Collective Agreement No. 12 states:

> **Investigation Procedure**
>
> **34.1** No employee shall be disciplined, discharged or have their employment terminated for any reason until he/she has had a fair and impartial investigation and his/her responsibility established. An employee may be held out of service with pay pending the complete investigation and notice provided to the Local Chairperson.
>
> **34.2** Except as otherwise provided in this Rule, when an investigation is to be held, the employee will be given at least one day's notice of the investigation and will be notified of the time, place and subject matter of such investigation. This shall not be construed to mean that the proper officer of the Company, who may be on the premises when the cause for such investigation occurs, shall be prevented from holding an immediate investigation.
>
> Following that investigation, the Company will not be allowed to conduct the investigation anew into the circumstances of the initial investigation.
>
> When employees are required to make any formal statements on matters affecting the Agreement, Company policies, procedures or working rules or compensation, a duly authorized representative shall be present. When employees are required to make statements on matters not affecting the Agreement, Company working rules or compensation, the employee may have a fellow employee or an accredited representative of the Union present.
>
> Copies of statements, stenographic reports and all other evidence taken shall be furnished to the employee and to his/her authorized representative.
>
> The Union will be provided an opportunity to reply and/or submit additional evidence for consideration to the proper officer of the Company within 7 days of the investigation. Such information will form part of the investigation record.

40. In the Investigation Procedure, there is no mention to the effect that the entire evidentiary record is requested at the beginning of the employee's investigation.

41. All the evidence was provided to the Grievor in advance of the conclusion of the investigation and in response the Union provided submissions to form part of the investigation record. The additional documents were provided three days subsequent to the investigation and the Union had the opportunity to reply and submit a forty-page submission.

42. As for the statements made by employees Barry Bamford and Kevin Yank, during the investigation, saying that they did not notice that the Grievor smelled of alcohol, that it was Supervisor Troy Hurrell who told them that he smelled of alcohol and that he was going to deal with it, no significance is to be given to these statements considering the results of the blood alcohol tests and the fact that both Troy Hurrell and Dan Monfils confirmed that the Grievor smelled of alcohol.

43. The Union argues that the investigating officer failed to record properly some of the answers to the questions asked to the Grievor as well as the objections made by the Union during some of the questioning. Unifor Unit Chair Mike Lavergne took notes during the investigation and these notes demonstrate that not all that was said during the investigation was captured on the transcript of the investigator.

44. The transcript reliably captures the essence of what was discussed during the investigation. The Company’s questions allowed the Grievor to give his version of the

event. He and his representative had the opportunity to add anything they thought was relevant to the investigation for the purpose of the record.

45. Furthermore, The Grievor and the Union had the opportunity to add anything they believed was relevant to complete the investigation report.

46. The Union submits that Cory Mitic was centrally involved in this case from beginning to end and through the entire process which represents a conflict of interest. The Union submits that there is a high potential of bias that would come from the investigating officer to ensure that his involvement would serve in favour of the Company.

47. Cory Mitic did not sign the suspension's notice, the letter of October 11, 2018 summoning the Grievor to an investigation nor the termination of employment.

48. It was Troy Hurrell and Dan Monfils who first smelled alcohol on the Grievor's breathe and then reach out to Humain Ressources. Labour & Employee Relations Manager Cory Mitic and Dan Monfils escorted him for the alcohol testing at CamAmm and Cory Mitic conducted the investigation.

49. This case differs from decisions referred by the Union on that subject. Notably, Cory Mitic did not submit a report which was the only evidence against the Grievor, he did not act as a witness during the investigation and nor was he a Supervisor Officer.

It's not unusual for Labour & Employee Relations Manager to be involved in the investigation process.

50. In *Ontario Northland Railwa* v. *BLE (Corriveau)*[5], Arbitrator Picher writes regarding fair and impartial investigations :

> As previous awards of this Office have noted (*e.g.* ***CROA 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.
> (Underligned added)

51. According to the balance of probabilities, there is no reason to conclude that Cory Mitic did not meet the minimal standards of impartiality. The Union and the Grievor had the opportunity to respond to all the evidence provided by the Company. After receiving them, the Union provided a forty-page submission. The Union cannot claim it did not have the ability to reply and rebut the evidence of the Company. Therefore, the Company abide by the procedural requirements described in Section 6 Rule 34 (Investigations and Grievance Procedure) of the collective agreement No. 12 and the process was handled in a fair and impartial manner as the collective agreement mandates.

[5] 1990 CarswellNat 2099 (CROA&DR Case No. 2073).

52. In addition, the Company's decision to dismiss the Grievor was based more than anything else on the results of the alcohol tests and not on the conclusion of the investigation regarding the questioning of the witnesses.

53. The alcohol tests result for a blood alcohol concentration of 0.047% at 11:43 a.m. and of 0.039% at 11:59 a.m. on September 19, 2018, is not disputed by the Grievor. Therefore, even if there had been a breach of procedural provisions of Section 6 Rule 34 (Investigations and Grievance Procedure) it would not change the fact that gave rise to its decision.

MEASURE OF DISCIPLINE

54. The Grievor explained during the investigation that he had not consumed any alcohol while at work and that he had not consumed alcohol since the previous evening and that he thought he was fine.

55. The Union thinks the Grievor was not impaired. It submits that numerous factors can affect the blood alcohol concentration and how individuals react to alcohol, including age, medications, weight, liver disease, drinking alcohol on an empty stomach and drinking many drinks in a short period of time. The Union refers to a general estimate published on the website ''healthline.com'' on how long it takes to metabolize different alcoholic beverages (several hours for a few drinks).

56. The Union states that technically speaking, the level of the Grievor's blood alcohol concentration was under 0.08, so he was still legally permitted to drive.

57. In the present case, the alcohol test result shows a blood alcohol concentration of 0.047% at 11:43 a.m. and of 0.039% at 11:59 a.m.

58. In SHP Case No. 530, arbitrator Picher concludes :

> The cut-off level of .04 BAC as reflecting impairment for risk sensitive employees is reasonably supported by scientific and medical opinion, and is a permissible standard whose application does not violate the proper exercise of management's rights.

59. There is no way to confirm the amount of alcohol consumed on the evening of September 18, 2018. However, even if the Grievor did not consume alcohol on September 19, 2018, the fact is that if he had passed an alcohol test when he commenced his shift at 8:00 a.m. the blood alcohol concentration would have been much higher.

60. In the criminal case law of Ontario Court of Justice *Her Majesty the Queen* and *Sundaran Rajeswaran*[6], the Court states that judicial notice may be taken of the fact that "it is reasonable rule of thumb that the average human being eliminates alcohol at the rate of 15 milligrams per 100 millimetres of blood per hour":

> 30. Regard may also be had to the decision of Langdon J. in this jurisdiction in R. v. Coulter. [2001] O.J. No. 5608. 24 M.V.R. (4th) 61 (Ont. S.C.J.). In that case the Court dealt with a Charter based contention that the defendant had been arbitrarily detained by being held for some hours after breath testing. In upholding the rejection of the claim, Langdon J. said:
>
> 31. Based on expert evidence in hundreds of cases that I have heard involving elimination of alcohol from the body, I have learned that it is

[6] 2003 CarswellOnt 2051

> reasonable rule of thumb that the average human being eliminates alcohol at the rate of 15 milligrams per 100 millimetres of blood per hour. […]

61. Applying the "15 milligram rule" in this case means that the Grievor had a blood alcohol concentration of approximately 0.099% when he commenced duties at 8:00 a.m.

62. On September 19, 2018, the Grievor's action constituted serious misconduct. He was under the influence of alcohol and was working in a safety-sensitive position. The results of the test demonstrate that he operated or attempted to operate a vehicle at work while intoxicated.

63. The nature of the Grievor's position is an aggravating factor. He is in a safety position where he is responsible for safely operating motor vehicles including locomotive. Any errors by the Grievor could cause significant property damage and injury to himself or other workers.

64. In *Canadian Pacific Railway and CCROU (Hébert)*[7], the Grievor was discharged after it was determined that he reported working while intoxicated. Arbitrator Picher writes:

> […] I am satisfied, on the balance of probabilities that Mr. Hébert presented himself for work on March 10, 1994, under the influence of alcohol in violation of General Rule G. […] If for the purposes of clarity, given the safety sensitive nature of the Company's undertaking as a common carrier and the grievor's position as a

[7] 1995 CarswellNat 3146 (CROA&DR Case No. 2609); (See also *CN Marine Inc* and *CBRT & GW*, 1985 CarswellNat 1424 (CROA&DR Case No. 1329.)

> locomotive engineer, nothing herein should be interpreted to suggest that the Company did not have reasonable and probable grounds to require the grievor to take a test, […] The prospect of an employee assuming the care and control of a train's movement when under a reasonable apprehension of intoxication is extremely serious. […]
>
> The issue next to be determined is the appropriate measure of disciplinary penalty. Needless to say, the violation of Rule G by a person occupying the safety sensitive position of a locomotive engineer is among the most serious of disciplinary offences, particularly where it involves being under the influence of alcohol while on duty.

65. CROA cases involving the reinstatement of employees who were discharged for attending work while intoxicated usually includes mitigating factors that are not found in the present case.

66. During the investigation and in his initial statement, the Grievor showed no remorse or acknowledgement of his misconduct. It was in a second letter on the last page of the Union's submission that he acknowledged that the level of alcohol in his system could impact his ability to do his job safely and apologized for the incident:

> After reviewing the results from CannAmm I recognize that the level of alcohol in my system could still impact my ability to perform my duties safely.
>
> There is no way that I would ever want to jeopardize my co-worker's safety. I love my job and I would never want to put anyone in danger – myself included.
>
> I apologize for this incident and I assure you that that this will never happen again, as repeating myself, I truly enjoy my job and the Company itself.

67. The Grievor had been working for the Company for about eighteen years. Prior to this incident, he had accumulated 40 demerit points on his disciplinary record.

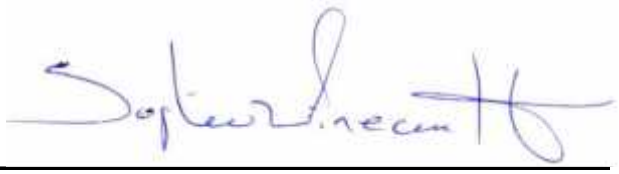
68. In *Canadian National Railway and BMWE (Lylyk)*[8], the Grievor had engaged in four instances of misconduct in the seven months prior to the incident leading to his dismissal. Arbitrator Picher writes:

> 1. […] At the time of the incident the grievor's disciplinary record stood at forty demerits.
>
> […]
>
> 4. This is not a case of an employee with an otherwise good record having been discharged for a single lapse of attention resulting in a collision. The graver, whose length of service is not long, had a perilously high number of demerits to his record at the time of the incident. Even if it is accepted that forty demerits was an excessive measure of discipline in the circumstances, given the gravity of the grievor's error, the Arbitrator cannot conclude that he was not, at a minimum, deserving of twenty demerits, which would still place him in a dismissible position.

69. In this case, the fact that the Grievor has 18 years of continuous service cannot be considered a mitigating factor giving the seriousness of the Grievor's conduct, his safety-sensitive position and the fact that the undersigned cannot conclude that he was not, at a minimum, deserving twenty demerits which would still place him in a dismissable position.

NOW THEREFORE, the CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION:

DISMISSES the grievance.



May 29, 2020

SOPHIE MIREAULT
ARBITRATOR

[8] 1988 CarswellNat 2022 (CROA&DR Case No.1762)