

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

CASE NO. 4868

Heard in Edmonton, September 14, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 demerits issued to J. Chapman.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation Mr. Chapman was assessed discipline as noted in his Form 104 as follows,

Please be advised that you have been assessed with twenty (20) demerits for delay to train 112-28 deadheading as a result of your delay in removing yourself from train 112- 28 resulting in a 22 minute delay at Levack on May 2, 2020. Violation of Train and Engine Rule Book Section 2 item 2.1(a)(iii) and Section 2 items 2.2(c)(ix).

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends as below.

The Company failed to respond at each step of the appeal in violation of Article 40.03 of the Consolidated Collective Agreement and the May 29, 2018 Agreement on management of Grievances which prejudices the Union as we are unaware of the Company's position with respect to the alleged violations.

The Union contends the discipline is unwarranted in the circumstance. The discipline assessed in contravention of section 147 of the Code.

Locomotive Engineer J. Chapman and his Conductor R. Churchill were ordered Dead Head (DH) by freight in the second unit from Cartier to Mactier on train 112-28 at 1039hrs on May 2, 2020. After departing Cartier, Diesel Exhaust Emissions (DEE) began to enter the cab of the locomotive Mr. Chapman and his Conductor were riding in. The

RTC was advised by Mr. Chapman that he and his Conductor were required to remove themselves immediately from this danger. The RTC did not challenge the crew's refusal to stay in the locomotive in question. Mr. Chapman requested the operating crew of the train to stop so he and his Conductor could remove himself from this hazardous situation and walk up through the units to the head end for safety. The operating crew obliged and were slowing to a stop. The RTC was abreast this plan. The train stopped just west of Levack at the whistle post for highway#144. Due to CP protocol regarding Covid-19 which limits the maximum number of employees in the operating cab, riding in the head end locomotive was not an alternative. TCRC Note; Train crews dead heading by freight to Mactier have experienced DEE inhalation when leaving Cartier numerous times and have filed WSIB exposure reports including Mr. Chapman in this case. The practice has been, crowd into the lead unit and have the DH crew disembark at the Sudbury VIA station and wait for a taxi protected from the elements at the VIA station. Covid-19 was preventing this regular practice. The RTC then advised the crew to disembark the train at the West Siding Switch Levack and get on the scheduled VIA passenger train and take it back to Cartier. At the time, the VIA was still at Sudbury (26 miles from Levack) loading passengers. While the operating train crew of 112-28 pulled down slowly to the west switch / Highway 144. (Stopping and starting the train twice in the process because of grade) While speaking to the RTC, Mr. Chapman inquired, "are you saying you want us to stand on the side of the highway, in the rain for an hour and wait for the VIA?" The RTC then checked with Director who said "yes". The crew disembarked. TCRC Note; There is no train station or any other form of shelter from the elements at Levack. The RTC came back again and said he was advising the VIA train crew of the pick-up at Levack but he was also calling a cab and said to get in whichever comes first. The VIA arrived before the taxi, which took approximately one hour. Regarding the T&E Rule Book Section 2 Item 2(a) (iii) alleged violation, Mr. Chapman was dressed and ready for duty as he was already working. There were questions of rain gear and preparedness in the investigation (questions 21, 22 and 23) and Mr. Chapman explained he was aware of the weather forecast and fully prepared with warm lined rain gear on this day. Regarding the T&E Rule Book Section 2 Items 2.2(c) (ix) alleged violation; the fact remains there was a delay to train 112-28 on May 2, 2020. This was inevitable as it obviously took time to have the crew disembark. The fact that the operating crew stopped the train twice (the second time at the crossing) took the bulk of the time. This had nothing to do with Mr. Chapman; there are discrepancies in the times provided in Mr. Clarks memo, the train delay report of the operating crew Conductor and Mr. Chapman's times. 22 minutes at Levack, 30 minutes at Levack or 10 minutes to disembark. As entered in the investigation, the discrepancies were not addressed and no certain time was determined to be the delay as the Company's record is not time stamped and no rebuttal to Mr. Chapman's time was entered. Mr. Clarks delay report of 22 total minutes may have been the most accurate but the relevance of the delay is secondary to the importance of employees Health & Safety in an incident of

DEE exposure. The train was stopped twice before the dead head crew disembarked. The grade at Levack needs to be taken into consideration. Although not a mountain grade, it is a very steep grade. To stop west of the Highway 144 whistle post and pull down again to the WSS Levack is a time-consuming endeavor. The trainline would have needed to be recharged before proceeding. Once charged, it would be a slow rolling movement before stopping the second time. This would have taken the bulk of the 22 minutes for which the train was supposedly delayed.

Mr. Chapman was being exposed to Diesel Exhaust Emissions (DEE) which is known and identified as a Class 1 Carcinogen. Mr. Chapman and crew took action, under Part II of the Canada Labour Code to remove themselves from a Hazard. Mr. Chapman and his Conductor advised the RTC and took immediate action to avoid further danger to themselves. The RTC or Director did not challenge the refusal to ride further in this locomotive. This action by the DH crew was meeting the requirements of CLC, Duties of Employees (health and safety matters) 126.1 (1). Director Clark's memo states in part; "On May 2, 2020 at approximately 1125, the Ontario North RTC advised me that the deadhead crew riding in the trailing unit of 112-28 out of Cartier, ON advised they were vacating the trailing unit at the Levack siding account fuel exhaust coming from the head end locomotive into the trailing unit." At this point the TCRC must question the Director's "due diligence" as it is defined by the Canadian Centre for Occupational Health & Safety Regulations (CCOHS). • OH&S Legislation in Canada – Due Diligence "Due diligence is the level of judgement, care, prudence, determination, and activity that a person would reasonably be expected to do under particular circumstances. Applied to occupational health and safety, due diligence means that employers shall take all reasonable precautions, under the particular circumstances, to prevent injuries or incidents in the workplace. This duty also applies to situations that are not addressed elsewhere in the occupational health and safety legislation. Reasonable precautions are also referred to as reasonable care. It refers to the care, caution, or action a reasonable person is expected to take under similar circumstances." Director did not ask if the crew was ok, the degree of emission exposure they experienced or if they required medical attention. This is a contravention of CLC 124 General duty of employer & CLC 125.1(1)(h) nor did he hold train 112-28 until the arrival of the VIA or taxi, rather he expected and instructed the crew to disembark and wait for their transportation. Also, from the Director's memo; "I went to see the RTC in his office and observed while he instructed the crew to wait at Levack for the westbound VIA which was 30 minutes away in order to return to Cartier station so another mode of transportation could be set up for their trip to Mactier". The VIA took approximately 1 hour to arrive. Director's memo also states; "Locomotive Engineer Chapman appeared to accept the instruction. He later advised that he did not want to vacate the locomotive and wait for the VIA because it was raining." Contrary to this portion of the Director's memo and as reflected in Appendix C (transcripts), this alleged advisement of Mr. Chapman that he "did not want to vacate the locomotive and

wait for the VIA because it was raining” is untrue. Mr. Chapman was prepared and ready rain. He merely asked if the expectation was to stand out in the rain for an hour.

Clarifying an expectation to stand out in the rain for an hour on the side of a highway is not an unreasonable question. As mentioned, there is no protection from the elements at this location. As recorded in the investigation, the most concerning natural element of Levack is bears. Levack has a very healthy bear population. This incident occurred on May 2nd, keeping in mind, spring is the height of sow & cub season. TCRC Note: CP does not supply Running trade employees in Ontario with bear mace. Director Clark finalized his memo with; “After some back and forth between the RTC and the DH crew, they agreed to disembark thus allowing 112 to depart Levack and meet the VIA at Larchwood. This resulted in a 22minute delay to 112 waiting for the DH crew to disembark 112-28” The Union is not arguing the fact train 112-28 suffered a delay of 10 to 30 minutes. To put this train delay on Mr. Jamie Chapman is unreasonable. In doing so this office contends this to be a clear contravention of the Canada Labour Code Section 147 Reprisal. CLC states; Disciplinary Action Marginal note: General prohibition re employer 147 No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee’s rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee • (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part; • (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or • (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part. Manager’s Handbook Canada Labour Code - Part II Disciplinary Action (section 147) Section 147 deals with disciplinary action taken against employees who exercise various rights provided for under Part II. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee has sought the enforcement of his or her rights or privileges under the Code. In addition to being a prohibition enforceable through the courts, a complaint can be made to the Public Service Labour Relations Board by the employee or somebody acting on behalf of the employee (likely to be a union representative). The Board can hear the complaint under its own rules of procedure. The impact could be extensive if supervisors, managers and staff relations specialists are not fully aware of this provision and the possible action on the part of employees, their union representative or the Board.

There is no question that the discipline assessed is unfair and unwarranted as the Company did not undoubtedly prove that Mr. Chapman was culpable of their allegations.

The train had to stop to allow the deadhead crew to detrain. To allow a crew to detrain to safety is not a delay. As the Union contends, as the discipline is without merit, it appears that the discipline was a consequence to his complaint of diesel exhaust, and removing himself from the unsafe situation. The facts are clear, diesel exhaust was present, all supervisors required were informed, the train stopped to allow Mr. Chapman and his Conductor to detrain, the Company took action against Mr. Chapman with an unsubstantiated allegation.

The Union requests that the discipline assessed be removed and any associated lost wages be paid with interest, without loss of EDO and AV entitlement/benefits/pension and seniority. The Union requests the Company cease and desist in exposing employees to fumes and particulates of diesel exhaust emissions as is the repeatedly seen case in deadheading as this is viewed as negligent on behalf of the employer. The Union requests an admission by the Company that Mr. Chapman was unjustly dealt with when action was taken against him in contravention of section 147 of the code as he was disciplined for delay to train when he requested removal from the unsafe situation due to diesel exhaust exposure.

In the alternative, the Union requests that the discipline be mitigated as the Arbitrator sees fit.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On May 2, 2020, the Grievor was called on a "deadhead" back to his home terminal and was transported via the second locomotive's cab on train 112-28. During this deadhead he called the Locomotive Engineer in the lead locomotive informing him that there were diesel fumes in the cab he was riding in and that they would need to stop the train so they could get off. The RTC then instructed the crew operating the train to stop at the next siding and arranged for transportation for the Grievor and his crewmate. The RTC then instructed the Grievor and his crewmate to immediately exit the cab of the locomotive however due to rainy conditions, the Grievor refused. After lengthy discussions between the parties, the Grievor eventually acquiesced and exited the locomotive and he was transported back to his home terminal.

Following an investigation the Grievor was assessed discipline as noted in his Form 104 as follows,

Please be advised that you have been assessed with twenty (20) demerits for delay to train 112-28 deadheading as a result of your delay in removing yourself from train 112-28 resulting in a 22 minute delay at Levack on May 2, 2020. Violation of Train and Engine Rule Book Section 2 item 2.1(a)(iii) and Section 2 items 2.2(c)(ix).

Company Position

The Company disagrees and denies the Union's request. Due to the Grievor's initial refusal to remove himself from the locomotive an unnecessary delay to train 112-28 occurred. The Company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104 and the discipline assessed was just and appropriate considering the circumstances.

The Company maintains actions were taken to immediately address the Grievor's concerns by trying to remove him from the perceived danger and arranging alternate transportation however, the Grievor failed to cooperate.

The Company maintains, as outlined by the Union in their Ex Parte Statement of Issue, the sole issue in dispute is the assessment of 20 demerits. As such, any other alleged violations brought forth by the Union are not properly before the Arbitrator. Without precedent or prejudice to the Company's position above, the Company will endeavor to respond to the Union's additional allegations.

The Union argues that the Company violated Canada Labour Code 124, 125, 147 and Occupational Health & Safety Regulations by unjustly imposing discipline to the Grievor for removing himself from an unsafe situation. The Company cannot agree. As per the Grievor's form 104, he was disciplined for a train delay, plain and simple.

Notwithstanding the aforementioned, the Company vehemently disagrees that a violation of the code or regulation has occurred and the Company maintains that the Union has not provided any evidence to support this claim.

The Grievor filed a CIRB complaint on August 25, 2020 alleging violation of section 147 of the Canada Labour Code. The CIRB's decision was released on March 4, 2021 wherein the Board confirmed that the core issue underlying the Grievor's allegations is having the demerits assessed to be removed. The Board also stated in its decision that it would not be making decisions regarding other members of the TCRC based on the particular facts related to the Grievor's complaints. The Company maintains that this further supports the fact that the only issue in dispute is the assessment of 20 demerits. In addition, this supports the principal that each case should be reviewed upon its own merits.

Within the Union's grievance correspondence, they request that the Company cease and desist in exposing employees to fumes and particulates of diesel exhaust emissions as is the repeatedly seen case in deadheading as this is viewed as negligent on behalf of the employer. The Company objects, as this is a separate matter from the Grievor's assessment of discipline and not properly before the Arbitrator but also an attempt to arbitrarily consolidate/bundle multiple disputes into a single grievance.

In regards to the Union's allegations concerning the grievance correspondence, as per the grievance procedure the remedy for a failure to respond is escalation to the next step. This has occurred and the Company's position has been provided.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Company maintains that no violation of the Collective Agreement nor the Code has occurred, the Grievor is not due any additional compensation and requests the Arbitrator deny the Union's grievance in its entirety.

FOR THE UNION:
(SGD.) E. Mogus
General Chair

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director Labour Relations

There appeared on behalf of the Company:

A. Cake	– Manager Labour Relations, Calgary
A. Harrison	– Manager Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary
T. Gain	– Counsel, CPKCR, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Bishop	– General Chairperson, LE-E,
J. Chapman	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

Summary

[1] This Grievance challenges discipline of 20 demerits assessed to the Grievor for delaying a 100 series train on April 2, 2020.

[2] For the reasons which follow, the Grievance is allowed, in part.

[3] While the conduct of the Grievor was culpable, the imposition of 20 demerits was an excessive disciplinary response. That response is vacated and discipline of 5 demerits is substituted as a just and reasonable response.

Facts

[4] The facts in this case are straightforward. The Grievor is a long service employee with some broken service. At the time of this Grievance, he was employed as a Locomotive Engineer. On April 2, 2020, the Grievor and a conductor were deadheading on Train 112-28. This train was a "100 series" train. As noted by the Arbitrator in *Canadian Pacific v. TCRC (Evans Grievance)* "100 series" trains are "...expedited trains

that handle high priority traffic. They are on a tight schedule from origin to destination” (at p. 2). Train 112-28 was enroute from Vancouver to Montreal.

[5] The Grievor and a Conductor were deadheading on the train and were traveling in a second locomotive immediately behind the lead locomotive. Shortly into the trip, the Grievor contacted the Locomotive Engineer operating the lead locomotive and said “[t]here is lots of diesel exhaust back here so I need you to bring it to a stop and we’re going to go to the headland”.

[6] Some context is required to understand this reference.

[7] Prior to COVID19 restrictions, when deadhead crews rode behind a locomotive and had issues with diesel exhaust, they would join the operating crew in the lead locomotive. On April 2, 2020 when the Grievor made his suggestion of “going to the headland”, I am satisfied he had forgotten that due to COVID19 distancing restrictions, it would not be possible for he and the deadhead Conductor to ride in the lead locomotive with the other crew, and that other arrangements would need to be made.

[8] Returning to the incident, the Grievor contacted the Rail Traffic Controller (RTC) to tell him of the situation and that the train was going to be brought to a stop and they would be “vacating this locomotive it’s full of diesel exhaust fumes”. It was arranged with the RTC that the train would be stopped by the west switch of Levack and the RTC would arrange for “another ride” for the crew.

[9] The RTC noted the “Bud car” would be leaving Sudbury soon, and that the train crew could “jump on that and head back to Cartier” where another mode of transportation could be arranged. The “Bud” car was a reference to the VIA passenger train which was loading passengers at that point in time in Sudbury. That train was approximately one hour away. The RTC told the Grievor to let the RTC know when they got off and he would talk to the Director to arrange something else for you.

[10] The Grievor confirmed “Stopping getting on the Bud car”.

[11] I am satisfied this initial conversation took place while the train was still in motion.

[12] A second conversation then occurred between the Grievor and the RTC. It is this conversation which is at the heart of this dispute. That conversation is reproduced, below.

RTC: K I advise the bud car to have a look for you there at Levack at the west end of Levack they'll pick you up and bring you back to Cartier there.

LE Jamie Chapman: It's raining out so you want us to stand outside for over an hour while we wait for this bud car?

RTC: Ahh the option is this bud car is going to meet this 112 at Larchwood so um yeah I guess you'll have to get off and wait for it there, I've got the U57 at the siding in Levack so I can't meet the 2 trains there

LE Jamie Chapman: You know were not on the tail end remote here were on the second locomotive you know that too right?

RTC: You are not on the tail end ok you're on the second one?

LE Jamie Chapman: No tail end remote here.

RTC: Ok I thought you said you were on the tail end, ok yeah I'm not sure if you have another idea but yeah I can't meet at Levack here so the options are to step off here and wait for the bud car

LE Jamie Chapman: "Crazy" to stand outside for over an hour waiting for the bud car

RTC: k I don't have another alternative for you so that's kind of your option

LE Jamie Chapman: Probably order a taxi probably be on the taxi before the bud car gets here

RTC: The taxi probably comes out of Sudbury it'll be an hour probably getting there I would say

LE Jamie Chapman: You won't know until you order it up so ah

RTC: Ok so you want to stay on the train here for a taxi to arrive is that what you're saying?

LE Jamie Chapman: standing outside in the elements when it's raining for an hour over an hour

RTC: K I'll get the director to give you a call here

LE Jamie Chapman: Lead locomotive please

[13] From a review of all of the evidence, I accept that this second conversation took place while the train was stopped at Levack.

[14] The Grievor admitted in the Investigation that he did not immediately disembark from the train when it stopped at Levack. I find the Grievor was not pleased with having to wait in the rain, and that he failed to disembark the train as instructed and in a timely

manner, because of that displeasure. The Grievor did ultimately disembark from the train at Levack. There is disagreement between the parties regarding how long the train was delayed due to the Grievor's failure to disembark from the train when it stopped at Levack. The Company argued 22 minutes and the Grievor stated he kept good time records and it was 10 minutes.

[15] The RTC arranged two options. A taxi was dispatched – as suggested by the Grievor – and it was arranged the VIA train would pick up the employees. The VIA train arrived in about an hour, before the taxi.

[16] The Grievor was investigated and was disciplined by an assessment of 20 demerits for delay of train. The Grievor also filed a complaint regarding his exposure to the diesel fumes with WISB (which did not find any effect)¹ and also filed a complaint with the CIRB alleging violation of section 147 of the *Canada Labour Code* that his discipline was retaliation. By letter decision dated March 4, 2021, that body deferred its decision to this process.² It found the “core issue underlying the Complainant’s allegations is having the demerit points assessed against him removed”.³

Analysis and Decision

Arguments

[17] The Company argued the actions of the Grievor were culpable and caused a delay to the strict timetable of this 100 series train. It argued that delay was 22 minutes, as noted in the Memorandum of Mr. Clark. Mr. Clark was the Director for the RTC employee who was dealing with the Grievor. He was consulted by the RTC during the Incident and filed a memorandum into the Investigation. The Company argued it had not retaliated against the Grievor for issuing his Complaint, which occurred after its Investigation. It argued the discipline of 20 demerits was just and reasonable.

[18] For its part, the Union argued the Grievor did not breach section 2 of the T & E Rule Book. It argued he was only seeking confirmation of the plan before he got off and that he did in fact disembark the train. It argued this was a reasonable confirmation for

¹ Ex. 7; Letter dated May 26, 2020 from the WISB

² Ex. 8

³ At p. 4.

him to seek. It urged his conduct was not culpable. It also argued the Company did not allege any insubordination by the Grievor and that – to raise that issue at this hearing - is an expansion of grounds. It further argued the discipline was retaliation for the Grievor filing his complaint with the CIRB. Even if culpable, the Union urged the discipline was excessive and unwarranted.

Decision

[19] For the reasons which follow, in answer to the first question of the *Re Wm. Scott & Co.* analysis I find there was cause for discipline for the actions of the Grievor.

[20] Like the arbitrator in **CROA1290**, I consider this to be a “classic” case of “work now, grieve later”. It is not necessary to determine if the Company has expanded the grounds for dismissal, as argued by the Union. I accept that the Grievor’s failure to disembark in a timely manner – which was admitted by the Grievor – was culpable conduct and resulted in a violation of the T & E Rule Book, section 2, items 2.2(c)(ix) which required the Grievor to work in a “productive” manner.

[21] The Grievor’s back and forth second conversation with the RTC during the second exchange and the ultimate involvement of the Director was unnecessary and caused delay. The Grievor’s actions in staying on the train once it had stopped – whether for 10 minutes as he said or for 22 minutes as the Company said – was not productive and caused a delay, breaching the rule. I cannot accept the Union’s characterization that the Grievor was reasonably seeking confirmation of the plan in his second exchange with the RTC. He already had that confirmation in the first exchange, where he confirmed: “Stopping getting on the Bud car”. That should have been the end of the conversation.

[22] Further, seeking confirmation of a plan is not consistent with the Grievor’s use of the word ‘crazy’ in the second exchange and it does not result in the Grievor’s decision not to get off the train immediately when it ultimately stopped.

[23] I further accept that even a six minute delay of a 100 series train was found culpable behaviour in *CP v. TCRC (Evans)* and warranted a Formal Caution.

[24] Like the Arbitrator in **CROA 3816** – where the dispute was whether the delay was 10 minutes or 30 minutes – I find the precise time of the delay to be of “less significance”

than that the Grievor chose not to immediately disembark the train when it stopped, which is conduct he has admitted.

[25] This failure to get off the train occurred, even though the Grievor had noted in the first conversation with the RTC that the cabin was “full of diesel fumes” and he needed to get off. I accept the Grievor had the appropriate warm, lined rain gear for the weather but he still felt it was “crazy” for the Company to expect him and the Conductor to wait outside in the rain.

[26] While the Union has asserted there is no train station or shelter at the Levack crossing where the crew was to be put off, that is not entirely accurate. There is no shelter *owned by CP*, but there *is* a restaurant a short distance down the track, within walking distance of where the crew was ultimately dropped off. I am satisfied that if the Grievor had a concern with either the rain or with wildlife, he could have walked that short distance to the restaurant. He was aware the VIA train was still in Sudbury and there would be some delay in reaching him, so had time to do so. While the Union representative noted the danger of bears during the Investigation, that danger was not raised by the Grievor and is not his evidence. I am satisfied the concern of the Grievor was with standing outside in the rain while waiting for a ride and not with the wildlife.

[27] That said, upon considering all of the jurisprudence and the evidence, there are significant mitigating factors in this case. Reviewing these factors, I cannot agree with the Company that 20 demerits was a just and reasonable discipline for the Grievor’s actions.

[28] First, there was the impact of COVID19. COVID 19 was in its early stages in the spring of 2020. I accept it was not usual for train crews not to be able to ride with the lead crew, which caused some confusion for the Grievor. Second and third, the Grievor was a long-service employee with the Company and had a good discipline record. These are significant mitigating factors in this case. The Grievor has held numerous positions in the Company, including training positions and his service is considerable. Finally, it was not suggested the Grievor’s request to be removed from the train due to the impact of diesel exhaust was not reasonable. I accept that some delay was inevitable to make this happen, as it takes time to stop a train. That delay cannot be attributed to the Grievor.

[29] Given these mitigating circumstances, while the conduct was culpable and attracted some discipline, I find that discipline 1/3 of the way to dismissal under the Brown System was excessive and unwarranted.


[30] This raises the third question of the *Re Wm. Scott & Co.* analysis, which is what discipline is appropriately substituted.

[31] Giving careful consideration to the facts and the jurisprudence, I consider that minor discipline of 5 demerits would be a just and reasonable discipline response for this incident. This minor level of discipline is consistent with the jurisprudence and supported by the facts in this case.

Conclusion

[32] The Grievance is allowed, in part. The discipline of 20 demerits is vacated and a discipline of 5 demerits is substituted. I retain jurisdiction for any questions relating to the implementation of this Award and to correct any errors or omissions to give it the intended effect.

December 12, 2023



**CHERYL YINGST BARTEL
ARBITRATOR**