

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

**CASE NO. 5010**

Heard in Edmonton, February 15, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Dismissal of Locomotive Engineer R. Kilbrei of Kenora, Ontario.

**JOINT STATEMENT OF ISSUE:**

Following a formal investigation conducted on October 4, 2022, Mr. Kilbrei was issued a Form 104 on October 20, 2022, notifying him that he is dismissed from Company service for the following reason(s):

“For improperly paying yourself by making inappropriate wage submissions under the Honour System of Pay on August 18, 2022 while working as Locomotive Engineer; a violation of the Honour System of Pay.”

**Union Position:**

Engineer Kilbrei worked Train 420-19, ordered at 2230 from Winnipeg to Kenora on August 18, 2022. After completing his tour of duty, Mr. Kilbrei mistakenly submitted a PU claim and CT claim for the same location (Winnipeg). On August 25, 2022, within seven-days, an Auditor found Mr. Kilbrei’s mistake and corrected it by removing the PU claim, a total of \$26.29. The incorrect PU claim was removed prior to the next pay period. No money was ever exchanged.

The Union asserts the Company has not produced the evidentiary proof that there was an intent on part of Mr. Kilbrei to defraud the Company. The Honour System allows for claims submitted to be adjusted up to four months. The claim was submitted, investigated, and discipline assessed all within sixty-four days.

The Union contends that there are bound to be claims submitted in error and therefore a need for an Auditor and the need for employees to have time to adjust their claims. Mr. Kilbrei admitted to his “human error” and asserted to become more diligent with pay claims going forward.

Like CROA 3283, Engineer Kilbrei did not submit a fraudulent or deceptive wage claim, he made an error while submitting his wage claims. The Union asserts, the audit response explaining to him that he is not entitled to this claim was appropriate to ensure that this type of claim is not submitted in the future.

The Union disagrees with the Company’s position that culpability was established for making false wage claims in a previous investigation of a separate issue for which Engineer Kilbrei was issued discipline.

The Union respectfully requests the Arbitrator reinstate Locomotive Engineer Robert Kilbrei without loss of seniority and that he be compensated for lost wages with interest, and benefits for his time removed from service.

Company Position:

The Company disagrees and denies the Union's request.

The Company maintains the Grievor's culpability as outlined in the discipline letter was established through the fair and impartial investigation. Discipline was determined following a review of all the pertinent factors, including those described by the Union. Moreover, the discipline was properly assessed in keeping with the Company's *Hybrid Discipline and Accountability Guidelines*.

The Grievor was well aware of the seriousness of improper wage claims and still chose to submit claims without care and diligence. He had ample opportunity to review and submit a correct claim and ought to have ensured entitlement prior to submitting the claim. At any time between his claim submission and the time the claim was identified and clawed back the Grievor also could have adjusted his claim, but chose not to. The Grievor could have contacted an Auditor as well as, but chose not to.

This was the Grievor's second incident of inappropriate wage claim submissions under the Honour System of Pay in a short period of five months.

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

**FOR THE UNION:**

**(SGD.) G. Lawrenson**

General Chairperson, LE-W

**FOR THE COMPANY:**

**(SGD.) L. McGinley**

Director, Labour Relations

There appeared on behalf of the Company:

P. Sheemar	– Manager Labour Relations, Calgary
S. Scott	– Manager Labour Relations, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary
A. Harrison	– Counsel, CPKCR, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Vancouver
C. Ruggles	– Vice General Chairperson, LE-W, Lethbridge
D. Fulton	– General Chairperson, CTY-W, Calgary
T. Burns	– Local Chair, Kenora via Zoom
R. Kilbrei	– Grievor, Kenora, <i>via Zoom</i>

**AWARD OF THE ARBITRATOR**

**Background and Issues**

[1] The Grievor is a Locomotive Engineer. The facts in this case are set out in the JSI, above.

- [2] It is not disputed that claims were improperly submitted by the Grievor' for his work on August 18, 2022. The claims were for both "CT" (Terminal Switching) and "PU" (Picking up and Setting out Units) at the same location, for the same day.
- [3] The Grievor was not entitled to the PU claim. The claims would have resulted in an overpayment of \$26.29. The claim was captured by the auditors before payment was made.
- [4] The issues in this case relate to both cause for discipline and its reasonableness, under the *Re. Wm. Scott & Co.* framework of analysis.
- [5] The Grievor was Investigated and stated he "assisted" the Conductor with the tie up, but did not review the ticket created by the Conductor for accuracy and felt everything was correct, as he had "assisted the conductor with the tie up for the entirety of the ticket".
- [6] It is not entirely clear what the Grievor meant by "assisted the conductor", as it appears from his evidence he did not review the ticket for accuracy.<sup>1</sup> The Grievor indicated he did not feel entitled to submit both claims, but stated he "made mistake when entering the claims, I do not feel entitled to both claims".<sup>2</sup>
- [7] He indicated he did not have "sufficient time" to "correct my mistake" as it was clawed back on August 25, 2022, three days later, and he pointed to the Honour System Manual which allowed him to adjust claims back four months.
- [8] When asked if he understood he did not have a "grace period" for correction but that wage claims had to be accurate and true when entered, the Grievor again pointed to the fact that wage claims could be adjusted four months back.<sup>3</sup>
- [9] The Grievor was ultimately discharged.
- [10] There is context which impacts the discipline decision in this case, as reflected on the Grievor's discipline record.

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<sup>1</sup> QA 30-32

<sup>2</sup> Q/A 34

<sup>3</sup> Q/A 35 and 36.

[11] Less than four months previous to the timekeeping issue in this case (in April of 2022), the Grievor made two improper time entries under the Honour System when he claimed payment for two days when he was on strike. That entry was found by auditors and clawed back. The Company did not properly plead fraud in that case, but the Grievor was found to have been reckless and negligent in not bringing due care and attention to his timekeeping: **CROA 5009**. Consistent with the actions of other arbitrators in this industry, the assessment of a 45 day suspension was upheld as reasonable by this Arbitrator, even when fraud and/or intent to deceive was not found.

### **Arguments**

[12] The Company did not argue fraud or intent to deceive in this case. Rather, it argued it had just cause to discharge the Grievor and that discharge was reasonable, in the specific context of this case. The Company noted this was the second timekeeping error for the Grievor in the space of a few short months, and that the bonds of trust had been irrevocably broken that the Grievor would or could properly and accurately record his time under the Honour System, which was fatal to his continued employment.

[13] The Union argued the Company has not met its burden of proof to support discharge, which is the ultimate penalty. It argued no fraud was established and that the claim was for a small amount, and was mistakenly made. It argued discharge is reserved for the most significant cases, where fraud and intent to deceive have been established. The Union also pointed out that employees could change wage claims for four months under the Honour System Manual.

### **Analysis and Decision**

[14] The first question is whether cause existed for some form of discipline.

[15] The Honour System, and the significance of a lack of due care and attention, negligence and recklessness in the timekeeping task in this industry, were analyzed in **CROA 5009**. That analysis is adopted here, although it will not be repeated. The Company puts considerable responsibility on its employees to

uphold the integrity of the Honour System of payroll. Each employee is “his [or her] own timekeeper”.

- [16] Arbitral jurisprudence supports a serious and significant response for time-keeping errors, even where fraud or deceit are not established, as analyzed in **CROA 5009**.
- [17] Although I am not entirely satisfied of what the Grievor meant by “assisting the conductor” with a time claim in this case, I am satisfied the Company has made clear to its employees that – *even if another crew member makes the time entry on their behalf* - every employee remains responsible and accountable to the Company for that entry. Each employee must ensure the accuracy of any claims so made and stands behind that entry if it is questioned. Reliance on another employee will not be an acceptable excuse for inaccuracy of a time entry.
- [18] What this practically means is that to be diligent, an employee – and especially an employee in a precarious employment position due to a past timekeeping discrepancy – must ensure that every timekeeping record entered on his behalf was made correctly and accurately. I am satisfied the Grievor knew this expectation – or should have known of it, given his 11 years of service. I am also satisfied that employees are told that if an employee is unsure of their entitlement to a wage claim, they are to enter their wage submission as an “IP” (Interpretive) claim in the Honour System, which will route it to an auditor, to be properly assessed.
- [19] The Grievor failed to ensure the time record made on his behalf was entered accurately and as a result, claimed for more wages than he was entitled. I am not satisfied the Grievor has given a satisfactory answer that would allow a conclusion that a “mistake” occurred, as he knew he was not entitled to the claim and made the claim anyways. He has not explained how his knowledge changed regarding entitlement between when the claim was entered and the investigation, for example. Why did he know at the Investigation the claim was not allowed, but not when he entered the claim?

- [20] Considering all of the circumstances, including the Grievor's knowledge of his previous discipline, I am satisfied that cause existed for discipline in this case.
- [21] The second question is whether the discipline of discharge – which is the “ultimate” discipline – was just and reasonable, on the facts and circumstances in this case.
- [22] The question of “just and reasonable” discipline looks not only to the nature of the event, but to other factors such as the record of the Grievor generally; whether there was provocation; whether there are other incidents of the same type of issue on the discipline record; and if remorse was shown and accountability taken, to provide assurance to the Company that the conduct would not be repeated. When further behaviour of a similar nature occurs, there is a legitimate concern of an employer that the earlier discipline was not effective to change behaviour.
- [23] The Grievor's record in this case is particularly challenging for him, and presents an aggravating factor for discipline. This is the *second* incident of improper timekeeping flagged by auditors in less than five months, relating to this Grievor. Arbitrators are united in determining that a strong message must be sent – both to a grievor and for broader deterrence – that the Honour System of payroll requires the utmost due care and diligence to ensure time records are accurate and true, *even where fraud and intent to deceive are not established*.<sup>4</sup> As was noted in **CROA 5009**, the Company cannot “police” the integrity of the Honour System. It depends on random audits to review accuracy.
- [24] In that case, the Company did not properly put in issue fraud or intent to deceive from the Grievor claiming payment for two days on which he was on strike, in late March of 2022. However, it was determined that the Grievor acted negligently and recklessly and failed to bring due care and attention to that important task when he took the 10 steps necessary to enter those two days.
- [25] It was also determined this was a significant and serious offence which attracted commensurate and significant discipline, as supported by the

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<sup>4</sup> See **CROA 5509** for review of the jurisprudence and this analysis.

jurisprudence. The 45 day suspension assessed by the Company was upheld by this Arbitrator as a just and reasonable response and consistent with that line of authority.

- [26] In this case, the Grievor's response was confusing. He stated he did not check the claims made for accuracy, as he "felt everything was correct",<sup>5</sup> but he also said he "assisted the conductor" with the tie up; he said he knew he was not entitled to the payment (i.e. he was not confused about that entitlement); and yet he made 'a mistake' in claiming it. He also admitted he did not check the tickets for accuracy.
- [27] It is confusing how the Grievor could feel everything was correct if he did not check the tickets; and if he *did* check the tickets it would be confusing how he felt he was entitled to both payments, since he was aware at the Investigation that he was not so entitled.
- [28] Given the Grievor's precarious employment position, this comfort in his colleague's entry seems particularly misplaced. While this Arbitrator recognizes it is not unusual for employees to make entries on each other's behalf, not all employees stand in as precarious position as did this Grievor, in the summer of 2022.
- [29] It remained the Grievor's responsibility to *ensure* accuracy and not to *assume* accuracy. With a 45 day suspension on his disciplinary record and 35 demerits – more than halfway to dismissal – the precarious state of the Grievor's employment for further timekeeping discrepancies should have been readily apparent to him, leading him to particularly guard against further incorrect entries.
- [30] That the lengthy suspension did not lead to that diligence has reasonably led the Company to believe the bond of trust for accurate and truthful timekeeping by this Grievor has been irrevocably broken.

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<sup>5</sup> Q/A 31.

- [31] The Grievor has noted the four month period of time to access the Honour System as a justification for his behaviour. I agree with the Company that there is no four month “grace period” for employees to ensure they have made correct and accurate wage claims. As noted in **CROA 5009**, the fact that a claim can be changed for up to four months does not relieve an employee of ensuring the claims are accurate when they are entered, or of facing responsibility when they are not. If the Union’s argument were correct, the Company would have a legitimate concern that it was being used as a “bank”, with employees able to improperly claim wages and then be overpaid, so long as those employees corrected their entries before the expiry of that four month period. That would be an abuse of the Honour System of payroll and is not the expectation communicated to employees by the Company.
- [32] A further *Re Wm. Scott* factor to be assessed in determining if the bond of trust is irrevocably broken - or whether discretion should be exercised to mitigate a penalty of discharge - is the Grievor’s level of accountability, responsibility and remorse. An appropriate attitude would give the Company assurance that the Grievor understood the error and would take more particular care against this error, in the future.
- [33] It is concerning for the Grievor to rely on the “four month” ability to change a record as an explanation for his behaviour, as that reliance does not demonstrate this necessary accountability and responsibility. While the Grievor indicated in his Investigation that he would “be more diligent in reviewing my pay claims going forward, ensuring I am submitting the correct claims”,<sup>6</sup> it is reasonable for the Company to question that assurance, as that should have been the result from the previous 45 day suspension, issued just a few months before.
- [34] The Union has argued the amount is minimal and should not result in the discharge of this 11 year employee. However, it is not the amount that results in the discharge. The Grievor has not satisfactorily explained how a “mistake”

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<sup>6</sup> Q/A 42.

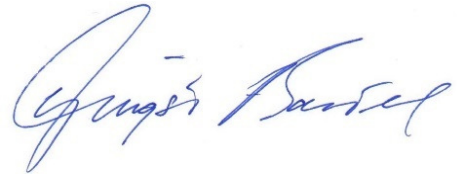


occurred in this case. The Grievor was again careless and negligent regarding his entitlement, demonstrating lack of due care and attention and the diligence required by the task. It cannot be the case that the amounts determine the level of responsibility, when it is the same obligation in place, regardless of that amount. It is a continuing lack of diligence, care and integrity over a key employment task that is reasonably of significant concern for the Company, given that this second incident occurred in such a short period of time, despite a significant and weighty disciplinary response a few months earlier.

- [35] The only mitigating factor in this case is the Grievor's 11 years of employment.
- [36] Despite the able argument of the Union on the Grievor's behalf, I do not find the mitigating factor of service – or the minimal amount – to be sufficient to overcome the aggravating factors in this case.
- [37] Had this been the Grievor's first timekeeping issue; or even had there been more time between the timekeeping discrepancies; or had there been some scope for interpretation regarding the disputed claim, the Union's argument for mitigation of this penalty would have had greater force, as a first offence and perhaps a "one off" issue. However, if a 45 day suspension for improper time keeping mere months before has not led to the expected increased diligence and responsibility by the Grievor to at least check over time claims made on his behalf to ensure timekeeping was accurate and true (and make any changes if not or to route an IP claim if any concerns existed), then it is not clear that an exercise of discretion to return the Grievor to work after this second event, would lead to that end, either.
- [38] Accurate and diligent time-keeping in this industry is foundational to the Company's trust in the Grievor and on the circumstances of this case, it was reasonable for it to assume that trust was irrevocably broken.
- [39] While I am sympathetic to the plight of the Grievor, I am reluctantly drawn to the same conclusion as the Company, in all the circumstances of this case.
- [40] The Grievance is dismissed.

I reserve jurisdiction for any questions relating to the implementation or application of this Award, and to correct any errors and address any omissions to give it the intended effect.

April 15, 2024

A handwritten signature in blue ink, appearing to read "Cheryl Yingst Bartel". The signature is fluid and cursive, with a large initial "C" and "B".

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**CHERYL YINGST BARTEL  
ARBITRATOR**