# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 5055

Heard in Edmonton, June 12, 2024

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of 30 demerits assessed to Conductor Jason McDonald of Kenora, ON.

**JOINT STATEMENT OF ISSUE:**

Following a formal investigation Mr. McDonald was assessed 30 demerits on December 20, 2019 which was described as:

> "Your missing a scheduled investigation on November 14th 2019 out of Kenora, Ontario.
> A violation of T&E Availability Standard MBNO-026-17 dated April 11th, 2017.
> Pursuant to the Hybrid Discipline & Accountability Guidelines, "Employees who accumulate 60 demerits will be subject to dismissal."
> As a matter of managerial leniency only, the Company is providing you with one last chance to comply with the policies, procedures, and rules governing your position as Conductor. This will serve as notice that your employment with the Company is in jeopardy if you commit another offence for which discipline is warranted."

Union Position

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above. In the alternative, the Union contends the discipline assessed is unjustified, in all of the circumstances, including mitigating factors evident in this matter.

The Union submits the Company has improperly characterized the discipline assessed as a "Last Chance", and further disputes any reference to undertaking a last chance agreement on the part of Mr. McDonald.

The Union requests that the discipline be removed in its entirety, and that Mr. McDonald is made whole for any associated loss. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position

The Company disagrees and denies the Union's request.

The Company maintains that lack of intent to violate the rules do not negate the fact that rules were violated. The Company stands by the Memorandum of Trainmaster Jillian Penner.

The Company cannot overlook the fact that the Grievor did not appear at the agreed upon scheduled meeting at 10:00am on November 14, 2019. The Company Officer attempted to call the Grievor twice and even left a message to which no response was received. It was not until 1.5 hours after the scheduled meeting that the Grievor walked into the office. During the fair and impartial investigation, the Grievor admitted he failed to contact the Company Officer to inform her that he would not be in attendance.

The Company maintains that the Grievor's culpability was established through a fair and impartial investigation, the discipline assessed was appropriate and warranted under the circumstances and in keeping with Company policy. Further, before discipline was assessed the Company duly considered all mitigating and aggravating factors.

For the foregoing reasons, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

| **For the Union:** | **For the Company:** |
|---|---|
| **(SGD.) D. Fulton** | **(SGD.) L. McGinley** |
| General Chairperson, CTY-W | Director, Labour Relations |

There appeared on behalf of the Company:

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| A. Harrison | – Manager, Labour Relations, Calgary |
| L. McGinley | – Director, Labour Relations, Calgary |
| S. Scott | – Manager, Labour Relations, Calgary |
| S. England | – Manager, Labour Relations, Calgary |

And on behalf of the Union:

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| K. Stuebing | – Counsel, CaleyWray, Toronto |
| J. Hnatiuk | – Vice General Chairman CTY West, Mission |
| B. Wiszniak | – Vice General Chairman CTY West, Regina |
| J. Rousseau | – Local Chair Div 535, via Zoom, Kenora |
| J. McDonald | – Grievor, via Zoom, Kenora |

## AWARD OF THE ARBITRATOR

### *Background, Issue and Summary*

[1] The Grievor is a Conductor, having entered Company service in 2012. Since August of 2015 he has worked out of the Kenora, Ontario terminal.

[2] This is the third of four Grievances concerning this Grievor, that were heard in the June 2024 CROA session.

[3] In **CROA 5053,** no cause for discipline was established and the Grievance was upheld. The Company was directed to remove the 10 day suspension from the Grievor's record and to make him financially whole.

[4] In **CROA 5054**, the same result was achieved: No cause for discipline was established and the Company was directed to remove the discipline of 20 demerits from the Grievor's record.

[5] This Grievance is filed against the further assessment of 30 demerits and a warning letter, given in November 2019. This discipline resulted from the Company's belief the Grievor failed to attend in a timely way for a scheduled Investigation.

[6] As a result of this assessment, the Grievor was also given a last chance agreement for exceeding 60 demerits, which under the Brown System results in termination.

[7] The raised issues in this case involve the application of the framework from *Re Wm. Scott & Co.*[1], which requires an Arbitrator to consider two questions:

i. Has the Company met its burden of proof to establish there was cause for some form of discipline? and
ii. If so, was the discipline assessed just and reasonable?

[8] However, a preliminary concern became evident to this Arbitrator when reviewing the Investigation transcript in preparing this Award. That concern is discussed below, and resolves this Grievance.

[9] For the reasons which follow, the Grievance is upheld. The Investigation lacked procedural fairness towards the Grievor, in a substantive manner. The discipline is therefore *void ab initio.*

## Relevant Provisions

39.04 **EXAMINE WITNESSES DURING AN INVESTIGATION**
Note: Formerly November 16, 1992 Letter Re: Examine witnesses during an investigation.

[1] [1976] B.C.L.R.B.D. 98

> (1) In respect of a witness from whom a statement will be taken, the employee under investigation will be notified of the time and place in order that that employee or accredited representative may be in attendance if they so desire. Should they attend, they will be permitted to ask questions of the witness and/or offer rebuttal at the conclusion of the witness' statement. It should be noted that all questioning must be directed to the witness through the investigating Officer in order to ensure the orderly conduct of the statement. Only questions or cross-examination on subjects directly pertaining to the evidence or matter under investigation will be allowed. When, in the opinion of the investigating Officer, a question is wholly irrelevant, it may be declined. The question will be recorded in the statement, together with the action of the investigating Officer in declining to direct the question to the witness. If rebuttal is offered or questions asked by the employee under investigation or accredited representative, such rebuttal and questions asked together with the answers given by the witness will be recorded in the statement. Should the employee elect not to question the witness, this will also be recorded in the witness' statement.
>
> (2)…
>
> (3) When a Company Officer gives evidence in the form of a memorandum, the Officer, if requested by the employee under investigation or accredited representative, will be present at the statement of employee. The employee or accredited representative will be permitted to ask questions of the Company Officer through the presiding Officer or to offer rebuttal. The rebuttal offered or questions asked and the Officer's answers will be recorded in the statement in the same manner as noted above.

**Facts**

[10] On November 5, 2019, the Grievor was told he was required to attend before Trainmaster Penner for two Investigations for Attendance, which were to be held on November 13, 2019. It was the Company's evidence that a text was sent to the Grievor and the Notice to Appear was also placed in the Grievor's pigeon hole, advising him of this scheduled Investigation.

[11] The Grievor then contacted Trainmaster Penner on November 13, 2019 at 08:54 a.m. to state there was a misunderstanding with the time and his Union representative would not be available to attend the Investigation until the following day, November 14, 2019.

[12] This is where the evidence diverges.

[13] The Grievor maintained that his understanding was that he and his Union representation were going to come over for the Investigation *after* the local Union meeting was over on the morning of November 14, 2019, and not that he would necessarily attend at 10:00

a.m., which time was noted in Trainmaster Penner's Memorandum as discussed between the parties.

[14] The Company maintained the Investigation had been set for 10:00 a.m. It relied on Trainmaster Penner's Memorandum, which states, in part:

> Jason asked if we could reschedule until Thursday November 14th after the union meeting. I asked what time the union meeting was over as I had other items on the docket. Jason advised that the union meetings never last over an hour so 10:00 am would work perfect and that it should be quick as they are similar type investigations. I confirmed with Jason that we would reschedule to 10:00 on Thursday November 14, 2019.

[15] The Grievor did not attend for the Investigation at 10:00 a.m., as the Union meeting was not done by 10:00 a.m. The Company's evidence from the memorandum of Trainmaster Penner was she made a call to the Grievor at 10:44 when he was 44 minutes late and he did not answer this call.

[16] It was the Company's submission the Grievor walked in, in a casual manner, an hour and 40 minutes late. As pointed out by the Union, there is no evidence to support the narrative that the Grievor entered in a casual manner. A narrative is not evidence.

[17] The Grievor stated he did not receive the call as his phone was turned off during the meeting, as was required. In the Step 1 Grievance procedure, the Union confirmed this was a requirement at Union meetings.The Grievor also gave evidence he did not advise Trainmaster Penner he would be late, as his understanding was that the Investigation was always to occur after the meeting was over, and not at 10:00 a.m.

[18] Trainmaster Penner cancelled the Investigation when the Grievor did not arrive and scheduled a further Investigation for allegedly not attending the Investigations.

[19] In between A10 and Q11 of the Investigation transcript is a notation "I called Trainmaster Jillian Penner during the investigation at 13:12 and she confirmed it was a defined time of 10:00 a.m." This notation appears to have been made by the Investigating Officer. No other comment is made on the transcript regarding this call.

**Analysis and Decision**

[20] It is trite that the Company bears the burden of proof for establishing both that cause exists for some form of discipline, and that its assessment of discipline was just and reasonable, in all of the circumstances, considering both mitigating and aggravating factors.

[21] Given the disposition of this Grievance, however, it is not necessary to set out the arguments of the parties regarding these factors or decide those issues. There is a fundamental concern regarding procedural fairness in the Investigation process, which determines the outcome of this Grievance.

[22] Some background regarding procedural fairness is necessary to situate this issue.

[23] While Arbitrators under the CROA process are subject to the terms agreed to by the parties in the CROA Agreement, they are also subject to the requirements established by the legislature in the *Canada Labour Code.* That legislation – and arbitral jurisprudence more generally - entitles arbitrators to set their own procedure, but requires those individuals to respect the principles of procedural fairness and natural justice. This is required of all statutory tribunals.

[24] Fundamental to that obligation is to ensure that each party has the same opportunity to question a witness whose evidence is then to be relied upon in the decision-making process. In the normal course, an arbitrator ensures this aspect of procedural fairness by overseeing the testimony of witnesses during a hearing.

[25] Under the CROA process, however, the parties have agreed that a large part of an arbitrator's fact-finding role has been assumed by the Investigatory process. That includes the questioning of witnesses who may have information relevant to the particular dispute. Given the role of the Investigation in this expedited process multiple cases can be heard in a day, as oral evidence is rare.

[26] The importance of evidence-gathering from witnesses is reflected both in the Collective Agreement between the parties: Article 39.04(1) and (3) and in the CROA Agreement.

[27] The CROA parties recognized the importance of the fair and equal questioning of witnesses in their Agreement setting the rules for this process. As noted in the CROA Agreement, paragraph 13, an Arbitrator is to ensure at a hearing that each party is given the "right" to "examine all witnesses called to give evidence at the hearing".

[28] Company Officers who file a memorandum into evidence are specifically referred to in Article 39.04(3). That Article outlines how the evidence of those Company Officers – if given in person – is to be received, including a requirement that the Union representative be given an opportunity to question that witness, with questions and answers recorded on the transcript.

[29] The integrity of the questioning of witnesses during the Investigatory process to ensure fairness to both parties regarding witness evidence is therefore not only a matter left to be raised by one party or the other as an "issue" in a JSI under the CROA Agreement, as it is not an "issue" in the ordinary sense. Rather, it is a fundamental aspect of an arbitrator's role in ensuring procedural fairness for the resulting hearing process. That obligation is a broader umbrella under which each of those requirements sit.

[30] Neither the Investigation process nor the CROA Agreement absolve an arbitrator of her underlying obligation to ensure that witness evidence is subject to the protections of procedural fairness. An arbitrator cannot abrogate that aspect of her role. As such, that aspect of the Investigatory process must be guarded by an arbitrator and not just the parties.

[31] Given the importance of fairness in the Investigation process, it is well-established in this industry that procedural flaws in the Investigation can result in the discipline being found *void ab initio*. As explained in **AH809-M**, the CROA process of arbitration has "for decades, imposed harsh consequences for actions, however innocent, which prejudice the process".[2] While that case was addressing the failure to identify issues in the Joint Statement of Issue, the same statement holds true for substantive issues of fairness which arise from the procedure followed to question witnesses, the significance of which may not be appreciated by the lay parties who are involved in the Investigation process.

[2] At para. 41

[32] Applying these underlying principles to the facts in this case, the Investigating Officer of the Company contacted Trainmaster Penner as part of the Investigation, to "clarify" her evidence. There is a note between Q/A10 and Q/A 11 which references this "clarification" call. While Article 39.04(3) allows an employee to request that Company Officer's presence at the Investigation, there is no provision made for the Company to clarify that evidence. There is a larger concern at play in this case, however than that. *There is no mention on the transcript of any opportunity given by the Investigating Officer to the Union during the Investigation to* ***also*** *question Ms. Penner regarding her evidence as to time or otherwise*. Even assuming the Company can seek this type of clarification, the Union would also be entitled to an opportunity to ask questions of that witness. That this opportunity is offered is then noted on the transcript, as noted in Article 39. If a Union has no questions, that is also noted on the transcript.

[33] The Company was therefore not entitled to call and talk to Trainmaster Penner as part of this Investigation *without also giving the Union the opportunity to question Ms. Penner as to her memory*, as a matter of fundamental procedural fairness. This is of critical importance when the issue of what time was set for this meeting – which the Company was clarifying – is the key point of contention between the Grievor and Trainmaster Penner.

[34] The failure of the Company to provide to the Union the same opportunity it has taken for itself to question a key witness on a key point of fact is, in my view, a fatal flaw which taints this Investigation process in a substantive manner. The discipline assessed cannot stand for that reason alone and must be set aside. It is considered *void ab initio* or "from the start".

[35] If I am wrong in this result, I would have found the Company had met its burden of proof to establish that the Grievor was aware that 10:00 a.m. was the start time for this Investigation, for the following reasons.

[36] This is a case resolved on the evidence. Either the Grievor failed to attend the Investigation as required in this case, or there was a simple misunderstanding and no culpable behaviour occurred.

[37] Given the level of detail Trainmaster Penner was able to recall, I would have found her evidence was in harmony with the balance of probabilities for what occurred; that she and the Grievor had set 10:00 a.m. as the time for the Investigation; that the Grievor assumed the meeting would only go one hour and be done by 10:00 a.m. and he would be one time; and that he should have – but did not – contact Trainmaster Penner when the 10:00 a.m. time could not be met, as the Union meeting ran longer than expected. He failed in that responsibility and this behaviour was culpable.

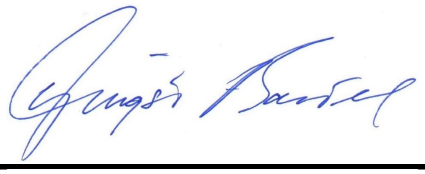
[38] However, I would have found that the discipline of 30 demerits – or halfway to dismissal under the Brown System – for this failure to contact the Company when the meeting went long – was a harsh, excessive and unwarranted disciplinary response, in all the circumstances of this case, and considering the jurisprudence. I would have therefore exercised my discretion to vacate the 30 demerits and substitute a written warning.

[39] The Grievance is upheld. The discipline assessed is *void ab initio* due to an issue of procedural fairness during the Investigation.

[40] The Company is directed to remove the 30 demerits and warning letter from the Grievor's record and to make him whole for any financial impact.

Should the parties not be able to agree on the financial aspect of this Award, either party can request that the matter be set down as a stand-alone issue at a CROA session over which I preside, for resolution.

I remain seized with jurisdiction to address that issue and any other issues arising from the implementation of this Award. I also remain seized with jurisdiction to correct any errors and to address any omissions, to give this Award its intended effect.



**July 26, 2024**

**CHERYL YINGST BARTEL**
**ARBITRATOR**