CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5056

Heard in Edmonton, June 12, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 30 Demerits and subsequent dismissal for accumulation of demerits assessed to Conductor J. McDonald of Kenora, ON.

JOINT STATEMENT OF ISSUE:

A formal investigation was conducted on January 12, 2021, which resulted in the Grievor being assessed 30 Demerits on January 30, 2021, described as:

Please be advised that your discipline record has been assessed THIRTY (30) Demerits for the following reason(s):

> *In connection with your two (2) missed calls on Monday, December 28 2020 at 0422 and 0746, while working as a Conductor in Kenora ON; a violation of the T&E Availability Standards.*

The Grievor was issued a subsequent letter on January 30, 2021 stating,

> *Please be advised in light of your January 29, 2021 assessment of 30 (Thirty) Demerits, you are hereby DISMISSED from Company Service for an accumulation of 105 Demerits under the Hybrid Discipline and Accountability Guidelines.*

The Grievor was reinstated on August 30, 2022.

Therefore, the period in dispute is between January 30, 2021 and August 30, 2022.

UNION POSITION

The Union contends the Company has failed to establish culpability related to the allegations outlined above. In the alternative the Union contends the discipline assessed is unjustified, unwarranted, and excessive in all of the circumstances, including mitigating factors evident in this matter.

The Company alleges a violation of the T&E Availability Standard. The Union disputes this policy in all its facets.

The Union contends the discipline assessed to Mr. McDonald is unjustified, unwarranted, and excessive in all of the circumstances. Accordingly, the Union requests the discipline be removed in its entirety, and that Mr. McDonald is made whole for all associated loss with interest. 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 assessed discipline of demerits and dismissal for accumulation was determined following a review of all pertinent factors, including those described by the Union and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the Hybrid Discipline and Accountability Guidelines. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

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:

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:

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

[1] The Grievor is a Conductor, employed since 2012. This is the fourth and final Grievance involving this Grievor, all of which were heard during the June CROA session.

[2] This Grievance is filed against two discipline assessments.

[3] The first assessment was 30 demerits for two missed calls on December 28, 2022, at 0422 (for train 420-28) and 0746 (for train 320-242). The Company considered these missed calls to have breached its T&E Availability Standards, reproduced below.

[4] The second assessment was dismissal due to accumulation[1] of 105 demerits, which occurred on January 29, 2021[2].

[5] On August 30, 2022, the Company reinstated the Grievor, by a letter of reinstatement dated June 24, 2022, on a "leniency basis". In that letter, the Company maintained the reinstatement was a "last chance arrangement for continued employment with CP Rail". That reinstatement was without compensation or benefits for the time out of service, or the time required to meet the Company's requirements as outlined in that letter.[3]

[6] The issues between the parties are:

a. Were the two missed calls on December 28, 2020 culpable behaviour that attracted discipline?

b. If so, was the assessment of 30 demerits a just and appropriate disciplinary response? and

c. Is the Grievor to be compensated for loss of compensation and benefits for the period January 31, 2021 until his return to work on August 30, 2022?

[7] The results of the previous Grievance Awards are relevant in determining the issues in this case:

a. **CROA 5053**: no culpability for discipline found; 10 day suspension set aside;

b. **CROA 5054**: no culpability for discipline found; 20 demerits set aside.

c. **CROA 5055**: discipline was *void ab initio* for lack of procedural fairness in the Investigation; discipline of 30 demerits was set aside.

[1] Under the Brown System, dismissal occurs once an employee reaches 60 demerits.
[2] His disciplinary record indicates he was dismissed January 30, 2021, but his Form 104 letter has the date as January 29, 2021. It is that document that has been accepted as establishing the date of dismissal.
[3] Rules Qualification and medical assessment.

[8] For the reasons which follow, the Grievance is upheld. The Company has not met its evidentiary burden to establish the Grievor's conduct was culpable.

Relevant Provisions

T&E Availability Standard

For Canadian Pacific to be successful and competitive in the North American Railway industry we not only have to provide great customer service, we have to continue our collective efforts at exceling on efficiency and productivity. Give that efficiency and productivity are directly impacted by employee attendance levels, an attendance policy that is understood and adhered to by all is essential.

Effective February 1, 2017, the following availability standard supersedes and replaces all previous availability standards for T&E employees in Operations at Canadian Pacific.

T&E employees have negotiated opportunities provided for in their Collective Agreements to legitimately remove themselves from the working board. Examples of negotiated and also legal absence categories that will not result in discipline under this availability standard include: annual vacation; pre-authorized personal leave; bereavement; jury duty; company business; and time off mandated by the hours of service regulations.

T&E Employees who book off sick on two or more available work days in the calendar month will be subject to attendance review. Disciplinary action may result.

The following absence categories will be handled as more serious offenses separate from this calendar month review:

- Miss calls (including missing calls as an ESB);
- Booking sick or unfit on-call or after accepting a call;
- Booking sick or unfit after call time or after start time of assignment;
- Refusals to protect service;
- Not reporting or reporting late for duty;
- Unauthorized absence (AWOL);
- Exhibiting a patterns of booking sick on weekends or consecutive to other absence types, such as, but not limited to: vacation, paid leave, Earned days off and rest days.

Note: Medical documentation will not be accepted to excuse these absence categories except in extraordinary circumstances involving a documented medical emergency.

Employees requesting to have sick absences excused due to serious medical issues must ensure that satisfactory medical information is received by Occupational Health Services for review within three (3) business from the last day of the medical absence. The three business day requirement will be strictly enforced. Upon receipt of timely and satisfactory information, Health Services will review the request and advice CMC whether the absence has been medically substantiated.

> Article 39 Informal Handling
> …
> (3) A record of the incident will be placed on the employee's file and a copy of same given to the employee.
> (4) This record on file does not constitute discipline but does establish that the incident took place. The fact that the incident occurred may be used by the Company in assessing the appropriate amount of discipline should repeat offences take place within a one year period.
> (5) The existence of this record on an employee's file will not be used at arbitration by either party if repeat offences do not take place within one year.

Facts

[9] On December 28, 2020, the Grievor missed two calls for work, as noted above. The Grievor was investigated for these missed calls on January 12, 2021.

[10] It was the Grievor's evidence his cell phone died the evening of December 27, 2020. While he plugged it in overnight, it failed to charge and so he missed the two calls, made at 0422 and 0746 on December 28, 2020. It was the Grievor's evidence that he woke when his colleagues attempted to contact him through Facebook regarding the missed calls, which resulted in 'dings' on his computer, which he heard. His further evidence was that when he realized what happened, he swapped out his SIM card into another phone. He then contacted the CMC to advise of the problem he had, and to book on.

[11] This call was made at 0846, which was approximately one hour after the second missed call. He was booked on at 0918. Shortly thereafter, the Grievor accepted a call for train 100-26 for 1200.

[12] The Company's T&E Availability Standard is currently under grievance.

[13] By the CROA Agreement which governs this expedited arbitration process, arbitrators are entitled to seek evidence. At the hearing, this Arbitrator asked if the T& E Availability Standard had been referenced in the Grievor's discipline for a missed call in 2018, as the explanation was truncated in the Company's submissions. The Company subsequently sent a copy of the full record to demonstrate that Standard was noted. The Union objected to this late evidence.

[14] As Arbitrators are entitled under the CROA process to seek evidence, I am prepared to accept this evidence as relevant, given that it exists on the full disciplinary record of the Grievor maintained by the Company; and given that this information was provided in answer to a question specifically asked in the hearing.

[15] This is not a 'late' submission of evidence, given that context, and is relevant to the resolution of this Grievance.

Arguments

[16] Given the disposition of this Grievance on the first question of the framework in *Re Wm. Scott & Co.,* (culpability), it is not necessary to address the jurisprudence relied upon by the parties for the proper measure of that discipline.

[17] The Company argued the staffing model for its workplace is different than most other workplaces, due to the nature of its business. It noted that employees with position on a Board are called in order of their position to work and are required to be available for that call. When employees are unavailable for work, it argued it is particularly impacted and this results in scheduling issues and other operational impacts. It noted the issues which result for the Company from absenteeism, and argued it is the Grievor's responsibility to ensure he is available for work. It was the Company's position that the Grievor's behaviour was culpable, as he breached the T&E Availability Standard, which sets out the reasonable expectations for attendance by employees when called in to work. It argued that when the Grievor missed two calls, he was put into a dismissible position, given his demerits at that point in time.[4]

[18] Regarding the reasonableness of the discipline, it argued his discipline record was poor for missed attendance. It noted that there were seven incidents of discipline and four informal handlings over a period of six years for this Grievor. Its position was that the determination of the amount of discipline was just and reasonable, relying on jurisprudence and its own Hybrid disciplinary policy.

[4] 50 demerits have been removed from the Grievor's record in the three previous cases heard during this session.

[19] The Company argued the Grievor did not present any mitigating factors for consideration. It pointed out he was not a long-service employee and his disciplinary record was a mitigating factor. Given all of these factors, it argued the discipline assessed of 30 demerits for missing two calls was just, reasonable and appropriate. It argued the unpaid time when the Grievor was off work was effectively an unpaid 1.5 year suspension, which "had the desired effect of communicating the importance of compliance with expectations to the Grievor" as he has not had any further attendance issues since he was reinstated.

[20] It must be noted that several of these incidents of discipline relied upon by the Company have now been set aside, as a result of **CROA 5053**, **5054** and **5055**. The Grievor's disciplinary record therefore does not stand as it was, when referred to by the Company in support of its decision to consider the Grievor culpable and issue discipline.

[21] The Company's representative stated that Train 100-26 – which was the call the Grievor ultimately accepted – was a preferential assignment. The implication from this comment was that the Grievor purposely chose to wait for that preferential assignment, instead of accepting the other two missed calls. The Union argued there was no evidence for that conclusion and it took exception to that supposition. It urged that any suggestion that the Grievor sought out a preferential assignment was purely speculative.

[22] The Union argued the Grievor should never have been booked on for the second call in any event on December 28, 2020, as he missed his turn as a result of the call at 0422. He was required to wait for his turn to return to the home terminal. His turn had been filled by a spare employee and had not returned.

[23] The Union argued the Grievor was honest and forthright throughout the Investigation. It further argued he had given a legitimate and reasonable explanation for missing the two calls on December 28, 2020, which was not challenged by the Company during the Investigation. It noted he accepted a call as soon as he realized what had occurred. It also noted he went to work on December 28, 2020, and was not "moonlighting" (avoiding the Company's call to work elsewhere). It argued these actions demonstrated he was not trying to avoid working on that day, as argued. It pointed out he committed in the Investigation to ensuring his phone was fully charged in the evening, which is borne out by the fact he has not had this type of issue occur since, or received any discipline for

missed calls in the two years since the incident. It also pointed out that several of the disciplinary events relied upon by the Company were under Grievance and being heard in this session.

[24] Even if discipline were warranted, it argued the discipline was excessive given all of the factors, and that it should be either vacated or substantially reduced to a written warning or caution. It argued there was no intentional wrongdoing in this case.

[25] In Reply, the Company argued the Union is not entitled to raise the position the Grievor should not have been called a second time, as a mitigating factor, as that is outside of the JSI and was not raised earlier. It argued the Union's arguments note the manpower shortage, which means the Grievor's missed call has a greater impact. It also pointed out that it is the responsibility of the employee to be available and attend work when required; and that this was not a "one off" incident. It argued the leaves of absences in 2020[5] resulted in the extension of the one (1) year timeframe that non-major discipline is considered active. It argued it had provided numerous opportunities to the Grievor in the form of Informal Handling and progressively more severe discipline. It distinguished the Union's jurisprudence.

[26] In its Reply, the Union argued the Company is not entitled to rely on the Grievor's Informal Cautions and Handlings. It argued Informal Handlings do not constitute discipline under the Collective Agreement: Article 39.11. It argued the discipline should be deemed void as a result. It argued there was more than one year between any notations in 2014-2015 and the formal reprimand received on January 31, 2017, and that the missed calls in question took place on December 28, 2020, while the last missed calls prior to this time were on May 18 and 19, 2019 (10 demerits) which was 19 months prior. It argued that any Informal Handlings from 2015, 2017 and 2018 cannot be relied upon by the Company in this arbitration. It argued the Company should not have taken these Handlings into account at the time of assessing discipline, as part of its "concerning pattern", and that this should void the discipline *ab initio*. It argued the bond of trust was not broken and the

[5] Jan 14 to Feb 2, 2020; and March 14 to October 6, 2020.

Grievor should have not have been dismissed, which is evident in the fact he was reinstated. It distinguished the Company's jurisprudence.

Analysis & Decision

[27] As noted in **CROA 5054**:

> …[t]he staffing model in this industry is different than in other industries. Employees can be "called in" for work if they occupy a position on a Board. They are called in order of their position, and are required to be available for work when called. When employees are unavailable to work, other employees must be called for work earlier than they may have been anticipating. Such absences therefore can have operational impacts which are different than in typical workplaces, given the unique nature of this industry.[6]

[28] That said, as has also been recognized by multiple arbitrators in this industry[7], an assessment of discipline for booking sick or for not responding to calls to work cannot be based on speculation and supposition, notwithstanding the realities of this industry. As noted in **CROA 5054** and in the case noted in that Award, suppositions and suspicions are distinct from evidence.

[29] This distinction becomes critical when the assessment can cause dismissal due to accumulation, as occurred in this case.

[30] While it has been noted previously in this industry that the 100 series trains are "…expedited trains that handle high priority traffic" [8], I agree with the Union that there was no evidence filed by the Company that a) this was considered a preferential assignment by its employees; b) why it would have been preferential for this Grievor; or c) that it had cause to believe the Grievor was waiting for this preferential assignment when he did not respond to the two earlier calls to work. In short, the Company did not offer any evidence to back up its suppositions and doubts.

[6] At paras. 9, 10
[7] See for example the cases noted in CROA 5054.
[8] See for example **CROA 4868** and *CP v. TCRC (Evans)* **AH677**

[31] Had the Company demonstrated that the Grievor had a pattern of missing calls and accepting calls only for preferential assignments, for example, that pattern could support that this was “more of the same” behaviour, which could lead to culpability[9].

[32] The fact that the Grievor has been disciplined in the past for booking sick and missing calls (some of which discipline has been now set aside), does not establish a concerning pattern of conduct that he did not simply sleep through a call, but was “cherry picking” assignments. His past discipline record is not so poor or deliberate that it supports that conclusion, especially in view of the Awards in **CROA 5053**, **5054** and **5055.**

[33] It is not unreasonable for an individual to depend on his phone for his alarm clock.. While in hindsight the Grievor should have set a back-up alarm and is encouraged to do so in future, his explanation of his phone not appropriately charging is not an unknown phenomena, and was logical and reasonable. It was not an excuse which inherently lacked credibility or logic. I find credible that the Grievor had a legitimate reason for missing calls on December 28, 2020.

[34] Further, the Grievor also acted consistently with that reality by calling into the CMC and booking on as soon as he was awoken and realized what happened. The Grievor was not off work for the entire day, as might be expected if he did not want to work on December 28, 2020. He booked on as soon as he realized what had occurred, and was in touch with the Company within one hour of missing the second call.

[35] Culpability for discipline has not been established.

[36] Arbitrators have a broad discretion to craft appropriate remedies, based on the particular circumstances of each case, both under legislation, and arbitral jurisprudence. As a result of **CROA 5053**, **5054**, **5055** and **5056**, the Grievor’s disciplinary record should be 25 demerits, less any amounts he has worked off since this Grievance was filed.

[37] Given that level of demerits, the Grievor should not have been dismissed due to accumulation under the Brown System.

[9] As was the case in **AH750**

[38] The Grievor has already been reinstated by the Company. His time on dismissal should not be considered to be an unpaid suspension, given that no culpability was established. He should not have been dismissed.

[39] Neither should he be considered to be under a "last chance arrangement" with the Company.

[40] The Grievance is upheld. The Company is directed to remove 30 demerits from the Grievor's disciplinary record. The following directions will flow as a result of the findings in this Award:

a. The Grievor's reinstatement is directed to be without loss of seniority, compensation or benefits and he is to be made financially whole for the time he was dismissed;

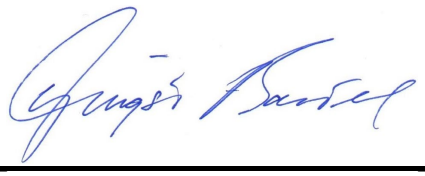
b. The Grievor is further to be compensated for any time required to meet the Company's requirements under paragraphs 1 and 2 of the letter of June 24, 2022;

c. The Grievor is not to be considered as being under a "last chance arrangement". The June 24, 2022 letter is to be removed from the Grievor's employment record;

d. The exact amount of compensation in compliance with these directions is referred back to the parties for their resolution; and

e. If the parties are unable to agree on that amount, either party can approach the CROA office to have that issued resolved at a session over which this Arbitrator presides.

I remain seized with jurisdiction to address any 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 it the intended effect.



July 26, 2024

CHERYL YINGST BARTEL
ARBITRATOR