

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

**CASE NO. 5085**

Heard in Montreal, October 8, 2024

Concerning

**CANADIAN PACIFIC KANSAS RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE  
MAINTENANCE OF WAY EMPLOYEE DIVISION**

**DISPUTE:**

Assessment of 30 demerits to Mr. Royce Kelsh and dismissal for an accumulation of demerits.

**JOINT STATEMENT OF ISSUE:**

On March 7 2024 the grievor, Mr. Royce Kelsh, was issued two Form 104s, one for 30 demerits and the second a dismissal for an accumulation of demerits in excess of 60.

The 104 for 30 demerits stated the following:

Please be advised that you have been assessed **30 Demerits** for not performing the duties of a foreman as required in a productive and safe manner during your tour of duty on January 24th, 2024.

Following a fair and impartial investigation you were determined to be non-compliant with the following:

1. You did not ensure a pre-trip inspection was completed for vehicles being operated by your crew. (violation of SPC 41 3.2 item (a)(i))
2. You did not notify the person in charge of the track while fouling the track at Ellerslie auto compound (violation of RBEE 5.1 item 2)
3. You chose to use lookout protection for approximately 3 hours as opposed to using red flags/lights and/or private locks (violation of RBEE 2.2 item (a) and SPC 41 3.2 item (a)(iv))

Summary of Rules violated:

<b>BOOK</b>	<b>SECTION</b>	<b>SUBSECTION</b>	<b>DESCRIPTION</b>
Rule Book for Engineering Employees	5. Protection in Non-Main Track and Cautionary Limits	5.1 Protection of Maintenance Work	2. Did I advise any person responsible for the track(s) starting the main and/or non-main

			track(s) to be occupied or fouled?
SPC 41 M/W Rules & Instructions	3. Foreman – General Rules and Responsibilities	3.2 Responsibility for Employees	a. Foreman are in charge of the employees assigned to them. Foreman must: i. see that employees understand and properly perform their duties. Carelessness, neglect, incompetence, or misconduct. iv. Seek out and assign productive work during stand by time.
Rule Book for Engineering Employees	2. General	2.2 While on Duty	a. Safety and a willingness to obey the rules are of the first importance in the performance of duty. If in doubt, the safe course must be taken.

The Union disagrees with the discipline assessed and, as a result, both the 30 demerits and the dismissal were grieved on March 25, 2024. The Company responded to the grievance on April 26, 2024.

The Union contends that: The Notice of Investigation in this matter was issued in violation of the fairness and impartiality provisions of the Collective Agreement (sections 15.1 and 15.2); The Company violated Section 15 of the Collective Agreement by dismissing the grievor when the offences he allegedly committed could not legitimately be considered as dismissible; The discipline assessed was unjust, unwarranted and not in conformity with the Collective Agreement, arbitral jurisprudence, the principle of progressive discipline, and CPKC's Discipline Policy.

The Union requests that: The Company be ordered to reinstate the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company Position:

The Company denies the Union's contentions and declines the Union's request.

The Company maintains that culpability was established through a fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor's service and past discipline record.

Although the Union has contended that the Notice of Investigation (NOI) allegedly violates the fairness and impartiality of the Collective Agreement, they have not particularized in what way this occurred. Simply stating something and calling it fact, does not make it so.

Further, the Collective Agreement has no language limiting the circumstances in which a dismissal can occur for employee's outside of their probationary period. Given the Grievor's active

discipline was at 75 Demerits, the dismissal was in line with Company Policy, historical practice, and jurisprudence. There has been no violation of Section 15.

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 and requests that the Arbitrator dismiss the Union's grievance in its entirety.

**For the Union:**  
**(SGD.) W. Phillips**  
President-MWED

**For the Company:**  
**(SGD.) L. McGinley**  
Director Labour Relations

There appeared on behalf of the Company:

S. Oliver – Manager, Labour Relations, Calgary  
F. Billings – Director Labour Relations, Calgary

And on behalf of the Union:

W. Phillips – President, MWED, Ottawa

### **AWARD OF THE ARBITRATOR**

#### **Context**

1. On January 24, 2024, the grievor was the Foreman of a three person maintenance crew. He was given instructions: "... to go to Eilerslie compound on the Leduc sub and flange/clean out the crossings in the compound from snow and obstructions. After that job task was completed, the crew was instructed to go into Lambton Park Yard east end and cut/replace seized frog bolts and heel block bolts as well as in Clover Bar, Scotford Yard and Elk Island. Employee was asked to inform Nick Leduc via text at the end of the shift of what switches were completed for the bolt maintenance." (See Tab 3, Union documents).

2. The Company investigated the grievor: "in connection with your alleged failure to perform the duties assigned to you in a productive manner on January 24, 2024 and your alleged non-compliance to the application of lookout protection" (Tab 4, page 1, Union documents).

3. On March 7, 2024, the grievor was issued a Form 104 advising him that he was being assessed 30 demerits "for not performing the duties of a foreman as required in a

productive and safe manner during your tour of duty on January 24, 2024”(Tab 1, Union documents). The Form 104 identified the following issues:

- You did not ensure a pre-trip inspection was completed for vehicles being operated by your crew. (violation of SPC 41 3.2 item (a)(i));
- You did not notify the person in charge of the track while fouling the track at Eilerslie auto compound (violation of Rule Book for Engineering Employees 5.1 item 2);
- You chose to use lookout protection for approximately 3 hours as opposed to using red flags/lights and/or private locks (violation of Rule Book for Engineering Employees 2.2 item(a) and SPC 41 3.2 item (a)(iv)) (see: Form 104, Tab 1 Union documents).

4. The grievor was dismissed for accumulation of points, having a total of 75 points with the most recent incident.

5. At the time of his dismissal, the grievor had sixteen (16) years of seniority.

### **Preliminary Objection**

6. The Union makes a preliminary objection that the investigation was not appropriate, as the Notice of Investigation was overly broad. The NOI provided: “This investigation will be held in connection with your alleged failure to perform the duties assigned you in a productive manner on Jan. 24, 2024” (see Tab 7, Union documents).

7. The Union cites a number of cases (see **CROA 2280, AH 521** and more generally, paragraphs 21-41 of the Union Brief), which stand for the proposition that proper notice is imperative to ensure a fair and impartial investigation, and that a failure to provide a proper notice can result in the discipline being dismissed as void ab initio.

8. The Company argues that the NOI was appropriate and that the grievor knew the Company concerns prior to his testimony in the investigation.

### **Decision on the Preliminary Objection**

9. I find that the Preliminary Objection should be dismissed, for the reasons which follow.

10. Firstly, the jurisprudence is clear that the investigation is not intended to have the trappings of a trial. As Arbitrator Picher noted in **CROA 1858**: “investigation procedures... are intended to provide an expeditious, fair and open system of fact finding in serious disciplinary cases. The procedure is not, however, intended to take on the procedural trappings of judicial or quasi-judicial hearings”.

11. It is clear that the investigation process is not as formal as a Court process. The grievor is, however, entitled to know the case he has to meet for the process to be fair.

12. Secondly, the grievor was given the evidence and statements on which the Company relied:

1. Memorandum written by Adam Dowie, dated Jan. 29, 2024
2. Memorandum written by Nick Leduc, dated Feb. 02, 2024
3. Image of safety inspection record
4. GPS record for BTMF truck H17010
5. Fuel Report and Geo Tab report for H17010 & H17052
6. Spencer Clark Signed Statement
7. Richard Mabiza Signed Statement

13. The statements and evidence go a long way further in providing the particulars on which the Company relies and to which the grievor is entitled.

14. Thirdly, it is clear that the grievor was sufficiently in possession of the necessary facts to be able to contest the evidence presented by the Company. Indeed, he refutes many of the documents and statements advanced by the Company (see Investigation transcript, Tab 4, Union documents, pages 2-3).

15. Fourthly, the investigation took place on February 23, less than one month after the incident on January 24, 2024. There is no evidence that the memory of anyone involved was affected by the passage of time.

16. I find that while the NOI could have been more explicit, the grievor knew the case he had to meet and was not prejudiced by the terms of the NOI.

17. Accordingly, the Preliminary Objection is dismissed.

## **Merits of the Case**

### **Position of the Company**

18. The Company takes the position that the grievor failed to perform his duties as a foreman and that his actions warrant the imposition of 30 demerits in the circumstances. In particular, the grievor failed to ensure that the pre-trip inspection report was completed, failed to notify the person in charge with respect to track fouling while his maintenance team performed their tasks, and chose lookout protection, rather than red flags/lights or private locks, thereby making himself unavailable for maintenance work for over three hours.

19. The Company notes that the grievor has accumulated 75 demerits in the last two years and has shown that he has not learned from past discipline. Accordingly, dismissal was both justified and reasonable.

### **Position of the Union**

20. The Union takes the position that the grievor did not in fact violate any Rules and is not deserving of any discipline. In the alternative, it argues that the discipline imposed was too severe and that the grievor should be reinstated.

21. The Union notes that it is the driver, and not the grievor, who is responsible for the pre-trip inspection and report. It argues that the grievor did notify the Security Guard at the locked gate that his team would be performing maintenance and that he provided lookout protection in accordance with the Rules.

### **Decision on the Merits of the Case**

22. For the reasons that follow, I find that discipline was appropriate, but exercise my discretion to reduce the number of demerits imposed and reinstate the grievor. However, the grievor has demonstrated that he currently does not have the proper leadership

qualities to continue to act as a foreman. Consequently, as part of the reinstatement, the grievor is to be demoted to a non-foreman role.

23. The first allegation relates to the failure by the grievor to ensure that the pre-trip inspection was properly carried out. I accept the Union argument that the inspection itself is carried out by the driver, not the grievor. This is accepted by the driver himself (see Q and A 25-27 of Spencer Clarke, Tab 5, Company documents). However, the responsibility of the foreman is not to perform the inspection, but to ensure that the inspection was properly carried out, which would include signing off on the log book, or obtaining a new log book or other document to signal that the mandatory inspection had been carried out (see Safety Rule Book Section E-4, Tab 10, Company documents).

24. It is clear that the driver knew that he had a responsibility to sign off on the inspection, but the grievor bears a responsibility to ensure that it is done. In failing to do so, the grievor is liable to discipline.

25. The second allegation relates to the failure of the grievor to contact the Trainmaster with respect to the work which was going to be performed by his crew at the Elderslie Yard. The grievor testified that he had notified the Security Guard at the locked entrance to the Yard, so did not feel it necessary to notify the Trainmaster as well. I agree with the position of the Company that the Security Guard is not the appropriate person to ensure the safety of a crew working on track. The Guard has no authority or training concerning the movement of trains. Even if there were no current movements scheduled on or near the tracks on which the crew was working, that situation could change. The Trainmaster needs to be informed in order to be able to protect the maintenance crew. While the grievor indicates that he made several attempts to contact the Trainmaster (see Q and A 72, Tab 7 Company documents), it is difficult to believe that the Trainmaster was unavailable for the more than three hours the crew was in the Yard. Here the grievor clearly did not properly communicate with the Trainmaster and is liable to discipline.

26. The third allegation is respect to the failure of the grievor to properly protect the track. The Union position is that the grievor was providing lookout protection and as such, was abiding by the Rules. The Company's position is that the grievor spent more than three hours in his heated truck, while his two crew members worked on de-icing the track by hand. It points out that the grievor could have provided protection through the use of flags/lights or by locking out the track. This would have enabled the grievor to work alongside his crew members while still having track protection.

27. I find the Company position far more compelling. The role of the foreman is to ensure productive and safe work for the crew which he supervises. Here, the grievor ensured the safety of his crew but at the cost of lost productivity. There were other equally safe methods to ensure track protection which the grievor could and should have used. As a result of the extra time taken by the crew in Elderslie, given that only two crew members worked on de-icing the track, they were unable to complete other assigned tasks. The productivity of the entire crew for the night of January 24, 2024 was reduced by the decision of the grievor. One cannot help but be struck that this decision was the product of a desire to remain inside the truck, rather than working outside in an Edmonton winter night with the other members of his crew. This decision was wrong and deserving of discipline.

28. The oft-cited William Scott decision directs arbitrators to consider attenuating and aggravating factors when considering appropriate discipline. I do so here, in considering whether the imposition of 30 demerits and a dismissal based on accumulation of demerits is appropriate in the circumstances. I am mindful of the guidance given the decision in **Bruce Power** not to lightly intervene (see Tab 26, Company documents).

29. Here, the primary mitigating factor for the grievor is his length of service. Sixteen years in the Company service is a significant investment by the grievor. Against this is his discipline record, which is lengthy, recent and contains evidence of a failure to properly accept the responsibilities which come with being a foreman in charge of the safety and productivity of a crew:



<b>Date</b>	<b>Discipline Assessed</b>	<b>Comments</b>
3-7-2024	30 demerit points	30 Demerits - for not performing the duties of a foreman as required in a productive and safe manner during your tour of duty on January 24, 2024.
3-7-2024	Dismissal	Dismiss - with your assessment of 30 Demerits on March 7, 2024, you now have 75 active demerits. You are hereby Dismissed from Company Service effective immediately for the accumulation of Demerits.
3-30-2023	20 demerit points	20 Demerits - For violation of SPC 41 M/W Rules and Instructions 4.1 b) and Rule Book for Engineering Section 7 listed below, when on January 30, 2023 you failed to cancel your TOP prior to the end of your shift.
3-30-2023	Formal Reprimand	Formal Reprimand - For violation of SPC 41 M/W Rules and Instructions 1.2b and Engineering 2019 System Motel & Camp Rules Canada, when on February 8, 2023 you failed to be present for a properly scheduled investigation.
1-26-2023	15 demerit points	15 Demerits - Damage occurred to Unit H16006 (Banff Section Truck) and failed to report the damage to your Supervisor; a violation of the Engineering Safety Rule Book, CORE Safety Rules, Rights and Responsibilities and SPC 41, 3.0 Foreman - General Rules and Responsibilities, 3.1 Responsibility for safety.
6-29-2022	10 demerit points	10 Demerits - For safety concerns while performing your Foreman duties with the AB South Surfacing Crew between April 3, 2022 and May 3, 2022, a violation of SPC 41, Subsection 3.0 Foreman - General Rules and Responsibilities. Grievance resolved dated October 15, 2021: 30 day suspension and 5 year restriction modified to 20 day suspension with a restriction from driving Company vehicle from October 27, 2020 to October 18, 2021. - 30 days suspension (effective 0001 November 3, 2020 to 2359 December 2, 2020) and a five-year restriction from performing Foreman duties, holding D Card and RTSR qualifications, and operating company vehicles or self-propelled machines of any kind for the following reason(s): For your direct involvement in a motor vehicle accident that took place on July 31, 2020 near Alix.
11-4-2020	20 day suspension	As a result you have violated the following: Rule book for engineering employees Section 4, Authorities and Instructions Rule book for engineering employees Section 4 Subsection 4.2, Paragraph (a), Sub para (VI) Rule Book for Engineering Employees, Section 2 Rule 2.2 Paragraph a Rule Book for Engineering Employees, Section 2 Rule 2.2 Paragraph C. (vi) Hybrid Discipline Policy States that, policy outlines that Dishonesty, attempting to "cover up" an incident, making material false statements or concealing material facts concerning matters under investigation Use of Electronic Devices policy – HS 5320

1-10-2017	5 day suspension	5 day /40 hour suspension ( effective 0001 April 4, 2017 to2359 April 7, 2017) For failing to ensure that Annual Hi-rail Inspection on Unit L13114 was completed as per current instructions resulting in this unit derailing on a switch on January 10, 2017.
6-24-2015	15 day suspension	<p>Please be advised that you have been assess4ed with a 15D (150hours) SUSPENSION – start Date Thursday June 25th and End Date Tuesday July 21st,2015 (based on an 8&amp;6 cycle) returning to work on Wednesday July 22, 2015, for the following reason(s):</p> <p>For failing to conduct a proper Job Briefing to identify and protect against hazards while repairing Chemical Plugger 5108-18 and for failing to apply Lock Out / Tag Out while performing those repairs at Stephen, BC (Laggan Sub) on May 28th, A violation of Engineering Safety Rule Book; item E-0 Job Safety Briefings and Item E-16 Hazardous Energy Control Lockout.</p> <p>Summary of Rules violated:  BOOK SECTION SUBSECTION DESCRIPTION  Engineering Safety Rule Book E-16 Hazardous Energy control Lockout 1. “Each employee must apply a CP provided personal lock and tag when required to isolate/control hazardous energy in accordance with prescribed instructions.  Engineering Safety Rule Book E-0Job Safety Briefings 1. “Employees must participate in a job briefing before beginning work and when the task or job conditions change. The job.</p>
4-17-2015	Admission of Responsibility – Caution (0)	<p>For being absent from duty, April 17th, 2015 without permission while working on the Pacific Rail Crew on the Laggan Subdivision. A violation of 2015 System Motel &amp; Camp Rules 6.1“It is the duty of very employee to be available for work at the beginning of every shift.  Absenteeism, without just cause, will not be tolerated. Employees must not, without permission, absent themselves from duty during prescribed hours, exchange duties with others, or engage in substitutes.”</p> <p>Summary of Rules violated:  BOOK SECTION SUBSECTION DESCRIPTION  2015 System Motel &amp; Camp Rules 6 1 “It is the duty of every employee to be available for work at the beginning of every shift.”</p>
4-1-2013	20 Demerits	<p>For putting the wrong type of fuel in the M00038 on March 5, 2013 in Calgary Alberta. A violation of SPC 41 - MW Rules &amp; Instructions 17.0 Rules for the Operation and Maintenance of Track Units 17.1. General Rules for Track Units;</p> <p>a. Track units are equipment that operates on a railway track. Track units are used for construction on, repairs to and inspection of the track or right-of-way. Track units may include roadway machines, motor cars, inspection</p>

		vehicles and off-track vehicles and equipment with or without high-rail attachments. b. Under these rules, "operator" means the person who is assigned to operate and care for the track unit. e. Operators of track units are responsible for the proper care and operation of their track units. Operators must be familiar with their track unit's parts as well as how to adjust and lubricate them. They should also be familiar with general instructions regarding track units as well as with those applying specifically to the unit under their control.
6-15-2011	20 other	Automatic Reduction of Demerit Points (12 months) Brown – 20 points.
6-15-2010	10 Demerits	For failure to perform a walk around inspection of the vehicle you were you were operating on May 31, 2010, resulting in damage to CPR Unit # M0040. A violation of Safety Rules and Recommended Practices for Engineering Services Employees Section II, E-2 Company Vehicles item 1 "Inspect company vehicles for unsafe conditions before use."
8-7-2009	10 Demerits	For not reporting to your Supervisor that a machine 5711-18 was not completely repaired and a hose had been left unhooked on July 16, 2009. This is in violation of SPC 41 M/W rules and instructions Section 16.1 Work Equipment Maintainers Responsibilities Item i Work Equipment Maintainers are responsible for the inspection, adjustment, diagnosis and repair of work equipment under their control, in accordance with current instructions.

30. Prior to this incident, the grievor was already at 45 demerits. Indeed, his superior specifically briefed the grievor in light of his "precarious" situation:

On January 10, 2024, I conducted a safety orientation check list with Mr. Kelsh. Where I review the requirements of the terminal, the special instructions for the terminal, and all the maps and track schematics for the terminal. We spoke to the orientation of the yards, their locations and provided the company phone for his role with all the required contacts within. Specifically, the requirements for track protection on non-main track were reviewed, referencing the most recent changes in the rule book engineering employees. During the review of Mr. Kelsh's safety record, I noticed that his record was extensive. I advised Mr. Kelsh that based on the observations that I made during his review it was apparent that he was an at-risk employee, and I was concerned about his performance when working on my territory. I advised Mr. Kelsh that if he had any questions or needed any assistance with anything he was to reach out and call me, as I am always available. In total I spent just under two hours (from 1901-2059) with Mr. Kelsh

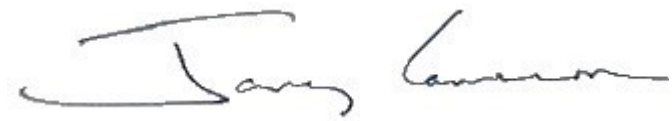
conducting this review and ensuring that he had everything he needed to be successful in his role. He was appreciative that I took the time to review everything with him and thanked me for not being prejudice towards him based on his safety record.

31. His discipline record indicates multiple attempts by the Company to correct the behaviour of the grievor, apparently with limited success. The actions of the grievor on the night of January 24, 2024 clearly show a failure by him to embrace the need for a leadership role as foreman. He failed to act in supervising the driver and notifying only the Security Guard. His decision not to use proper track protection through flags/lights or private locks, which would have enabled productive work on his part, is unacceptable. The 30 demerits imposed by the Company does, however, appear to be unduly harsh, representing half of the total points permitted by the Brown system. Other cases have imposed lesser penalties for arguably greater violations (see for example, **CROA 3782**, where an employee was given 20 demerits for a deliberate safety violation).

32. I am prepared to exercise my discretion in a manner which recognizes the valid concerns of the Company, while also recognizing the tenure of the grievor and the necessity of a significant change in his future behaviour. Accordingly, the grievor is reinstated, but demoted from his role as foreman, and the discipline is reduced to 14 demerits. The grievor is therefore at 59 demerits. He would be well advised to mend his past behaviour to demonstrate that he has a future with the Company. The grievor is to be made whole, less mitigation.

33. I remain seized with respect to any issues of interpretation or application of this Award.

**November 21, 2024**

A handwritten signature in black ink, appearing to read "James Cameron", written over a horizontal line.

**JAMES CAMERON**  
**ARBITRATOR**