CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5104

Heard in Edmonton, November 13, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE – RAIL TRAFFIC CONTROLLERS

DISPUTE:

Assessment of 30 demerits and subsequent dismissal for accumulation of demerits of Rail Traffic Controller H. McFarlane.

JOINT STATEMENT OF ISSUE:

On the night of July 22, 2022, while at work, RTC H. McFarlane experienced some back pain while performing accommodated duties. RTC H. McFarlane did not report the injury to her lead team during her scheduled shift.

A formal investigation was conducted on October 4, 2022, in connection with the events surrounding "your alleged failure to report your personal injury that occurred on July 22, 2022." At the conclusion of that investigation, the Company determined the investigation record as a whole contained substantial evidence that Ms. McFarlane violated the following:

- Corporate Safety Policy dated May 2022
- CROR General Rule A
- CROR General Rule C

Ms. McFarlane was assessed 30 demerits as shown in her form 104 as follows, *Please be advised that you have been assessed with 30 (thirty) demerits, for failing to report your July 22,2022 personal injury during your shift on July 22,2022. This was in violation of corporate safety policy May 22, CROR General Rule A, and CROR General Rule C.*

A second 104 was issued stating, *Ms. McFarlane, For the accumulation of 60 demerits under the Brown System of Discipline, you have been dismissed from Canadian Pacific.*

Union's Position:

As RTC McFarlane had a preexisting back condition, she thought that she had only "tweaked" her back and did not think the pain was something which she had to report.

This was made clear throughout the investigation as well as with RTC McFarlane's statements to her doctor and to WCB.

RTC McFarlane did not know she had to report tweaking her back, did not realize that it was classified as an “at work injury” and at no time attempted to deceive the Company or avoid reporting.

The Union requests the removal of the 30 demerits and the coinciding dismissal, and that RTC McFarlane be made whole for all losses with interest for the time she was dismissed until her return to work.

Company’s Position:

The Company maintains the grievor’s culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union. The Company’s position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

This assessment of discipline is in line with the principles of progressive discipline. Additionally, The Company maintains the discipline is further supported and properly assessed in keeping with the Hybrid Discipline and Accountability Guidelines.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the arbitrator be drawn to the same conclusion.

For the Union:	**For the Company:**
(SGD.) J. Bailey	**(SGD.) F. Billings**
General Chairman, RTC	Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Bailey	– General Chairperson, Edmonton
V. Linkletter	– Vice General Chair, Calgary

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] The Grievor was hired in 1995. She began her career as a Brakeman and eventually became a rail traffic controller. The Grievor had a pre-existing, non-work-related chronic back injury of which the Company was aware, leading to the Grievor’s accommodation on modified duties.

[2] The Grievor was working modified duties from July 21-23, 2022. During her shift on July 21/22, 2022, the Grievor encountered pain in her back which she described as he "normal" pain from a pre-existing back injury (non work-related).

[3] Ultimately, the position of the Grievor's doctor was that this was a "work-related" injury.

[4] The Company considered the Grievor failed to report a work-related injury and that this was culpable misconduct. In the Form 104, the Company stated position was that the reportable injury occurred "*on July 22, 2022*" and the Grievor's culpability arose from "failing to report your July 22, 2022 personal injury during your shift on July 22, 2022". She was assessed 30 demerits. That assessment then led to the Grievor's dismissal for accumulation, under a separate Form 104.

[5] The issues between the parties are:

a. Was there culpable action on the part of the Grievor for failing to report an injury?
b. If so, was an assessment of discipline of 30 demerits just and reasonable discipline for that action?
c. If not, what discipline should be substituted by the exercise of this Arbitrator's discretion?

[6] For the following reasons, upon consideration of all of the evidence and the jurisprudence filed, the Company has not met its burden of proof to establish culpable conduct as alleged by its Form 104. The second and third questions therefore do not arise.

[7] The Grievance is upheld.

Analysis and Decision

Question One: Was the Grievor's Conduct Culpable?

[8] It must be emphasized that the Company bears the burden of proof, to establish culpability for its stated discipline. While that is true in every case, it takes on greater significance where – as here – that discipline can lead to dismissal for accumulation of a

disabled employee. There are two aspects to the Grievor's alleged culpability in this case: first, that she suffered a reportable injury; and secondly, that her obligation to report also arose on that same day.

Facts

[9] The facts are largely not disputed.

[10] On July 22, 2022, while working a night shift in her accommodated position, the Grievor was asked to organize a cabinet in a back room. While not a usual task for an RTC, the duties were within her medical restrictions.

[11] Upon standing up from her duties, the Grievor felt slight pain in her back. She indicated in her Investigation this occurred in the first two hours of her shift. According to the evidence of both Director Milne [incorrectly referred to as Director Klassen] he and the Grievor discussed during her shift on July 21/22 that she had a pre-existing condition and that "I said she looked like she was in pain and asked her if she was ok". Director Milne was sitting next to the Grievor during much of that shift. Ms. Sheil also noted in an email that "I recall her [the Grievor] saying her back was sore and that was it".

[12] Neither Director Milne nor Director Shiel considered that back pain for the Grievor was out of the ordinary. In fact, pain in her back while working was not an unusual occurrence for this Grievor. The Grievor explained that she suffers from a long-standing and chronic back injury, that leaves her with a certain level of pain that she considers to be "normal" for her (Q/A 27), which is not unexpected for a chronic injury. The Grievor explained when she said she said she was "ok" to Director Milne, that did not mean that she was saying she was pain free, given she lives with pain. In her Investigation, the Grievor described that the pain she felt after working on the cabinet organization that day was similar to her "normal" back pain that she could usually "walk off" if she moved or changed her activity.

[13] It was the Grievor's evidence she had no understanding that she had suffered any "work injury" on July 21/22, 2022, given that reality.

[14] The Grievor continued with her duties, but did not perform any more bending, lifting or sitting on the floor but concentrated on other tasks (Q/A 30). Both Directors Milne [referred to as "Klassen" in the Company's submissions but should have been "Milne"] and Director Sheil's evidence is consistent with the Grievor acting on an understanding that she had "tweaked" her "normal" back pain that day. As noted by Ms. Paul, the Transportation Coordinator for the Company, the decision for her to do so – although questioned by the Company in its submissions as inappropriate – was a reasonable one.

[15] A memorandum from Ms. Paul, Coordinator, Transportation Support was also filed. Ms. Paul confirms she and the Grievor spoke on July 23, 2022 and that the Grievor had told her "*her back had been sore overnight so she only got done what she could during her shift, which was more than fine if she was having back pain*".

[16] Ms. Paul also stated :

> *She [the Grievor] has mentioned having issues/pain with her back many times to me over the years as she has had back issues for years **so I didn't think much of it** other than passing conversations. I asked her if it was time to get some shots in her back again and she said probably and that she was going to see her doctor. She later called me to book off with a doctor's note for the next several shifts.*

[17] The reference to "shots" refers to the Grievor's pain control injections. Her next appointment for shots to assist with her pain control was not until August 23, 2022.

[18] The Grievor acted consistently with her evidence she was not aware she had suffered any reportable work injury. Her evidence was she told the ER doctor that it was not a work injury, since she had a pre-existing chronic back injury; and that she told the WCB and her own doctor the same information.

[19] When her own doctor maintained he would not fill in her medical forms as "different forms" were required for a work injury, she advised the Company that her doctor "refused to fill out the Lifeworks forms [when she dropped them off to him] as he thinks it's a WCB claim" and that she herself did not think that was the case.

Arguments

[20] The Company urged that the Grievor's conduct in not reporting an injury which occurred at work was culpable and that the assessment of 30 demerits (which led to dismissal from accumulation) was warranted, under the *Wm. Scott* framework.

[21] The Company maintained the latest issue was part of a flagrant disregard of the rules by the Grievor over the course of her twenty-seven year career. In making this argument, the Company focused on the totality of discipline received by the Grievor over the full course of that career. The Company pointed out the Grievor was reinstated in 2017 for "leniency". It also argued the Grievor kept "putting on the record" that the injury was not "work-related" but also that it occurred at work, which was inconsistent. It argued the Grievor was aware by August 22, 2022 it would be a WCB matter, but still was silent to her managers. The Company argued that although there were eight managers on duty, the Grievor had not "disclosed" to any of them she had "hurt herself at work" and that a "WCB claim would be submitted" (Company submissions, paragraph 18) and that the Grievor should have notified someone instead of self-directing her own work to reduce her pain. It argued she did not notify anyone, even after being asked if she was "ok".

[22] Given that this conversation occurred with her Director, who was sitting next to her, the Union maintained the Company was aware of the Grievor's issue, even if that notification were required, which it maintained it was not, given the Grievor reasonably believed she had not suffered a "work-related" injury but had a pre-existing back injury that had *not* occurred "at work". It argued her statements were not inconsistent and that the assessment of discipline of 30 demerits, which resulted in dismissal for accumulation, was unjustified. It argued that - even if discipline were appropriate - the discipline assessed was grossly unwarranted and excessive. The Union pointed out the Grievor's pain did not increase dramatically until after her shift on July 23, 2022, which was when she sought medical assistance, and that she maintained to her caregivers it was not a "work injury". She also maintained this to WCB. It pointed out the Grievor *did* have conversations with Directors Milne and Sheil and Ms. Paul regarding her pain, and that she noted her next pain shots were scheduled for August 23, 2022. It pointed out the Grievor had experienced flare-ups in the past to the Company's knowledge, hence her

need for shots. The Union urged it was the Grievor's doctor who refused to complete the medical forms, as he believed the Grievor's injury was work-related, and not the Grievor. It argued the Grievor's consistent evidence was that she did not believe her injury was work-related.

Analysis

[23] It may be trite – but bears repeating – that each case must turn upon its own factual context.

[24] It must be recalled the Grievor's underlying injury was non work-related and was chronic and ongoing. Upon review of all of the evidence in this case, the Company has alleged that the Grievor not only suffered a work injury on July 22, 2022 but that she "failed to report your July 22, 2022 personal injury *during your shift on July 20, 2022".* The Company chose that day to impute the Grievor with knowledge that she had a reporting obligation. There is no evidence for a breach of either CROR General Rules A or C; RTC Manual 1 or the Fitness to Work Medical Procedure, section 4.2. While the Company maintained the Grievor knew she would have a WCB claim as of July 22, 2022, the evidence does not support that conclusion.

[25] The choice of using July 22, 2022 as the date on which the Grievor's reporting obligation crystallized was the Company's. It was made after the Investigation and after hearing the evidence, summarized above.

[26] However, the Grievor did not *have* any culpability failing to report that had arisen by July 22, 2022. As of that date, the Grievor reasonably did not *have* any awareness that the pain in her back would be beyond what she experienced as a result of her chronic injury and able to be treated by her with changes of movement and overnight rest. It has not been established that as of that date, the Grievor had any expectation that the pain she was feeling would move *beyond* her "normal" pain or that it would become an independent WCB claim.

[27] It is confounding why the Company maintained the Grievor should have considered her condition to be a reportable, WCB injury on the date it occurred, when its

own official “didn’t think much of it”, given the Grievor’s history of chronic and continuing pain which needed pain “shots” to manage. According to the Grievor’s evidence – with which she consistently acted - she didn’t think an “injury at work” had occurred, because she suffered a previous chronic back injury (Q/A 38) and suffered from a level of pain all of the time. I am satisfied this was a reasonable assumption for the Grievor to believe, in these circumstances. Her belief was consistent throughout over 100 questions at the Investigation, and was supported by the Company’s own evidence of her conversations with its management.

[28] There is no indication that the Grievor *should* have understood that she would not be able to ‘walk off’ the pain as she had in the past, or – as the Company argued – that it was a “reportable” injury under its policies and she should have treated it as such as of July 22, 2022. I am satisfied that in these circumstances, she cannot be imputed with that understanding. In fact, it was not until her doctor considered that the injury required “different forms” to be filled out that the Grievor had any understanding that this situation could be considered as “work-related”.

[29] I am satisfied this belief was reasonable, in all of the circumstances. The Grievor sought no medical attention on July 22, 2022 nor did she reasonably believe that she had suffered any workplace injury that required reporting “on that day”. Any knowledge that can be imputed to her that she had “re-injured” her back beyond that point was <u>not</u> gained by her on July 22, 2022. The Grievor’s belief that she had not suffered a “work-related” injury was reasonable given the chronic nature of her injuries. Her actions were consistent with that belief; and were reasonable given the “normal” pain which she lived with; to the knowledge of the Company. I am further satisfied when the Grievor’s doctor determined he would not fill out the forms on another basis, the Grievor advised the Company’s occupational health department of the fact her doctor considered this a work-related injury.

[30] As noted in **CROA 3543**, it is not unreasonable for an individual to delay reporting “what might at first seem to be a minor injury” “at the moment it occurred”.

[31] The Company has offered no prejudice to the Grievor not advising her managers of her WCB claim on the date it occurred, which would be difficult to establish given the circumstances of this case, as both Directors Sheil and Milne were also aware of both the Grievor's history and her pain on July 22, 2022.

[32] This is not a case where the Company has cause to doubt the origin of the Grievor's pain.

[33] On these facts, I agree with the Union that the Company has not met its burden of proof to establish the Grievor failed to report a work-related injury as of July 22, 2022 as alleged.

[34] Even if I were incorrect in that conclusion and culpability had been found, the assessment of 30 demerits – half way to dismissal – would not have been a proportional response to the evidence of this case. A written reprimand would have been appropriately substituted, even if culpability were found.

[35] In **CROA 3308,** Arbitrator Picher stated:

> The Arbitrator has substantial difficulty, having regard to the prejudice caused by the Company, if any, with the assessment of fifteen demerits and the resulting discharge of an employee of over 20 years' service for this infraction. In my view the registering of a written caution or warning to the grievor would have sufficed in the circumstances to apprise him of the need to faithfully report any on duty injury in a timely manner. I am therefore satisfied that a reduction of penalty to a written reprimand and the removal of the fifteen demerits…is the appropriate disciplinary result.

[36] Unlike in **CROA 4484**, relied upon by the Company, this is not a "new" work-related injury (in that case a torn tendon in a shoulder from a work-related activity), where a report was made one month late, and where the Company had a suspicion of whether the injury was even "work-related" or not. In this case, the Grievor was familiar with managing flare-ups of her "normal" pain. There was no legitimate question raised that her tasks in organizing the cabinet could have caused a flare-up of her "normal" pain.

[37] Also unlike in **CROA 4484**, in this case, Company's own officials were aware that the Grievor was in pain from her back injury on July 22, 2022, yet Ms. Paul did not "think much of it" when she realized her duties made her back sore, given the Grievor's long-standing and chronic history of back pain, for which she had already been accommodated.

[38] In **CROA 4598**, the Company was skeptical the circumstances of the injury, which is not the situation in this case. In that case, there was an allegation of an aggravation of a pre-existing back injury and inconsistencies in the grievor's statements, which inconsistence are not present in this case. There was also no suggestion in that case that the grievor mentioned his back pain when it occurred to any form of management, unlike in the present case. The grievor's explanation was that an ill-fitting seat exacerbated his pain over time. In that case, while the Company initially terminated the Grievor, it then "unilaterally reinstated him" and subjected him to a "time served" suspension of 4.5 months, which was grieved. The Arbitrator found the penalty of dismissal to be "disproportionate" and substituted a one month penalty, even though the grievor had a "less than stellar" record.

[39] While the Company maintained this was another in a long line of the Grievor "flagrantly" disregarding Company rules, supporting significant discipline, I cannot agree that the facts fit that characterization. While the Company has included statistics over entire twenty-seven years of this Grievor's employment, how a Grievor responds to discipline is a relevant factor to consider when reviewing a Grievor's disciplinary record, since it is the progressive nature of discipline that is meant to teach and change behaviour. That requires a close consideration of the Grievor's more recent discipline. Further, as efficiency testing is also a record of the ability of a Grievor to follow the Company's rules, when flagrant disregard of those rules is alleged, that record is also relevant to determine whether a grievor's record is "flagrant".

[40] The Grievor's Efficiency Test information demonstrates a pass percentage pass of 97.9%, out of a total of 493 tests in her career. That record does not support the Grievor flouts Company rules. An employee who "flagrantly" disregards rules would presumably have that tendency seen in his or her efficiency testing record, given that a "fail" is

recorded when discipline follows E-Test failures. Second, the Grievor was dismissed for failure to protect a crossing in 2017, but was reinstated “for leniency” as described by the Company. Her reinstatement demonstrates the Company maintained confidence at that time in her ability to follow its rules. In the five years since that reinstatement, she has accumulated 30 demerits: 20 demerits for “pattern absenteeism” (no details of the factual underpinning or if pain-related) and for a failure to comply with CROR Rule 136 (10 demerits).

[41] I therefore cannot agree that this case warrants a discipline measure of 30 demerits which then led to the loss of this employee’s accommodated position, even if it were accepted that discipline was warranted. Where there are no facts justifying suspicion and no inconsistencies in the evidence of the Grievor; and where the Grievor is long-serving and in an accommodated position for a chronic injury, Arbitrator’ Picher’s direction in **CROA 3308** is appropriately applied:

[42] Had discipline been appropriate, a written reprimand for who the Grievor should have advised would have been sufficient.

Conclusion

[43] The Grievor bore no reporting obligation as of July 22, 2022, the date the Company maintained as leading to culpability. No culpability having been found for the Grievor’s actions, the Grievance is upheld.

[44] However, even if a reporting obligation *had* been found and to have been breached, given the particular facts of this Grievance and the knowledge of the Company, an assessment of a written reprimand would have been the appropriate level of discipline.

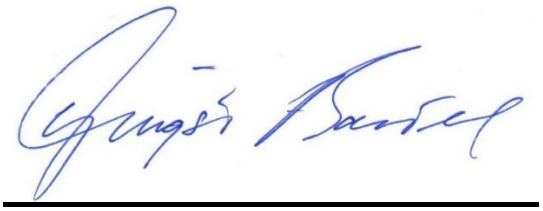
[45] Arbitrators are given broad jurisdiction to craft remedies to address the particular and unique circumstances of each case. No two situations are alike.

[46] The Company’s actions in this case have worked a unique hardship on this Grievor, given that she had been placed in an accommodated position, as a disabled employee. The Company’s actions resulted in the loss to her of that position, which – given her injury – may have made it very difficult for her to mitigate her damages.

[47] The Grievor is ordered to be reinstated back to her accommodated position, with no loss of seniority, and is to be made whole for all losses (after all mitigation efforts are considered). As the Grievor should not suffer any loss relating to her pension eligibility from the Company's actions, the Grievor's reinstatement is to be made effective as of November 8, 2024 (for pension purposes only).

I remain seized to resolve any questions regarding the implementation of this decision or its remedy directions.

I also retain jurisdiction to correct any errors; and to address any omissions to give it the effect intended.



February 10, 2025

CHERYL YINGST BARTEL
ARBITRATOR